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[PP. 5001-5470]

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
(Capital PCR: 2005-CP-18-1368)
The Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case No. 2014-000387

Kenneth Simmons, #5066, Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

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A Yes, I am.
Q What is the amount of that grant?
A The amount of the grant which includes a chunk that goes directly to the University is $900,000.
Q And that's to develop training for how to handle mixture cases?
A That's right.
Q And, obviously, this is a mixture case?
A Yes, it is.
Q Or maybe. Can you explain your prior work history, please?
A After I finished my Ph.D I did a post-doc at the University of Iowa and then I did a second post-doc at the National Institutes of Health in Bethesda, Maryland. All of that is prior to forensic things and then I went to work in 1988 at Cellmark Diagnostics which had just been opened for four or five months to do forensic DNA analysis and I have been doing that ever since.
Q Okay. How long were you employed at Cellmark?
A I stayed at Cellmark until 2005. The lab itself closed in 2005 and I continued to work for the company for another year, but the lab didn't exist. All the people had gone elsewhere. There were just a couple of us helping the Dallas lab to review cases and I decided that I should go elsewhere.

Q Are you a member of any professional organizations?
A I am a member of the American Society of Human Genetics and American Academy of Forensic Sciences.
Q Are you a Fellow of that institution?
A I am.
Q What does that mean?
A It's not a huge deal. It means you've been a member for a long time. It means you've participated in meetings, given presentations, and helped the organization in those kinds of ways. I also -- the Journal of Forensic Sciences is part of the American Academy of Forensic Sciences and I now serve as on the editorial board for that journal.
Q All right. And you were here during Dr. Word's testimony earlier today?
A I was.
Q And so your role as an editor of that journal is essentially the same as she described earlier?
A It is.
Q Are you a member of the board of directors of the ASCLD\LAB?
A Yes, I am.
Q Can you explain what that is?
A The acronym A-S-C-L-D and then the back slash L-A-B stands for American Society of Crime Laboratory Directors,

Laboratory Accreditation Board. There are two accrediting bodies for forensic crime labs in the United States. One of them is an organization which is the acronym is FQS and I think it is forensic quality services and the other accrediting body is ASCLD\LAB which accredits more than 400 crime labs in the US and I've served on the board of that organization two different times -- once while I was still part of Cellmark and then recently I'm again serving a four-year term as the public member and the organization accredits laboratories, does inspections, and is basically the primary accrediting body for American crime labs and also does international accreditation.

Q In your role as a board member when you were with Cellmark, what year -- what period of time does that correspond to?

A I was on the board from 2002 through 2006.

Q Okay. And you're now currently a member again?

A Yes.

Q Have you previously been qualified as an expert in forensic DNA and statistical analysis in court?

A Yes, I have.

Q Do you know about how many times?

A Approximately 250 times.

Q Do you know approximately how many times you might have testified for the prosecution?

A Almost all of those times would have been for the prosecution. I have -- This is now covering more than 20 years; so I have testified for the defense, but I would say probably less than 10 times.

Q All right. I'd like to hand you what's been premarked as Plaintiff's Exhibit F -- F like Frank. Could you take a look at that, please, Dr. Cotton, and let me know if you recognize that as a copy of your CV.

A It is a copy of my CV.

Q Does that include the information that you've just described about your background as well as other information?

A Yes, it does.

MS. PAAVOLA: We would move to admit Applicant's Exhibit F.

MR. ZELENKA: No objection.

(WHEREUPON, Plaintiff's Exhibit No. F was admitted into evidence.)

MS. PAAVOLA: At this time we'd move to qualify Dr. Cotton as an expert in forensic DNA and statistical analysis.

THE COURT: Any cross examination on her qualifications?

MR. ZELENKA: None necessary.

THE COURT: Thank you.

MR. ZELENKA: No objection.
Q Dr. Cotton, can you explain how you became involved in this case?
A Charlotte told me that she was doing a case and that I might be interested and you subsequently contacted me and because Charlotte thought it was interesting I figured it must be; so I agreed to look at the material and you sent me a big notebook, most of which is here at my feet, with a lot of material in it.
Q Did she tell you why she thought it might be interesting to you?
A She did not.
Q So you reviewed the material independently?
A I did.
Q And then ultimately the two of you concluded that you should prepare a joint report?
A Yes, we did.
Q And why was that?
A It's a lot of work to put together that type of report and because neither one of us has an actual laboratory around us it's very helpful to make sure that we're not making mistakes; that we've talked through the pieces of information thoroughly and so we decided it would save our time and everyone else's time to do it together.

Q And you concluded, I assume, that the findings in your joint report you both agree on those; is that right?
A Yes, we do.
Q Now, to be clear we also have already entered today a supplemental affidavit that Dr. Word prepared and she did that on her own; is that right?
A That's correct.
Q And that's because you did not travel to Dallas, Texas to review the files in person?
A That's correct.
Q Do you know how many hours of work you have devoted to this case?
A I have no idea.
Q Is it a lot?
A It's at least a week.
Q As well as additional time preparing in advance to review the materials and that sort of thing?
A Yes. I didn't count my hours because I didn't have any expectation that I was going to need to present some accounting to be reimbursed; so I just did what I did.
Q And have you been paid for any of your work in this case?
A No, I haven't.
Q Okay. Now, I don't see any need to go back through all of this in great detail, but I would just like to ask

you generally you were here for all of Dr. Word's testimony in court; is that right?
A Yes.
Q And did you agree with all of the testimony that she has already provided?
A I did.
Q Now with regard to the GQ Alpha Polymarker test results that she testified to are your conclusions essentially the same as Dr. Word's?
A They are.
Q And would the one exception be these changes that Dr. Word testified that she would make to the fraction number 56386, that was based on her review in person in Dallas, Texas?
A That's right.
Q And that's not something that you did?
A I didn't. I wasn't there; so I wasn't able to see that. Those -- those subtle distinctions between intensities on the dots are better looked at when you're looking in person; so since I wasn't there I am not prepared to comment on whether I would have made those changes or left it as it was.
Q All right. And with regard to the CTT test results you've reviewed the lab notes and the testing gels that correspond to those?

A I have.
Q Do you agree with what Dr. Word testified to about those results?
A I completely agree with all of the additions and changes that she made to the chart regarding the CTT results.
Q And to be clear that would mean that you agree that there are no CTT test results that incriminate Mr. Simmons at all?
A That's correct.
Q Now you both agree that if the DQ Alpha Polymarker test results are accurate at least at one sample he is included. He cannot be excluded as a possible contributor.
A That's correct.
Q For the DQ Alpha Polymarker test results. Does that mean it's him?
A The four alleles that are from a second contributor assuming that that is not a contaminant are consistent with alleles that he has. This is not by any stretch an identification. This is an inclusion and it is a weak inclusion as the stats demonstrate. We have the capability with testing systems today to unequivocally identify an individual with very high numbers but even in today's systems when there is a complicated mixture you

still can't do that and it needs to be very clear that this is not an identification of him by any stretch.

Q Now, you said it's an identification -- it's not an identification, but it is an inclusion, although a weak one, assuming that the DQ Alpha Polymarker test results are not contaminated?

A Yes.

Q Is there a possibility that they are contaminated?

A There is always a possibility of having undetected contamination. Had there been a reagent blank run we would have closed off a section of that as a possibility. It's impossible to always control for every source of contamination, but when you do all the required or expected controls, that's all you can do.

In this instance we don't have that reagent blank and so we can't rule that out as a possibility but we can also discuss it under the assumption that if it's not then this is what it means.

Q With regard to the reagent blanks how important is it that you do that control?

A In all of today's testing systems in the accreditation requirements, in the requirements from the FBI for all crime labs that want to submit data to CODIS reagent blanks are required controls. They must be run with every set of extractions.

Q It's not just something that's a suggestion?
A It is not just a suggestion. Now, at the time this test was done those standards -- those FBI standards -- were soon to be in place, but were not in place and instead of those standards there were these guidelines also from the FBI that Charlotte spoke about called the TWGDAM guidelines. They also suggested the three controls, the reagent blank, the positive and negative control for the amplification, but they were guidelines and guidelines are not standards.

Those guidelines subsequently became standards and they got, you know, made a little firmer, but no one even at the time -- we started doing PCR at Cellmark I believe in 1992; so from 1992 and forever after that we ran reagent blanks and so did everyone else as far as I knew. Why Lifecodes thought it was all right to run without a reagent blank, I have no idea.

Q All right. Do you also agree with Dr. Word's testimony that the gender-typing test results with regard to the three samples on this chart did not indicate any male DNA in those sample numbers?
A Yes, I agree with that.
Q If -- How -- What explanation, if any, is there for this apparent lack of male DNA with the CTT when the lab reported a mixture for the DQ Alpha Polymarker?

A The most obvious explanation is that the four alleles from the second contributor are not from a male and could be from a female. Now, I don't know -- I mean, I don't know how that -- I don't know if there is any fit with that and some information about the event, but the fact that there is no Y there would -- could be explained by that or somehow it wasn't detected or picked up and because we don't know very much about the chemistry that Lifecodes was using for the tests -- I mean, the CTT was standard and purchased from Promega. We don't know if whether the amelogenin chemistry was standard and purchased from Promega or they made that up themselves. It's not that hard. You just order primers and put it together. They had the capability as would we have had that capability; so because we don't know a lot about the chemistry and I think it's -- it gets pretty hard to speculate why it might not have picked it up, but it's clear that if there is male DNA in there it either didn't pick it up or it's not male DNA.

Q If it isn't male DNA is it possible that it's contamination from a female lab technician or some other female in a different test being run at the same time?

A Yes.

Q Both of those are possibilities for how contamination can occur?

A Yes.
Q From the lab technician themselves or when you're testing other cases at the same time?
A If you look at the reasons that people -- so it is true that almost every lab experiences some low level of contamination no matter how careful, no matter how good the lab is. When those incidences are investigated it is most often that it's come from the people who have handled the samples and that could go back beyond, you know, past the lab. It could go to when the samples were collected or it's been contaminated from a sample that was handled at the same time. Those are the most common things that are observed.
Q And was Lifecodes handling samples from other cases at the time it did this testing?
A It appears that they were from the notes that we have.
Q And can you just describe how that works? I mean, physically if you're testing things at the same time, what does that look like in terms of the method you're using?
A I don't -- I can't really say how that might have looked in their lab. The notes aren't clear enough. It is just that you can see that on a particular day there were multiple things happening.
MR. ZELENKA: Your Honor, I would have to object.

She's speculating.

THE COURT: Sustained.

MS. PAAVOLA: That's fine. Thank you, Your Honor.

Based on the reports that Lifecode issued in this case would it have been possible to tell from the reports that these corrections that we've now made to Applicant's Exhibit D should have been -- were true? Was it possible to tell that these changes were the correct result based on the reports that Lifecodes issued?

THE WITNESS: No.

Q Would it have been possible for the jury to know in any way that what we've now corrected was the truth based on what was testified to in court?

A The reports -- Let me make one clarification. The report gives the correct CTT type --

Q Yes, I'm sorry.

A -- for Mr. Simmons but so you could have -- you would have seen that in the report. It's there. The other things you would have not seen in the report since they didn't report those results.

Q Okay. Now, do you agree with Dr. Word's conclusion that the CTT test results should not have been included in the statistical calculation at all?

A Absolutely. They had no business being included in any calculation because the calculation should have been

related to the evidence and not to the standard for Mr. Simmons.

Q Right. Okay. And that's because the CTT test results do not tell us anything about the evidentiary strength or value of the actual crime scene evidence?

A That's right, because we only see in the CTT information from the evidence types that are consistent with the victim; so we don't have any additional information there.

Q All right. Now, do you agree that when Dr. Baird was asked to testify about his statistical calculation he reported single-source statistics instead of mixture statistics?

A Yes, he did.

Q And do you agree that that is a very different calculation? Single-source statistics are a very different calculation from mixture statistics?

A They are.

Q And the single-source statistics in this case do not tell us anything about the evidentiary strength of the actual evidence recovered from the crime scene?

A The single-source statistics tell you what all single-source statistics tell you which is often would you expect to find another person with this entire profile of in this example Mr. Simmons, and, of course, those

statistics can become very rare because you're looking at 9 loci in this case and you're not thinking about a mixture. In the mixture you want to report how often another person might be included and that's an entirely different question.

Q Anyone can calculate single-source statistics. We can calculate them for me or for you. They would all be large numbers like what was reported at Mr. Simmons' trial?

A That's correct.

Q But they wouldn't tell us anything about whether I or Mr. Simmons or whoever else we might be doing the calculation for is included from in the evidentiary sample?

A That's correct.

Q Do you agree that Dr. Baird's use of single-source statistics was not appropriate in this case based on the standards in your field?

A I agree that it wasn't appropriate. I think it was irresponsible.

Q You've testified that you had a prior role and a current role in accrediting various labs?

A Yes.

Q So you're familiar with what the standard practice is supposed to be?

A I am.
Q Is this statistical issue something on which reasonable forensic scientists in your field might disagree?
A No. I do not think you would find any disagreement that stating single-source statistical information about an individual and implying that somehow that was related to a mixture is acceptable by any competent professional.
Q If Lifecodes had been inspected for a lab accreditation and this case got reviewed what would happen to their lab?
A It would have triggered a finding and it would have triggered a review of many other cases to ensure hopefully that this was a stand-alone error. If it wasn't a stand-alone error, sufficient number of cases would have to be looked at, repaired. Protocols would have had to have been changed and approved by the crediting group and they would have not continued or the incident wouldn't be allowed to be repeated.
Q All right. If Lifecodes had a protocol that permitted them to report single-source statistics in this case, would that be okay?
A No, it would not.
Q No further questions. Thank you.
THE COURT: Mr. Zelenka?

CROSS-EXAMINATION

BY MR. ZELENKA:

Q Dr. Cotton, are you aware whether Lifecodes was accredited from 1993 to 1998? Were they an accredited lab.

A I don't believe so.

Q And why don't you believe so?

A I knew that they weren't accredited at the time we became accredited. I didn't serve on the board where I would have been consistently aware of who was becoming accredited. I don't recall them ever presenting themselves as being accredited. It would certainly be an easy thing to fact check.

Q Okay. With respect to your testimony concerning Applicant's Number 16, the chart which is at page 15 of the bate stamp, with the corrections made pursuant to your report you believe that those are all the correct responses; is that correct?

A Yes.

Q And you individually reviewed the data and the material to report those responses; is that correct?

A That's correct.

Q Did you come up with the same answers before Dr. Word or did Dr. Word come up with those answers?

A Well, she had done her work before or a lot of it, I

assume, before I ever received material. I received the material and looked at it by myself and came to the conclusions that would have fit with this. Later, when -- after she went and looked at the original documents and made copies or scans of some of those films we had even better information to look at; so I revisited that information again after that and those newer scans were much better and accurately reflected on the chart with the addition of the red information.

Q Okay. I am not sure what the red information is since everything is in red. The changes -- are you talking about---

A I'm talking about the changes under the 3 CTT columns: The CSF, TPOX and TH01.

Q That you had that information when you did your report in March 2012?

A We had it then and then we revisited it again with the better copies.

Q Okay. And with respect to the reagent blank materials, as I understand you're saying in 1998, 1997 there was a requirement that that particular reagent blank testing be done; is that correct?

A There were guidelines that said it should be done, yes.

Q Okay. But it wasn't a standard?

A It was not a standard at that time.
Q Okay. That suggests to me that there was some labs, possibly accredited labs, that weren't doing that particular testing at that time since it was not a requirement.
A Well, that's entirely possible. I don't -- I don't have a way to know that; so I can only say it's possible.
Q Okay. Were there standards that were in place in 1997 or 1998 that set out requirements for testing at all in the DNA area?
A No. There were only guidelines. The guidelines subsequently became standards and without doing a little background checking I -- which I didn't do prior to coming today, I can't tell you the date; so the standards were developed and then they didn't go into place until they had the stamp of approval of the director of the FBI and that process was mandated by some federal legislation and that process took a long time and the exact date that those standards were finally issued I'm not sure about.
Q Okay. Who did the population statistics in your report?
A Charlotte did the calculations. I reviewed the calculations prior to signing the affidavit.
Q Okay. What do you mean reviewed the calculations?
A I looked to make sure that they were laid out

properly and that I agreed that the way that they were laid out properly and the correct genotypes were listed as possible genotypes to be included. I did not -- I did not recheck the multiplication.

Q Okay. With respect to review of the vaginal swab male fraction where these items were circled, did you do the circling on those items in your report at all? Do you know what they mean -- those circles?

A I don't recall from this morning's testimony why those are circled except those are the types that are not consistent with having come from the victim and so they had to have some from a second person. So, I'm sorry; I don't remember exactly why they got circled this morning.

Q Okay. And the scratch-thrus on Applicant's 16, first line up from the bottom of the B and the A,C in those two test results -- do you recall why that was done?

A Yes, because Charlotte had reviewed that information after seeing the original documents in Dallas; so that reflects her careful examination of those dots. I can't give you a personal opinion since I didn't see those materials.

Q Okay. And the data reflecting the CTT report and the first line, the next to the last line, and the last line, did you review that data personally?

A I reviewed the scans from the original files that

were found in Dallas and after reviewing those scans -- so let me try to say this a little more plainly. We wrote the report and we thought those were the numbers. It was certainly possible that on looking at the original information, the original films in Dallas that they might have been so much clearer that we might have felt that those numbers should be changed. After looking -- so Charlotte went and looked at the originals. I didn't do that. I did look at the copies she made or scans that were made of the originals. They were much better than our original copies and those scans verified in my mind that the figure that -- the types that we originally have in there were correct and didn't need to be changed.

Q All right. One second Your Honor.

Thank you. I have no further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. PAAVOLA:

Q I just have a couple of questions for you about these reagent blank controls. I understand you're saying they were not necessarily a requirement but they were part of the guidelines?

A Yes.

Q And if I heard you correctly on direct you testified that your lab was using these as early as 1992?

A Yes.
Q In 1998 when this testing was done were you aware of any other lab who was not using the reagent blank control process?
A I wasn't aware of any other lab, but my awareness of lab -- of specifics about what laboratories were doing came basically from my participation as a laboratory inspector for the accreditation process; so the number of labs that I would have seen would have been not very many because you do that two or three times a year. So, I can't really speak to what many other labs were doing.
I can speak to what was considered to be good practice and certainly inclusion of a reagent blank was considered -- It specifically stated that in the guidelines which were also what was used to sort of define good practice at the time.
Q And were they also specifically recommended by the instructions that come with the testing?
A Oh, yes.
Q The test kit itself?
A Yes. In the DQA1PM kit specifically described how you would go about doing a reagent blank.
Q Okay.
A In the kit instructions.
Q Thank you.

THE COURT: You may step down. Thank you.

Next witness.

MS. PAAVOLA: We have no further witnesses, Your Honor.

THE COURT: That concludes all of your --

MS. PAAVOLA: Yes.

THE COURT: -- presentation.

How about the state? Where do we stand with you?

MR. ZELENKA: We have no further witnesses, Your Honor.

THE COURT: That concludes all the testimony we'll take in connection with the application?

MS. PAAVOLA: That's correct.

THE COURT: All right. Where do we go from here?

MS. PAAVOLA: Your Honor, we think given the time that this case has taken to get all the evidence in that the best course of action would be to prepare post-hearing briefing for Your Honor's review.

THE COURT: Thank you. Mr. Zelenka, any suggestions?

MR. ZELENKA: I have no objection to post-hearing briefing. Perhaps Your Honor would like to suggest since you've heard the testimony if there are particular areas that you'd like us to focus on in the breadth of the issues that are before the court.

THE COURT: Let's do this. Let me get an e-mail out

to y'all in the next week or 10 days about what I am specifically concerned about -- obviously, everything, but what you need to focus in on and it will probably be the mental issue more than anything else, but I think y'all---

MR. ZELENKA: The mental issue being the mental retardation?

THE COURT: Right. Y'all probably discerned that from all of the hearings we've had. That's sort of where I am going with it or looking at it but I'll get you something out within a week or 10 days about what I need and we'll go from there. Thank you very much. It was an excellent presentation by everyone. I will in due course get a decision out, but I'll send y'all something.

(End of Transcript of Record.)

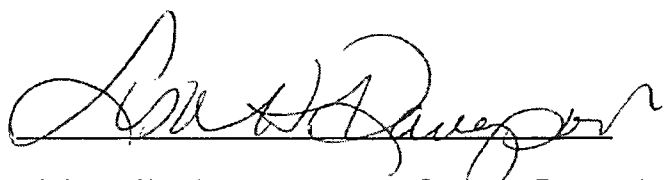
CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Aiken)

I, Lisa H. Davenport, Official Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Dorchester County, South Carolina, on the 2nd day of July, 2012.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 30, 2012



Lisa H. Davenport, Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF Dorchester

Case No: 05-CR18-1368
Hearing Date: 7-2-2012

EXHIBITS

Plaintiff (s): & Kenneth Simmons
vs.
Defendant (s): SC

	PLAINTIFF'S EXHIBITS		DEFENDANT'S EXHIBITS		COURT'S EXHIBITS
A	C.V.				
B	Affidavit of Dr. Ward.				
C	Supplemental affidavit				
D	Updated/Corrected Chart				
E	P.M. Types				
F	C.V. Robin Cotton				

FILED + RECORDED
2012 JUL 11 PM 1:4
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

CIRCLED ITEMS ARE IN EVIDENCE

Court Reporter: Lisa Hicklin
Clerk of Court: Patricia K. Thomas

Date: July 2, 2012

CERTIFICATE OF TRANSMITTAL

5027

JAMES B. HIERS
CLERK OF COURT FOR BAMBERG COUNTY
BOX 150, BAMBERG, S. C. 29003

TO: Cheryl Graham, CLERK OF COURT

FOR: Pedic Hiers COUNTY, S. C.

IN ACCORDANCE WITH THE O R D E R OF JUDGE _____

DATED _____.

WE HAVE ENCLOSED THE ORIGINAL PLEADINGS, ORDER, AND OTHER PAPERS WHICH HAVE BEEN FILED IN THE FOLLOWING CASE:

FILED - RECORDED
2012 JUL 11 PM 1:53
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

State of S.C.

PLAINTIFF(S)

VS.

Kenneth Simmons

DEFENDANT(S)

BAMBERG COUNTY CASE NO. _____

YOUR CASE NO. 05-CP-18-1368

RECEIPT OF THE ABOVE FILE IS HEREBY ACKNOWLEDGED THIS _____ DAY OF _____, 19 ____.

BY: _____
(NAME AND TITLE)

PLEASE RETURN THE SIGNED (WHITE) COPY TO BAMBERG COUNTY CLERK OF COURT'S OFFICE IN THE ENCLOSED SELF-ADDRESSED STAMPED ENVELOPE AND RETAIN OTHERS FOR YOUR RECORDS.

Curriculum Vitae

Charlotte J. Word, Ph.D.

FILED - RECORDED
2012 JUL 11 PM 1:41
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

Education

Ph.D. Microbiology, University of Virginia, Charlottesville, Virginia, 1981

B.S. Biology, College of William and Mary, Williamsburg, Virginia, 1976

Professional Experience

Consultant, Human DNA Identification and Paternity Testing, 2005-present

Consultant, Orchid Cellmark, Germantown, MD; Dallas, TX, 2005-present

Consultant, Applied Biosystems, Inc. 2006-present

Project Staff Associate, Northeast Regional Forensic Institute, Research Foundation of State University of New York, Albany, New York, 2006-2007

Senior Manager, Forensics and Laboratory Director, Orchid Cellmark, Germantown, Maryland, 2001 - 2005

Deputy Laboratory Director, Forensic Laboratory, Cellmark Diagnostics, Inc., Germantown, Maryland, 1997 - 2001

Senior Scientist, Cellmark Diagnostics, Inc., Germantown, Maryland, 1995 - 1997

Scientist, Cellmark Diagnostics, Inc., Germantown, Maryland, 1990 - 1995

Research Assistant Professor, Department of Cell Biology, University of New Mexico School of Medicine, Albuquerque, New Mexico, 1984 -1990

Research Fellow, Dr. Philip W. Tucker, Department of Microbiology
University of Texas Southwestern Medical School, Dallas, Texas, 1981 - 1984

Graduate Research Student (Ph.D.), Dr. W. Michael Kuehl, Department of Microbiology, University of Virginia. Thesis Title: "Murine B Lymphomas: Models for Immunoglobulin Expression in B Cell Development.", 1976-1981

PLAINTIFF'S EXHIBIT
1212 A 10

Sabbatical with Dr. Randolph Wall, University of California at Los Angeles Molecular Biology Institute, Los Angeles, California, 1980

Participant, Histopathobiology of Cancer Workshop, Keystone, Colorado, 1979

Professional Associations

American Society of Human Genetics

American Academy of Forensic Sciences

Mid-Atlantic Cold Case Homicide Investigators Association (MACCHIA)

CE Users Group

Honors and Research Support

Grant Review for National Institutes of Justice, 2006-present.

Auditor for the National Forensic Science Technology Center, 2005 – present

Inspector for the American Society of Laboratory Directors/Laboratory Accreditation Board 2004 – 2005, 2010.

Editorial Board, The Journal of Forensic Sciences, 2004 – present

Guest Reviewer, The Journal of Forensic Sciences, 2002 – 2004

Member, Post-Conviction Issues Working Group of the National Commission on the Future of DNA Evidence, 1998-1999. Co-author of "Postconviction DNA Testing: Recommendations for Handling Requests" 1999, U.S. Department of Justice Office of Justice Programs.

United States Department of Defense, 1996-1998, Enhanced DNA Recovery, $318,000.

NIH 1 RO1 HD20409. Immunoregulatory Factors in Human Colostrum. $88,218 (direct). 07/01/87 – 06/30/90. Co-PI: S. Crago.

American Heart Association Grant-In-Aid 1985-1989, Regulation of B Cell Immunoglobulin Isotype by T Cells, $99,000.

American Cancer Society Junior Faculty Research Award 1985-1988, Regulation of B Cell Immunoglobulin Isotype by T Cells, $90,500.

Recipient of AAI travel award for 6th International Congress of Immunology, 1986.

Fellow, Damon Runyon –Walter Winchell Cancer Fund Award, 1982-1984.

Semi-Finalist, 1981 Distinguished Dissertation Award from the Council of Graduate Schools/University Microfilms International.

Publications

Word, C.J. and Kuehl, W.M. 1981. Expression of surface and secreted IgG_{2a} by a murine B lymphoma before and after hybridization to myeloma cells. Mol. Immunol. 18:311-322.

Rogers, J., Choi, E., Souza, L., Carter, C., Word, C., Kuehl, M., Eisenberg, D. and Wall, R. 1981. Gene segments encoding transmembranal carboxyl termini of immunoglobulin γ chains. Cell 26:19-27.

Word, C.J., Mushinski, J.F. and Tucker, P.W. 1983. The murine immunoglobulin α gene expresses multiple transcripts from a unique membrane exon. EMBO J. 2:887-898.

Jones, S., Chen, Y.-W., Isakson, P., Layton, J., Pure, E., Word, C., Krammer, P.H., Tucker, P.W. and Vitetta, E.S. 1983. Effect of T cell-derived lymphokines containing B cell differentiation factor(s) for IgG (BCDFγ) on γ-specific mRNA in murine B cells. J. Immunol. 131:3049-3051.

Vitetta, E.S., Brooks, K., Chen, Y.-W., Isakson, P., Jones, S., Layton, J., Mishra, G.C., Pure, E., Weiss, E., Word, C., Yuan, D., Tucker, P., Uhr, J.W. and Krammer, P.H. 1984. T cell-derived lymphokines inducing IgM and IgG secretion in activated murine B cells. Immunol. Rev. 78:137-157.

Wels, J., Word, C.J., Rimm, D., Der-Balan, G., Martinez, H.M., Tucker, P.W. and Blattner, F.R. 1984. Structural analysis of the murine IgG_3 constant region gene. EMBO J. 3:2041-2046.

White, M., Shen, A., Word, C., Tucker, P. and Blattner, F. 1985. Human Immunoglobulin D: Genomic sequence of the δ heavy chain. Science 228:733-737.

Chen, Y.-W., Word, C.J., Jones, S., Uhr, J.W., Tucker, P.W. and Vitetta, E.S. 1986. Double isotype production by a neoplastic B cell line: I. Cellular and biochemical characterization of a variant of BCL_1 that expresses and secretes both IgM and IgG_1. J. Exp. Med. 174:548-561.

Chen, Y.-W., Word, C.J., Dev, W., Uhr, J.W., Vitetta, E.S. and Tucker, P.W. 1986. Double isotype production by a neoplastic B cell line: II. Allelically excluded production of μ and γ1 heavy chains without C_H gene rearrangement. J. Exp. Med. 164:562-579.

Word, C.J., Crago, S.S. and Tomasi, T.B. 1986. Regulation of IgA expression by isotype-specific T cells and soluble binding factors. Ann. Rev. Microbiol. 40:503-524.

Crago, S.S., Word, C.J. and Tomasi, T.B. 1987. Interaction of antisera to the secretory component with FcαR. In: Recent Advances in Mucosal Immunology, Part A. Eds. J. Mestecky, J.R. McGhee, J. Bienenstock, P. and L. Ogra. Plenum Publishing, NY, pp. 601-611.

Crago, S.S., Word, C.J. and Tomasi, T.B. 1989. Antisera to the secretory component recognizes the murine Fc receptor for IgA. J. Immunol. 142:3909-3912.

Word, C.J., White, M.B., Kuziel, W.A., Shen, A.L., Blattner, F.R. and Tucker, P.W. 1989. The immunoglobulin IgM-IgD heavy chain constant region locus in the human. I. Complete nucleotide sequence and structural analysis. Int'l. Immunol.1:296-309.

Kuziel, W.A., Word, C.J., Mushinski, J.F., Blattner, F. and Tucker, P. 1989. The immunoglobulin IgM-IgD heavy chain constant region locus in the human. II. Regulation of expression during B cell differentiation. Intl. Immunol. 1:310-319.

White, M.B., Word, C.J., G-Humphries, C., Blattner, F.R. and Tucker, P. 1990. IgD switching can occur through homologous recombination in human B cells. Mol. and Cell Biol. 1990 10:3690-3699.

Cotton, R.W., Forman, L., Word, C.J. 1991. Research on DNA typing validated in the literature. (Letter) Am. J. Hum. Genet. 49:898-899.

Walsh, D.J., Corey, A.C., Cotton, R.W., Forman, L., Herrin, G.L., Jr., Word, C.J., and Garner, D.D. 1992. Isolation of DNA from saliva and forensic samples containing saliva. J. For. Sci., 37:387-395.

Word, C.J., 1994. Validation studies on the AmpliType® PM PCR Amplification and Typing Kit for forensic testing: Summary of results from 15 laboratories. Proceedings from the Fifth International Symposium on Human Identification. Promega Corp., pp. 123.

Word, C.J. 1995. Forensic casework analysis using STRs, DQα, and PM in combination. Proceedings from the Sixth International Symposium on Human Identification. Promega Corp., pp. 32-35.

Word, C.J., Sawosik, T.M. and Bing, D.H. 1997. Summary of validation studies from twenty-six forensic laboratories in the United States and Canada on the use of the AmpliType® PM PCR Amplification and Typing Kit. J. For. Sci., 42: 39-48.

Bing, D.H., Sawosik, T.M. and Word, C.J. 1997. Assay performance results with the AmpliType® PM PCR Amplification and Typing Kit on DNA mock casework, adjudicated/non-probative casework and proficiency panels from twenty-one forensic laboratories in the United States and Canada. Crime Lab. Digest, 23:3-21.

Zachary, A.A, Bias W.B. and Word, C.J. 1997. Principles and Applications of Genetic Identification. In Manual of Clinical Laboratory Immunology, 5th Ed., ASM Press, Washington, D.C. pp.1141-1151.

Word, C.J. 1998. STR data goes to court - A laboratory perspective. Proceedings from the Eighth International Symposium on Human Identification. Promega Corp., pp. 1-5.

Word, C. J. 1998. STR data goes to court - A laboratory perspective. Profiles in DNA, 2:7-8.

Word, C. J., Co-author as a member of the Postconviction Issues Working Group of the National Commission on the Future of DNA Evidence. 1999. Postconviction DNA Testing: Recommendations for Handling Requests. U.S. Department of Justice, National Institutes of Justice, Washington, D.C.

Smialek, J.E., Word, C.J., and Westveer, A.E. 2000. The Microscopic Slide - A Potential DNA Reservoir. FBI Law Enforcement Bulletin, 18-22.

Kokoszka, J.E., Cline, R. E., Leisy, C., Grossweiler, L. L., and Word, C. J. 2006. The Successful DNA Typing of Samples Following a Thermal Cycler Power Loss. J. For. Sci. 51:1074-1079.

Word, C. (2010) What is LCN?—Definitions and Challenges. *Profiles in DNA* **13(1)**; [Internet] 2010. Available from: www.promega.com/profiles/1301/1301_01.html

Presentations/Abstracts/Workshops

Word, C.J. and Kuehl, W.M. 1980. A murine B-lymphoma expresses surface and secreted IgG_{2a}. 62nd Annual Meeting Federation of American Societies for Experimental Biology.

Word, C.J., Mushinski, J.F., Slightom, J.L., Blattner, F.R. and Tucker, P.W. 1982. Membrane and secretory IgA. 66th Annual Meeting Federation of American Societies for Experimental Biology.

Word, C.J., Mushinski, J.F. and Tucker, P.W. 1983. The murine immunoglobulin α gene expresses multiple transcripts from a unique membrane exon. 12th Annual UCLA Symposium, Journal of Cellular Biochemistry.

Word, C.J., Mushinski, J.F., and Tucker, P.W. 1983. The murine immunoglobulin α gene expresses multiple transcripts from a unique membrane exon. 5th International Congress of Immunology.

Crago, S.S., Word, C.J., and Tomasi, T.B. 1986. Interaction of antisera to the secretory component with FcαR. International Congress of Mucosal Immunology.

Chen, Y.-W., Word, C., Jones, S., Uhr, J.W., Tucker, P.W., and Vitetta, E.S. 1986. Biochemical and molecular characterization of an IgM/IgG_1-producing variant. 6th International Congress of Immunology.

Word, C.J., White, M.B., Shen, A.L., Kuziel, W.A., Blattner, F.R., and Tucker, P.W. 1986. DNA sequence and analysis of the human Ig Cμ-Cδ locus. 6th International Congress of Immunology.

Crago, S.S., Word, C.J., and Tomasi, T.B. 1986. Interaction of antisera to the secretory component with the IgA receptor (FcαR) on murine lymphoid cells. 6th International Congress of Immunology.

Word, C.J., White, M.B., Shen, A.L., Kuziel, W.A., Blattner, F.R. and Tucker, P.W. 1986. DNA sequence and analysis of the human Ig Cμ-Cδ locus. Rocky Mountain Immunology Meeting.

Crago, S.S., Word, C.J., Tomasi, T.B. 1986. Interaction of antisera to the secretory component with the IgA receptor (FcαR) on murine lymphoid cells. Rocky Mountain Immunology Meeting.

Crago, S., Word, C. and Tomasi, T.B. 1986. Anti-secretory component inhibits binding of IgA to FcαR. 71st Annual Meeting Federation of American Societies for Experimental Biology.

Crago, S., Word, C.J. and Tomasi, T.B. 1987. Anti-secretory component inhibits binding of IgA to FcαR. FASEB Summer Research Conferences on Fc Receptors and Immunoglobulin Binding Factors.

Word, C.J. - Presenter. 1990. Criminal Law and DNA, The Institute of Continuing Legal Education in Georgia. Atlanta, GA.

Word, C.J. - Presenter. 1990. California Association of Criminalist meeting, Long Beach, CA.

Kriss, J.E., Forman, L., Word, C.J., Garner, D.D. and Cotton, R.W. 1991. Factors affecting migration and resolution of DNA fragments. 43rd Annual Meeting of the American Academy of Forensic Sciences, Anaheim, CA.

Forman, L., Wadhams, M.J., Roby, R.K., Stacy, T.D., Word, C.J., Garner, D.D. and Cotton, R.W. 1991. Comparison of allele frequency distributions in four populations using probe YNH24. 43rd Annual Meeting of the American Academy of Forensic Sciences, Anaheim, CA.

Cotton, R.W., Kriss, J.E., Forman, L., Word, C.J. 1992. The effects of sample buffer composition on migration of DNA fragments. 44th Annual Meeting of the American Academy of Forensic Sciences, New Orleans, LA.

Forman, L., Roby, R.K., Wadhams, M.J., Stacy, T.D., Word, C.J., Garner, D.D. and Cotton, R.W. 1992. Effects on the calculation of frequencies from statistically-differentiated databases for multiple VNTR loci. 44th Annual Meeting of the American Academy of Forensic Sciences, New Orleans, LA.

Word, C.J., Cotton, R.W., Cooper, J.A., McCoy, M.J., Roby, R.K., Stacy, T.D., Walsh, D.J., Wadhams, M.J., Weber, M.A., Yates, P.J. and Forman, L. 1992. Use of single-locus and multilocus DNA probes in forensic paternity cases involving incestual relationships.

44th Annual Meeting of the American Academy of Forensic Sciences, New Orleans, LA.

Cotton, R.W., Forman, L. and Word, C.J. 1992. Minisatellite variant repeats (MVR's): Another layer of polymorphism in repeated DNA sequences. Third International Symposium on Human Identification, Scottsdale, AZ.

Cotton, R.W., Forman, L., Word, C.J. and Sozer, A.C. 1993. Minisatellite variant repeats and forensic analysis. 45th Annual Meeting of the American Academy of Forensic Sciences, Boston, MA.

Weber, M.A., Cotton, R.W., Forman, L., Garner, D.D. and Word, C.J. 1993. RFLP analysis of apparent partially restricted DNA samples from forensic casework. 45th Annual Meeting of the American Academy of Forensic Sciences, Boston, MA. and Northeast Association of Forensic Sciences 19th Annual Meeting, Springfield, MA.

Kriss, J., Corey, A.C., Cooper, J.A., Yates, P.J., Weber, M.A., Cotton, R.W., Garner, D.D. and Word, C.J. 1993. Validation Studies Using the HLA DQα Forensic Kit. 45th Annual Meeting of the American Academy of Forensic Sciences, Boston, MA and the Northeast Association of Forensic Sciences 19th Annual Meeting, Springfield, MA.

Word, C.J., 1993. Case application and court experiences with PCR. Florida DNA Training Session II: PCR Applications. Orlando, FL.

Cotton, R.W., Kriss, J., Wadhams, M.J. and Word, C.J. 1993. Quantitation of human DNA. Fourth International Symposium on Human Identification, Scottsdale, AZ.

Word, C.J., Presenter - AmpliType Users Forum. 1994. 46th Annual Meeting of the American Academy of Forensic Sciences, San Antonio, TX.

Forman, L., Ballmann, R., Campbell, W., Cooper, J.A., Danielsen, L.A., Quandt, K.R., Ranadive, A., Stolorow, M.D., Weber, M.A., Word, C.J., and Yates, P.J. Proficiency testing and DNA profiling. 1994. 46th Annual Meeting of the American Academy of Forensic Sciences, San Antonio, TX.

Word, C.J., and Bing, D. 1994. Validation studies on the AmpliType® PM PCR Amplification and Typing Kit for forensic testing: Summary of results from 15 Laboratories. Fifth International Symposium on Human Identification, Scottsdale, AZ.

Cotton, R.W., Wadhams, M.J., Kriss, J., Sipes, D., Forman, L. and Word, C.J. 1994. Validation of two STR loci in preparation for casework implementation. Fifth International Symposium on Human Identification, Scottsdale, AZ.

Kriss, J., Forman, L., Cotton, R.W., and Word, C.J. 1995. Validation studies using the AmpliType® PM PCR Amplification and Typing Kit. 47th Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Cotton, R.W., Kriss, J., Sipes, D.E., Wadhams, M., Forman, L., and Word, C.J. 1995. Experimental validation of three STR loci for forensic casework. 47th Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Bing, D.H., and Word, C.J., et al. 1995. PCR based forensic testing with AmpliType® PM PCR Amplification and Typing Kit: The results of validation studies from forensic laboratories. 47th Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Word, C.J., Presenter. 1995. AmpliType Users Forum. 47th Ann. Mtg. Seattle, WA.

Word, C.J. 1995. Implementation of STR/$AgNO_3$ protocols on casework. Florida DNA Training Session III: Advanced PCR Applications. Altamonte Springs, FL.

Word, C.J., Cotton, R.W., Ranadive, A.A., and Weber, M.A. 1995. Forensic casework analysis using STRs, DQα and PM in combination. Sixth International Symposium on Human Identification, Scottsdale, AZ.

Word, C.J. 1995. DNA Mid-Atlantic Association of Forensic Scientists Presents "The Gilbert and Trias Murders." Gaithersburg, MD.

Cotton, R.W., Chakraborty, R., Crouse, C., Forman, L., Kriss, J., Ranadive, A. A., Sipes, D.E., Weber, M.A., Weir, B., Word, C.J. 1996. Analysis of casework samples using a combination of the DQα, PM, and 3 STR loci. 48th Annual Meeting of the American Academy of Forensic Sciences, Nashville, TN.

Word, C.J. 1996. DNA Interpretation Issues Workshop. Northwest Association of Forensic Sciences Meeting, Salt Lake City, UT.

Word, C.J. 1996. Interpretation of mixed samples. Human Identification Users Meeting. Rockville, MD.

Word, C.J. 1997. STR data goes to court - A laboratory perspective. Eighth International Symposium on Human Identification, Scottsdale, AZ.

Word, C.J. and Gregory, S.A. 1997. Optimization of recovery and PCR amplification of DNA from stamps and envelopes. Eighth International Meeting on Human Identification, Scottsdale, AZ.

Reynolds, J.E., Weber, M.A., Colombo, K., Swienton, A.R., Word, C.J., Yates, P.J., Cotton, R.W. 1997. DNA typing of the transfused individual. Am. J. Hum. Genet. 61(4):A1311; Poster presentation at the 47th Annual Meeting of the American Society of Human Genetics, Baltimore, MD.

Reynolds, J.E., Weber, M.A., Colombo, K.A., Swienton, A.R., Word, C.J., Yates, P.J., and Cotton, R.W. 1998. The effects of blood transfusion on RFLP and PCR DNA typing: Forensic casework examples. 50th Annual Meeting of the American Academy of Forensic Sciences, San Francisco, CA.

Word, C.J., Gregory, S.A., Reynolds, J.E., and Cotton, R.W., 1998. PCR amplification and overcoming inhibition of DNA recovered from adhesive surfaces. 50th Annual Meeting of the American Academy of Forensic Sciences, San Francisco, CA.

Word, C. J. 1998. DNA quantitation and PCR inhibition issues. Florida DNA Training Session IV: STRs - The Next Generation, Orlando, FL.

Grossweiler, L.L., Gee, M.A., Crance, K.A., Sipes, D.E., Word, C.J., and Reynolds, J.E. 2000. Successful DNA extraction from serum samples. 11th International Symposium on Human Identification, Biloxi, MS.

Maddox, L.O., Suit, B., Koch, K., Higgins, J., Word, C.J., and Cotton, R.W. 2000. Forensic use of Abacus OneStep ABAcard® test for the identification of the p30 antigen. 11th International Symposium on Human Identification, Biloxi, MS.

Word, C.J., Danielsen, L.A., Reynolds, J.E., Maddox, L.O., and Cotton, R.W. 2000. Multiple-laboratory validation of fluorescent STRs using proficiency test results. 11th International Symposium on Human Identification, Biloxi, MS.

Word, C.J., Reynolds, J.E., Cotton, R.W., Grossweiler, L.L., Maddox, L.O. 2001. Solving old crimes with new DNA testing - contracting "cold" cases. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA. (presented by Melissa B. Thompson)

Cotton, R.W., Word, C.J., Danielsen, L.A., Reynolds, J.E., and Maddox, L.O. 2001. Demonstration of general acceptance of STR data to the court. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Cotton, R.W., Kriss, J.E., Colombo, K.A., Word, C.J., and Maddox, L.O. 2001. Defining alleles for four Y chromosomal markers without benefit of allelic ladders as part of Y chromosome validation studies. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Maddox, L.O., Suit, B., Word, C.J., Cotton, R.W. 2001. Advantages of enhanced sensitivity of product gel staining using GelStar™ nucleic acid stain. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Gee, M.A., Grossweiler, L.L., Crance, K.A., Sipes, D.E., Word, C.J., and Reynolds, J.E. 2001. Recovery of DNA from serum samples. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Word, C.J. 2001. Panelist at Brooklyn Law School Symposium, DNA: Lessons from the Past, Problems for the Future, Brooklyn, NY.

Grgicak, C.M., Reynolds, J.E., Sipes, D.E., Rosier, L.R., Knickerbocker, C.J., Zimmerman, C.E., Shofkom, A.E., Befus, J.K., Cotton, R.W., Word, C.J. 2002. Relative sensitivity comparison between ABI fluorescent detection instruments using data from large scale no-suspect casework. 54th Annual Meeting of the American Academy of Forensic Sciences, Atlanta, GA.

Cline, R., Polhamus, C., Winebrenner, L., Leisy, C., Heller, A., Cicco, M., Grossweiler, L., Kokoszka, J. E., and Word, C. J. 2002. The night the lights went out in Germantown, An amplification study. 13th International Symposium on Human Identification, Phoenix, AZ.

Grgicak, C., Sipes, D.E., Grossweiler, L.L., Cotton, R.W., Word, C.J. 2003. Comparative Analysis of the DNA IQ™ and QIAamp DNA® Extraction Kits for the Processing of Forensic Evidentiary Samples. 55th Annual Meeting of the American Academy of Forensic Sciences, Chicago, IL.

Grossweiler, L.L., Word, C.J., Maddox, L.O., 2003. Decision Branches for Testing of No Suspect Casework. 55th Annual Meeting of the American Academy of Forensic Sciences, Chicago, IL.

Word, C.J. Co-presenter 2005. Presenting DNA Evidence in Court. Sixteenth International Symposium on Human Identification, Dallas, TX

Word, C.J. 2006. Presented Workshop: Statistics in the Courtroom. 5th Annual Bode East Coast Advanced DNA Technology Workshop, Captiva Island, FL

Word, C.J. and Clarke, G. W. 2006. Presented Workshop: Courtroom Testimony: What You Need to Know. 17th Annual International Symposium on Human Identification, Nashville, TN

Word, C.J.and Dale, W. M. 2006. Quality Management System Concept and Tools "Mistakes Happen-What to do when it Happens to you & How to Prevent Them". 17th Annual International Symposium on Human Identification, Nashville, TN

Word, C.J. and Clarke, G. W. 2007. Presented Workshop: Expert Witness Testimony. 18th Annual International Symposium on Human Identification, Hollywood, CA.

Word, C.J. 2009. Presented Workshop: Expert Witness Testimony for New and Advanced DNA Analysts. Albany, NY

Word, C.J. 2009. What is LCN? Definitions and Challenges. 20th International Symposium on Human Identification, Las Vegas, NV

Word, C.J., Cotton, R.W., Grgicak, C., Butler, J. and Coble, M. 2010. Mixture Interpretation Workshop, San Antonio, TX

Seminars/Workshops

American Academy of Forensic Sciences Annual Meeting, Chicago, IL 2011

NIJ/OLES-funded Research Symposium, Office of Law Enforcement Standards, National Institutes of Standards and Technology, Gaithersburg, MD 2010

American Society of Human Genetics, 60th Annual meeting, Washington, DC 2010

21st International Symposium on Human Identification, San Antonio, TX 2010

American Society of Crime Laboratory Directors Meeting, Baltimore, MD 2010

15th National CODIS Conference, Reston, VA 2009

20th International Symposium on Human Identification, Las Vegas, NV 2009

Ethics Workshop, 20th International Symposium on Human Identification, Las Vegas, NV 2009

The NIJ Conference 2009, Crystal City, VA. 2009

14th National CODIS Conference, Crystal City, VA. 2008

19th International Symposium on Human Identification, Hollywood, CA. 2008

Ethics and Forensic Science Workshop, 19th International Symposium on Human Identification, Hollywood, CA. 2008

Troubleshooting Common Laboratory Problems Workshop, 19th International Symposium on Human Identification, Hollywood, CA. 2008

The NIJ Conference 2008; Criminal Justice Research, Development and Evaluation in the Social and Physical Sciences, Crystal City, VA. 2008

60th Annual Meeting of the American Academy of Forensic Sciences, Washington, DC 2008

Human DNA Quantification Using Real Time PCR Assays Workshop, 60th Annual Meeting of the American Academy of Forensic Sciences, Washington, DC 2008

DNA Mixture Interpretation: Principals and Practice in Component Deconvolution and Statistical Analysis Workshop, 60th Annual Meeting of the American Academy of Forensic Sciences, Washington, DC 2008

Eighteenth International Symposium on Human Identification, Hollywood, CA, 2007.

The NIJ Conference 2007; Forensic DNA: Tools, Technology, and Policy, Arlington, VA 2007

Grant Progress Assessment Training, Washington, D.C. 2007

HID 3130 Systems Training Program, Applied Biosystems, Rockville, MD 2007

Twelfth National CODIS Conference, Arlington, VA 2006

Seventeenth Annual International Symposium on Human Identification, Nashville, TN, 2006

5th Annual Bode East Coast Advanced DNA Technology Workshop, Captiva Island, FL, 2006

58th Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA, 2006

Eleventh National CODIS Conference, Crystal City, VA 2005

Sixteenth International Symposium on Human Identification, Dallas, TX, 2005

DNA Auditors Training Class, Quantico, VA, 2004

Tenth National CODIS Conference, Crystal City, VA, 2004

56th Annual Meeting of the American Academy of Forensic Sciences, Dallas, TX, 2004

American Prosecutors Research Institute National Conference: Justice Speaks, Crystal City, VA, 2003

Ninth National CODIS Conference, Lansdowne, VA, 2003

ASCLD/LAB Inspector's Training Class, Harrisburg, PA, 2003

Population Genetics Workshop, Taught by Dr. George Carmody, Rockville, MD, 2003

54th Annual Meeting of the American Academy of Forensic Sciences, Atlanta, GA, 2002

Y Chromosome Analysis and its Application to Forensic Casework Workshop, 54th Annual Meeting of the American Academy of Forensic Sciences, Atlanta, GA, 2002

Forensic Mitochondrial DNA Analysis: A Community Forum Workshop, 54th Annual Meeting of the American Academy of Forensic Sciences, Atlanta, GA, 2002

Statistics II – Forensic Mixture Interpretation & Analysis, Thirteenth International Symposium on Human Identification, Phoenix, AZ, 2002

Thirteenth International Symposium on Human Identification, Phoenix, AZ, 2002

Brooklyn Law School Symposium, DNA: Lessons from the Past, Problems from the Future, Brooklyn, NY, 2001

Twelfth International Symposium on Human Identification, Promega, Biloxi, MS, 2001

DNA Audit Class, Quantico, VA, 2000

52nd Annual Meeting of the American Academy of Forensic Sciences, Reno, NV, 2000

Fifth Annual Conference on the Future of DNA: Implications for the Criminal Justice System, New York, NY, 2000

Florida DNA Training Session V: DNA 2000, Miami Lakes, FL, 2000

Eleventh International Symposium on Human Identification, Promega, Biloxi, MS, 2000

Casework Guidelines and Complex Mixture Interpretation Workshop, Promega, Biloxi, MS, 2000

Statistics Workshop, Promega, Orlando, FL, 1999

Mitochondrial DNA Sequence Analysis in Forensic Casework Methods and Issues Workshop, Promega, Orlando, FL, 1999

Tenth International Symposium on Human Identification, Promega, Orlando, FL, 1999

50th Annual Meeting of the American Academy of Forensic Sciences, San Francisco, CA, 1998

Florida DNA Training Session IV: STRs - The Next Generation, Orlando, FL, 1998

Ninth International Symposium on Human Identification, Promega, Orlando, FL, 1998
49th Annual Meeting of the American Academy of Forensic Sciences, New York, NY, 1997

Eighth International Meeting on Human Identification, Promega, Scottsdale, AZ, 1997

A Workshop in Statistics for Forensic Scientists, St. Petersburg Junior College, St. Petersburg, FL, 1996

The Seventh International Symposium on Human Identification, Promega, Scottsdale, AZ, 1996

Northwest Association of Forensic Sciences, Salt Lake City, UT, 1996

Human Identification Users Meeting, Rockville, MD, 1996

47th Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA, 1995

Florida DNA Training Session III: Advanced PCR Applications, Altamonte Springs, FL, 1995

The Sixth International Symposium on Human Identification, Promega, Scottsdale, AZ, 1995

The Mid-Atlantic Association of Forensic Scientists Present "The Gilbert and Trias Murders," Gaithersburg, MD, 1995

46th Annual Meeting of the American Academy of Forensic Sciences, San Antonio, TX, 1994

The Fifth International Symposium on Human Identification, Promega, Scottsdale, AZ, 1994

BioEast '94 Workshop, Washington, D.C., 1994

45th Annual Meeting of the American Academy of Forensic Sciences, Boston, MA, 1993

The Second International Symposium on the Forensic Aspects of DNA Analysis, Quantico, VA, 1993

Florida DNA Training Session II: PCR Applications, Orlando, FL, 1993

The Fourth International Symposium on Human Identification, Promega, Scottsdale, AZ, 1993

44th Annual Meeting of the American Academy of Forensic Sciences, New Orleans, LA, 1992

The Third International Symposium on Human Identification, Promega, Scottsdale, AZ, 1992

AmpliType HLA DQα Forensic DNA Amplification and Typing Workshop, 1992.

43rd Annual Meeting of the American Academy of Forensic Sciences, Anaheim, CA, 1991

The Second International Symposium on Human Identification, Promega, Madison, WI, 1991

Eighth International Congress of Human Genetics, Washington, D.C., 1991

Association of Biotechnology Companies, Washington, D.C., 1991

International Symposium on Continuous Cell Lines - An International Workshop on Current Issues, Bethesda, MD, 1991

The Institute of Continuing Legal Education in Georgia, Criminal Law and DNA meeting, Atlanta, GA, 1990

California Association of Criminalist Meeting, Long Beach, CA. (taught course), 1990

Revised March 2, 2011

AFFIDAVIT OF CHARLOTTE J. WORD, Ph.D. AND ROBIN W. COTTON, Ph.D.

Charlotte J. Word and Robin W. Cotton, being duly sworn according to law, upon their oath depose and say:

1. I, Charlotte Word, am a forensic DNA Consultant and a former Laboratory Director at Cellmark Diagnostics (which became Orchid Cellmark) in Germantown, MD. I was employed at Cellmark from April 1990 to April 2005.
2. I, Robin Cotton, am an Associate Professor at Boston University School of Medicine and the Director of the Biomedical Forensic Sciences Program. I was employed at Cellmark Diagnostics in Germantown, MD from January 1988 until August 2006. I served as Laboratory Director from 1994 until October 2005.
3. Cellmark Diagnostics in Germantown, MD was a private laboratory that conducted human DNA identification testing and was accredited in 1994 by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board. For many years the Laboratory was also accredited by the American Association of Blood Banks for parentage testing. As a private laboratory in business for over 17 years, Cellmark offered DNA testing services to a wide variety of clients including but not limited to, crime laboratories, prosecutors, defense attorneys, law enforcement, the military, and state and local agencies from around the country.
4. The curriculum vitae for Charlotte Word and Robin Cotton are attached to this affidavit as Attachments 1 and 2.

Background and Qualifications of Charlotte Word

5. I, Charlotte Word, received a Bachelor of Science degree in Biology from The College of William and Mary in Virginia, and a Ph.D. in Microbiology from The University of Virginia. I did a postdoctoral fellowship at the University of Texas Southwestern Medical School in Dallas, TX conducting research in the areas of molecular biology and immunology. I was on the faculty at the University of New Mexico, School of Medicine, where I did research and taught in the areas of molecular biology and immunology from 1984 to 1990. I have over 30 years of molecular biology experience and 20 years of experience applying molecular genetics techniques to forensic testing including experience with the majority of the scientific tests used in the United

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CLERK OF CIRCUIT COURT
PRINCE GEORGE'S COUNTY, MD

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States since 1990 for forensic human DNA identification testing. This includes the extensive use of restriction fragment length polymorphism (RFLP) and polymerase chain reaction (PCR) testing. I have experience in the application of the various, and now outdated, test procedures used in forensic casework including DQA1, PM (also referred to as "Polymarker"), D1S80 and short tandem repeat (STR) testing using the "CTT" and "CTT-A" GenePrint systems from Promega Corporation as well as with the current test systems using fluorescently-labeled STRs.

6. I have testified in well over 250 criminal and civil cases in approximately 22 states as well as in federal and military courts. I have testified in over forty Frye, Daubert, relevancy and other admissibility hearings in numerous states regarding the reliability and application to forensic science of RFLP and PCR testing including the statistical frequency calculations using multiple population databases associated with any evidentiary DNA profiles where an individual was not excluded as a source of the DNA. While at Cellmark Diagnostics I participated in the design of validation studies and subsequently wrote protocols and quality control procedures based on the validation data for many types of PCR-based testing methods. In 1998 and 1999 I was a member of the Post-Conviction Issues Working Group of Attorney General Janet Reno's National Commission on the Future of DNA Evidence and co-author of "Postconviction DNA Testing: Recommendations for Handling Requests" 1999, U.S. Department of Justice Office of Justice Programs. I am on the Editorial Board of the Journal of Forensic Sciences, which is the premiere forensic journal in the United States, where I serve as a peer reviewer and advisor to the editor.

7. As one of the Laboratory Directors at Cellmark, my major responsibilities included performing technical reviews of forensic casework, reviews of casework performed by other laboratories as a consultant to prosecution or defense attorneys, testifying as an expert witness, training laboratory DNA analysts, conducting and evaluating validation studies, and performing audits. The laboratory initially performed RFLP testing and then began PCR-based testing using DQA1 and PM kits, D1S80 and silver-stained STRs (specifically CTT and CTT-A) as the test systems became commercially available. By the late 1990's and through 2005, when the laboratory was closed and consolidated with the Orchid Cellmark laboratory in Dallas, TX, our laboratory

was performing PCR testing using the STR kits called Profiler Plus, COfiler, Identifiler and PowerPlex Y using gel or capillary-based instrumentation from Applied Biosystems for all of our forensic testing.

8. Since 2005, I have been reviewing forensic casework typed with the Profiler Plus, COfiler or Identifiler kits as a consultant for several laboratories in the United States, reviewing cases as a consultant for prosecution or defense attorneys and testifying in court among other responsibilities. Since 2006, I have been performing reviews of and writing reports for validation studies performed in various laboratories across the United States using the Profiler Plus, COfiler, Identifiler, Yfiler and MiniFiler PCR STR kits.

Background and Qualifications of Robin Cotton

9. I, Robin Cotton, received a Bachelor of Science degree in Biology and a Masters of Science degree in Biology from Southern Methodist University in Dallas, TX and a Ph.D. in Molecular Biology and Biochemistry from the University of California at Irvine in 1980. I did postdoctoral work in the Department of Biochemistry at the University of Iowa Medical School and at the National Institutes of Health in Bethesda, MD. I have 22 years of experience in the application of molecular biology and genetics to forensic DNA testing. I have testified in approximately 250 cases in 35 states. I have served on the Paternity Testing Standards Committee for the American Association of Blood Banks and I served as an elected member of the Board of Directors of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) from 2002 to 2006. I am currently serving a second term on the ASCLD/LAB Board of Directors. I also serve on the Editorial Board of the Journal of Forensic Sciences.
10. I worked for Cellmark Diagnostics from January 1988 until October 2006. During most of this time I served as the DNA Technical Leader for the laboratory. I shared responsibilities for validation work and forensic case review with Dr. Charlotte Word and others. I have extensive forensic casework experience with the following test systems: RFLP testing, DQA1/PM testing, the STR systems referred to as CTT-A, and the currently used STR test kits Profiler Plus, COfiler, Identifiler, and PowerPlex Y. I have testified in court in both admissibility hearings and trials presenting results and conclusions as well as statistical frequency calculations using all of these DNA test systems.

11. I am currently employed at the Boston University School of Medicine as the Director of the Biomedical Forensic Sciences Program which awards students an M.S. Degree in Biomedical Forensic Sciences. I teach a course in Forensic DNA Analysis and Advanced topics in DNA Analysis. I am the Principal Investigator in a grant from the National Institute of Justice (NIJ) designed to develop training materials for mixtures containing DNA from more than one person. Dr. Word also participates in this grant activity as a contractor to Boston University School of Medicine.

General Information

12. We were recently asked by Ms. Emily Paavola to review some documents in the case of *Kenneth Simmons v. South Carolina*. We have received and reviewed documentation that contains copies of case notes and records from case numbers 61583 and 68554 from Lifecodes Corporation of Stamford, CT (with Bates stamps of 001-236) as well as several trial transcripts and depositions of Dr. Michael L. Baird and Ms. Lauren Crane. These records include what seem to be scanned versions of film results from CTT testing gels as well as a number of reports issued by Lifecodes Corporation.
13. All forensic DNA tests examine DNA locations on specific chromosomes. At any DNA location each person has two types ("alleles" is the formal scientific term). Not all DNA tests provide the same amount of genetic information or have the same ability to discriminate one individual from another. The high power of discrimination possible with current DNA test methods as compared to the methods available in the mid-1990s is a result of two critical features of these test methods. The first feature is that the current tests examine information at 13 or 15 genetic locations. The second feature is that each DNA location (termed "locus") tested in the test panel has a large number of possible alleles (minimally between 8 and 28). The power of discrimination of the DQA1/PM test was much lower than the current DNA testing methods since only 6 genetic loci were tested and the variation in the number of possible alleles at each of the loci ranged from only two to seven. The CTT test uses only three of the currently tested STR loci.

Synopsis of the Critical Problems in Testing and Testimony by the Lifecodes Laboratory

14. A large number of problems in the laboratory testing and reporting procedures and in the testimony by the Lifecodes Laboratory were identified

in our review. We list below the most critical problems identified. Background information, further supporting detail and descriptions of additional problems follow.

15. **Critical Problem #1:** The chart used to assist with both Dr. Baird's and Ms. Crane's trial testimony contains data that are completely unsupported by the laboratory notes and results provided. No records exist in the case documentation for the CTT test results that were used to include the defendant as a source of the sperm DNA. That is, some of the data appear to be fabricated. The CTT testing for the male fraction of FI56384 was not done, yet results including the defendant were reported in the table. Furthermore the CTT testing for the male fraction of FI56386 were reported incorrectly; the actual results are consistent with the results of L. Boyd and *not* the defendant as shown in the table.
16. **Critical Problem #2:** Dr. Baird, in his trial testimony and later in his deposition, provides a statistical frequency of greater than 1 in 1 billion based on the *defendant's known alleles* at all DQA1/PM and CTT loci. The frequency presented should have been based only on the results from the evidence which are in common with results from the defendant's known standard. In this case, statistical frequency calculations should have only been performed using the DQA1/PM test results. It is never appropriate to report results in the manner used by Dr. Baird; presentation of the approximate frequency of the defendant's known sample completely misinforms the jury regarding the strength of the evidence. No credible forensic scientist would report the results from DNA testing in this manner.
17. **Critical Problem #3:** There are no case records that indicate that a critical and required control for all PCR testing was performed. This control is generally referred to as an extraction blank or a reagent blank control. The importance of using this control for detecting spurious contamination was known at the time that the testing in this case was done.
18. **Critical Problem #4:** Based on the documentation available, when the sperm fraction from one set of vaginal swabs was tested using several different test systems, the results generated were inconsistent across the various tests. The reported presence of sperm from the vaginal swabs and the observation that a mixture of DNA from two or more individuals was present in the DNA extract are contradictory to the CTT results which indicate that DNA was

present from a single individual and the gender-typing test results that indicate the presence of DNA only from a female. These findings are unexpected if the *same* DNA extract from the sperm fraction of the vaginal swab was tested with the three different assays.

Records and Reports Reviewed

19. We have reviewed the Preliminary report dated October 25, 1996, and the report dated November 18, 1996, which pertain to DQA1 and PM test results from evidence samples collected from Lillie/Lilly/Lily Boyd (henceforth L. Boyd) as well as the reports dated January 23, 1998, and February 2, 1998, which pertain to the DQA1, PM and CTT test results for a blood vial from Kenneth Simmons. In the documentation provided, we could find no Lifecodes report stating the CTT results obtained for the DNA from the evidence samples from L. Boyd or any report documenting the findings and conclusions using the CTT data.
20. The copies of the case notes provided do not have sufficient quality reproductions of the DQA1 and PM testing strips to allow for our independent review and interpretation of the data from any of the samples tested nor from the positive or negative amplification controls. All conclusions given in this Affidavit regarding the DQA1 and PM results in this case are based on the data reported in the above-referenced Lifecodes' reports, which we have assumed to be correct and with the assumptions that all results reported were of equal or higher intensity than the control dots on each of the test strips, and that the positive and negative controls used during the testing worked correctly. All statements regarding CTT results are based on our review of three CTT films, two exposures dated 1/29/98 and one dated 1/23/98. A summary table of results that we relied upon to form the opinions stated below are shown in Attachment 3, Table 1 and Table 2. Should future information demonstrate that the control samples did not work correctly, that any of the reagents used were contaminated or that any of the results reported are incorrect, then the following comments, opinions and conclusions would need to be re-evaluated.
21. The Preliminary Report dated October 25, 1996, lists a number of items received for this case, including FI56382-60 ("...slide labeled vaginal swab of Lillie Boyd"), FI56384-62 ("1 Swab labeled vaginal, Lillie Boyd frozen in saline"), FI56386-64 ("2 Swabs labeled Lillie Bell Boyd, vaginal") and

FI56389-67 (1 Swatch of Blood labeled Lilly B. Boyd"). This report states "Data suggests that sperm was visualized in samples FI56382, FI56384, and FI56386." This statement is awkward and hints that there may have been a problem confirming the presence of sperm. The copies of the photographs labeled "56384" and "56386" (Bates page 066) provided to us were of insufficient quality to verify the presence of sperm. We did not find a photograph labeled FI56382.

22. Generally when sperm are detected in a sample, and particularly when the DNA profile of the sperm-donor is of primary interest in a case, it is the practice of crime laboratories to use a differential lysis extraction procedure that splits the DNA from a sample into two fractions. Ideally using this procedure, one fraction, which we refer to as the "sperm fraction", will contain all or most of the sperm present in the sample and will generate a DNA profile containing the DNA from the male contributor(s). However, DNA from the female may also be present in the sperm fraction. Lifecodes does not have a distinguishable designation for this fraction in their notes other than a sample number without a suffix, but the term "male fraction" is often used in the reports. The second fraction, which we refer to as the "non-sperm fraction" (designated "F" or "♀" by Lifecodes) is enriched for cells from the sample that are not sperm (e.g., blood, skin). The non-sperm fraction obtained from vaginal swabs frequently contains only a DNA profile of the female from whom the samples were collected, but may contain DNA from a male contributor particularly when a large number of sperm are present in the sample. Lifecodes performed the differential extraction procedure on the two vaginal swab samples, which is the appropriate procedure to use when sperm may be present. It seems from the notes (Bates page 065) that they did not use a differential extraction procedure for the vaginal slide sample FI56382-60, which was extracted at another time with a different procedure, for undocumented reasons.

DQA1/PM Test Results and Conclusions

23. The DNA from sample 56382 was amplified with the DQA1/PM kit on 10/22/96 (Bates page 071) and results are recorded on Bates page 073 and in the report dated November 18, 1996. All of the reported results are consistent with the results obtained from the DNA from L. Boyd. There is no documentation suggesting that DNA from a second individual was observed

even though Lifecodes had reported that sperm had been detected on this sample. It is possible that the sperm DNA was not released with the extraction procedure used.

24. The DNA from the sperm and non-sperm fractions of samples 56384 and 56386 were amplified with the DQA1/PM kit on 10/22/96 along with the DNA from samples 56389 and 56382. Results are recorded on Bates page 073 and in the report dated November 18, 1996. The reported results for the non-sperm fractions (designated "F" in the report) from the two samples are consistent with being from a single individual and are the same as the results reported for the DNA from L. Boyd. There is no documentation suggesting that DNA from a second individual was observed in either of these non-sperm fractions.
25. Results were reported in the report dated November 18, 1996, for the sperm fractions of the two vaginal samples. Both samples gave the same results and therefore the conclusions for the two samples will be identical. The data in parentheses (which indicates results of reduced intensity compared to the other result per the table footnote) at the D7S8 and GC loci, along with the observation of three results at the GC and DQA1 loci, indicate that a mixture of DNA was obtained from these two sperm fractions. It is not possible to determine the number of contributors to the DNA obtained from these samples – simply that there are two or more DNA contributors to the mixed sample. All of the results at the 5 PM loci (LDLR, GYPA, HBGG, D7S8, GC) with the exception of the 3 alleles listed in parentheses are consistent with the results of L. Boyd. Two of the results at the DQA1 locus (2 and 4.2/4.3) are consistent with the results from L. Boyd. Since all of the alleles from L. Boyd are present in the sample results, she is included as one of the possible DNA contributors.
26. Since it cannot be determined whether there are only two sources of DNA in the sperm fractions of the two vaginal swabs or whether the DNA results are from three or more sources, the DNA test results should be considered using two different sets of assumptions. Under Assumption Set 1, no assumptions are made regarding the number of contributors except that there are at least two contributors. As a result of not restricting the number of contributors, it is impossible to make any determination regarding which alleles from the different loci belong together to constitute a DNA profile from one contributor;

for example, it is not possible to link the fainter results from D7S8 with the fainter results from GC as the results could come from two separate contributors. One may also either assume that L. Boyd is one of the contributors to the DNA results observed or that she is not one of the contributors. Under Assumption Set 1, everyone is included (and therefore no one is excluded) at the LDLR, GYPA, D7S8 and GC loci since all possible results were detected with this assay. These loci are not meaningful for these samples and cannot be used in any way to exclude anyone who is not a source. Only the results at the HBGG and DQA1 loci are helpful in excluding an individual who is not a source. As shown in Table 1, only individuals with BB, AB, or BC at the HBGG locus *or* any combination of genotypes containing at least one allele that is 1.3, 3 or 4.1 can be excluded with this assay under this assumption.

27. Also shown in Table 1 are the genotypes of individuals who would be included at these two loci. We have calculated statistical frequencies for the combination of genotypes that could be included in the sperm fraction from these two samples; a table showing the genotypes, their frequencies and the combined frequencies are shown in Table 3 of Appendix 3. The frequency of all randomly selected individuals who would be included as a possible contributor is approximately 1 in 2 in the African American population and approximately 1 in 8 in the Caucasian population. The Lifecodes reports do not state any assumptions used in the interpretation of these results, however, it is clear that this set of assumptions was not considered since ten of the twenty-six individuals tested with complete DQ/PM profiles cannot be excluded (or are included) as possible contributors to the mixed DNA profile, yet all of them were reported as excluded in the various Lifecodes reports. In fact, it is interesting that one individual tested had the identical DQA1/PM profile as L. Boyd and obviously cannot be excluded from any sample for which she is a contributor.
28. Under Assumption Set 2, we assume two contributors to the mixed DNA obtained from the sperm fractions of the two samples and that L. Boyd is one of the contributors. Under this assumption some of the alleles that must be present in the profile of the second contributor can be determined (see Table 1). For example, the second contributor must have the fainter B detected at the D7S8 locus (with or without an A) as well as the AC genotype at the GC

locus since those results are not contained in the profile of L. Boyd. Furthermore the second contributor must also have the 1.1 allele at the DQA1 locus and that allele can be in combination with a 1.1, 1.2, 2 or 4.2/4.3 allele. (But also see the comment in #45 below). As with Assumption Set 1, the LDLR and GYPA loci are useless for excluding an individual who is not a true contributor since L. Boyd is heterozygous and has both possible types in her profile. As before, any individual with a B allele in any combination with the other alleles (i.e., BB, AB, or BC genotype) at the HBGG locus can be excluded as a contributor since no B was detected for these samples. However, with the restriction of only two contributors and L. Boyd being one contributor, it is now possible to exclude an individual with an AA genotype at the D7S8 locus as the second contributor since the B allele is a requirement for the second contributor. Similarly, anyone with a genotype other than AC can be excluded at the GC locus and anyone without a 1.1 allele is excluded at the DQA1 locus. We have calculated statistical frequencies for the combination of genotypes that are included for the two sperm fraction samples under Assumption Set 2 (see Table 3), and they are approximately 1 in 336 random individuals in the African American population and approximately 1 in 145 individuals in the Caucasian population. The DNA profile of Kenneth Simmons does contain the requisite four alleles and/or genotypes under this Assumption Set to be included as a possible contributor. We do not see any documentation in the case file or in any report that Lifecodes calculated the frequency of the alleles of the second contributor in the DNA mixture, although it seems that this is the set of assumptions used by Lifecodes for their interpretation and reporting.

29. As previously stated, it is not possible based on the DNA test results alone to know if the DNA obtained from the sperm/male fraction of the vaginal samples contains DNA from only two individuals, or more than two individuals. Therefore it is not possible for a DNA analyst or expert to determine if one of the assumption sets is more appropriate to use, and without additional information, it is prudent to report the conclusions under both assumption. Only in the context of other information related to the case might it be possible to give more credence to one assumption set over the other.

CTT and Amelogenin Test Results and Conclusions

30. According to the notes on Bates page 150, the non-sperm fraction of sample 56384 and both fractions of sample 56386 were amplified using the CTT system on 1/15/98. The notes also indicate that there was no remaining 56384 sperm fraction sample. It should be noted that the chart used in trial testimony does show CTT results for this sample. CTT gels results dated 1/23/98 (Bates page 197) show that there are no results for the non-sperm fraction of 56384, but that there are clear results for both fractions of sample 56386. The darker results for both fractions are the same and are not consistent with the results obtained for 68555 (Simmons). Some additional faint bands are present in the 56384 non-sperm fraction, however they are in the position of and consistent with the appearance of common artifacts of this type of testing called stutter. Based on the data available to us, it is not appropriate to conclude that there is DNA from a second individual present in this sample, and these faint bands should not be interpreted. A second CTT amplification was performed on 1/27/98 (Bates page 152) using five times more DNA for the 56386 sperm fraction (designated "56386 II) and also including the 56389 sample. These results are present on Bates page 195 and the results obtained are shown in Table 2 of the Attachment 3. The results for the sperm fraction from 56386 are virtually the same with perhaps a bit more background from the sample amplified on 1/27/98 as compared to the sample amplified on 1/23/98. Some possible faint bands in the stutter position are seen on several of the samples. The results from the two amplifications and gels are consistent and there is no clear indication that there is DNA present from a second individual based on the data provided. All of the CTT results for the three loci CSF1PO, TPOX and TH01 apparent on the films dated 1/23/98 and 1/29/98 (see Table 2) are consistent with the DNA profile of L. Boyd, the person from whom the samples were collected. Although Kenneth Simmons is excluded as a source of the DNA profile observed, it is not possible with this assay to make any determination regarding a possible source of the sperm observed on these samples since there was no DNA profile detected from a second individual.
31. On 2/9/98 the notes (Bates page 115) indicate that the non-sperm fraction of 56384 and both fractions of 56386 were amplified with primers for the amelogenin locus. This testing allows for the determination of the gender for

the source of a DNA sample. Based on the results present on Bates page 196 dated 2/10/98, all three samples show only a band for the X chromosome, consistent with the DNA being from a female (see Table 2 in Appendix 3). There is no hint of a band at the Y chromosome (i.e., male) location therefore these samples contain DNA from a female. The signal for the X chromosome is quite intense, and we would have expected to clearly see a band for Y if the sample contained DNA from a male in any appreciable amount. If there is any DNA from a male present in these samples, the amount is far below the detection capabilities of this system and very likely below the detection capabilities of the other PCR-based assays used. We did not receive a Lifecodes report stating that this testing was performed or documenting the findings and conclusions.

32. Given that the DQA1 and PM results from the 56386 sperm fraction indicate the presence of DNA from a second individual, it is expected that DNA from a second individual should have been detected with the CTT testing of the same DNA. Furthermore, if the second individual was the sperm donor, then a Y chromosome band should have been detected with the test at the amelogenin locus. We do not have a good explanation for the absence of DNA from a second individual when the 56386 sperm fraction samples were amplified with the CTT test system nor the absence of a Y chromosome when this sample was tested using the amelogenin locus primers. Some possibilities include: 1) a different DNA sample was used for the DQA1/PM vs. CTT and amelogenin amplifications; however, there are no notes indicating that a second extraction of the sample was performed. 2) Perhaps the amount of DNA available from the second contributor was so small compared to the amount of DNA from L. Boyd (or other contributor) that it was right at the limit of the PCR detection systems used and only the DQ/PM results were visible. Good quality reproductions of the original DQA1/PM test strip photographs would be needed to address this possibility. 3) Alternatively, some contamination event could have occurred only during the DQ/PM testing of the samples that introduced the additional results, and there is, in fact, no DNA present from a second contributor in these samples.
33. Similarly, DQA1 and PM test results as well as amelogenin test results were obtained for the non-sperm fraction of sample FI56384; however, there were no results for this fraction when tested with the CTT assay. These three DNA

test systems detect DNA fragments of similar length and it is our experience that results were generally observed with one system if good results were obtained with the one of the other systems and a sufficient amount of DNA is available for testing. Given this, the best explanation we have at this time for the lack of observable results using the CTT assay, and in light of the fact that more DNA was used in the CTT amplification, is that there was an error during testing. It is possible that either no sample was introduced into the tube during the CTT amplification or into the gel for displaying the results. There is no indication that this sample was re-amplified or re-run.

Lifecodes Reports and Testimony

34. The Lifecodes report dated November 18, 1996, correctly states that a mixture is indicated in the male (or sperm) fractions from the two vaginal samples and that L. Boyd is not excluded as a possible contributor. Many other individuals were tested and their test results were reported in a number of other reports. We have not reviewed those reports other than to confirm that all of the individuals except Kenneth Simmons were excluded by Lifecodes as possible contributors. These conclusions are correct under the Assumption Set 2 but incorrect for some of the individuals if the sample contains DNA from more than one individual. The reports dated January 23, 1998, and February 2, 1998, also correctly state that L. Boyd and Kenneth Simmons are not excluded as contributors using the DQA1 and PM profiles, however the conclusion under section IV of the February 2 report is not limited to just the DQA1 and PM results and could be easily misleading or misinterpreted given that CTT results for Mr. Simmons were also reported.
35. The last page of the February 2, 1998, report provides a statistical frequency for the DQA1/PM and CTT profile of Kenneth Simmons. Not surprising, it is quite rare, and falls in the range of statistical frequencies commonly reported in the 1990's for profiles containing results from the combination of the 9 loci tested in this case. It is our opinion, however, that this calculation should not have been performed nor provided in the report since it is the frequency of the known individual's profile rather than the appropriate statistical frequency from the relevant item of evidence in the case. Generally the relevant question in cases such as this is "What is the statistical frequency of the sperm donor's profile in the sperm fraction of the vaginal swabs?" and not "What is the frequency of the DNA profile of the suspect in this case?" Since

these two frequencies address significantly diverse questions and provide calculations for only a few loci for the evidence sample from only one of the tests performed vs. 9 loci for the suspect's standard, it is not surprising that they differ by many orders of magnitude.

36. Given that it was not appropriate to report the suspect's profile frequency in the first place, it is our opinion that it was completely inappropriate to provide the frequency to the jury during court testimony for two reasons. First, Dr. Baird was not answering the appropriate relevant question for the evidence in this case, and second, the CTT results should not have been included in the calculations. In our opinion, the prosecutor was trying to ask the correct questions during the direct examination of Dr. Michael Baird as stated on page 1480, lines 9-12 and in a different way on page 1480 lines 22-25 and page 1481, lines 1-2 and then again on page 1481, lines 14-29 of Dr. Baird's transcript (although it would have been helpful to have had the additional clarification regarding the types that could not be accounted for by L. Boyd):

    Q. "What percentage of the Caucasian population would be excluded as the donor of that semen in the male fragment [sic] of the vagina [sic] swabs taken at Lilly Bell Boyd's autopsy?"

    Q. "So to ask that question in a different way perhaps, Doctor, using that chart; what is the probability of a randomly chosen person unrelated to Kenneth Simmons having the same genetic profile as to the genetic profile found in the semen from the vaginal swab taken from the autopsy?"

    Q. "Dr. Baird, using that chart, please explain the probability of a randomly chosen person unrelated to Kenneth Simmons having that same genetic profile, the genetic profile found in the semen on this chart, the vaginal swabs taken from the autopsy?"

37. However, the question answered by Dr. Baird throughout his testimony at trial was instead "What is the frequency of Mr. Simmons' 9 locus profile in the general population?", even when asked again on page 1482, lines 4-5, "And you also see that same profile in the male fragment of the vaginal swab?" He even specifically stated the use of the "nine different genetic tests done in this case." (page 1481, lines 24-25). Since there were no results common to Mr. Simmons obtained during the CTT testing, the CTT loci should not have been included at all in the calculations for the evidence or presented to the jury in

any manner. We feel that Dr. Baird's testimony was grossly misleading and that he erred in answering the questions the way that he did.

38. A table, listing the samples tested in this case along with the DQ/PM results as reported in the report dated November 18, 1996, is present in the Lifecodes laboratory files on Bates page 015 and attached here as Attachment 4. Both the table in the report and the table on page 015 have a minor typographical error under the HLADQA1 results for the sample FI5634 Female fraction; that is, the two 4 alleles should be separated with a slash mark and presented as "4.2/4.3" rather than with the comma separating them. However, based on the information provided in the Lifecodes case file, and particularly based on the CTT gel results dated 1/23/98 and 1/29/98, it is our opinion that *all* of the results listed under the columns for the CTT system (i.e., CSF1PO, TPOX, TH01) are incorrect, with only two exceptions. It is our understanding that this table was introduced in court as State's Exhibit 24 and relied upon for testimony during Ms. Crane's and Dr. Baird's testimony. Our summary of the results are shown in Attachment 3,Table 2 and a corrected version of the chart presented in court by the Lifecodes witnesses is provided in Attachment 5. It is our opinion that the following errors exist in the table on page 015:

    a. For the blood sample of Lilly Bell Boyd, no results are listed. The results should be 10, 12 for CSF1PO; 9 for TPOX; and 8 for TH01.
    b. For the blood sample of Kenneth Simmons, the CSF1PO results are stated incorrectly. The results should be 10, 12. The correct results are stated for the TPOX and TH01 loci.
    c. For the male (sperm) fraction of FI56384, the table lists results consistent with the incorrect DNA profile of Kenneth Simmons. However, the laboratory notes (Bates #150) state "Note: No sample 56384 left". There is no indication that testing was performed on this sample with this assay and there is no lane of results for this sample on either of the gels. All results reported in the table are incorrect and should be changed to "Not Done".
    d. For the female (non-sperm) fraction of FI56384, the table is blank. This sample was tested, however, no results were obtained (also see #17 above). The table should say "No Results".

e. For the male (sperm) fraction of FI56386, the table lists results consistent with the incorrect DNA profile of Kenneth Simmons. None of these results are correct. The results should be 10, 12 for CSF1PO; 9 for TPOX; and 8 for TH01. These results are all consistent with the results obtained for L. Boyd and exclude Kenneth Simmons as a source of the DNA.

f. For the female (non-sperm) fraction of FI56386, the table is blank. This sample was tested and the results should be listed as 10, 12 for CSF1PO; 9 for TPOX; and 8 for TH01. These results are all consistent with the results obtained for L. Boyd and exclude Kenneth Simmons as a source of the DNA.

39. It is our opinion that the table on page 015 should never have been presented to the jury during the trial. It is also our opinion that the experts should not have relied on this table in any way to aid in their presentation. The table is factually wrong and can only be misleading to the trier-of-fact. It should have been corrected prior to any testimony being given on it, and at the least, both of the witnesses should have corrected it during testimony. It is our opinion that there is absolutely no possible way, based on the testimony of the two DNA witnesses, that the jury could have had any indication that the data were inaccurately displayed in this exhibit. The inaccurate presentation of data in the sperm fraction of two different samples along with the false representation that the results are the same as those from the defendant in this case, in conjunction with the testimony referencing this table while stating that Kenneth Simmons cannot be eliminated as a contributor, plus the testimony implying that DNA from a male was present in the samples (see # 42 below) while including the completely inappropriate statistical frequency is clearly a gross compilation of errors that can be nothing but prejudicial to the defendant. Dr. Baird was even asked (page 1475) "Is anything inconsistent at any time with Mr. Simmons there?" and his response was "No" even though all of the CTT results were not consistent with Mr. Simmons.

40. Review of the case file indicates that a number of other tests were performed on the DNA from the vaginal samples in this case. However we did not receive any reports from Lifecodes stating that these tests were performed nor were the findings and conclusions from the testing apparent in the notes or in any report. These additional tests include:

a. On 11/1/96 (page 075), samples 56382, both fractions of 56384 and 56386 and 56389 were amplified with D1S80 primers. Twice the volume of DNA that was used for the DQ/PM amplification was used for each sample during this amplification.
b. On 11/2?/96 (Bates page 113), samples were amplified for "D12".
c. Bates page #190 shows a film labeled D4S163, dated Oct 28 1996, with no apparent results.
d. Bates page #191 shows a film labeled D17S79.
e. Bates page #189 shows a film labeled D2S44, dated Nov 11 1996, with no apparent results.

41. On page 1462 of the trial transcript of Ms. Lauren Crane, she testified that sperm were detected on the oral swabs using "the same isolation procedure and a microscopic visualization for sperm." She further states on page 1463 that she did not perform PCR analysis on the swabs "because the amount of sperm that we visualized microscopically wasn't of the same quantity to obtain DNA results on [sic] there were only a few sperm seen." We received no notes or photographs documenting anything related to the DNA testing of the oral swabs or microscopic examination of the sample in this case, nor were these findings reported in the Preliminary Report or any subsequent report that we saw.
42. Our interpretation on page 1469, lines 7-18 of the trial transcript of Ms. Lauren Crane is that she is stating that the DNA from the sperm/male fraction of the DNA is a mixture of DNA from a male and a female. Based on the information that we have received to date, this is an incorrect statement as there are no results present in the laboratory case notes nor in any of the reports that show any indication that DNA from a male was verified.

Additional comments

43. We are particularly concerned that there is no indication that reagent (also termed extraction) blanks were used during the testing of any of the samples in this case. The introduction of a reagent blank control tube at the beginning of all DNA extraction procedures was recommended in all publications regarding the application of PCR testing to forensic samples and was a common practice in crime laboratories performing PCR testing. The need for a reagent blank is specifically stated on page 62 of the TWGDAM *Guidelines for a Quality Assurance Program for DNA Analysis* (Crime Laboratory Digest,

vol 18, No. 2, 1991), which was one of the authoritative documents regarding quality control in the forensic DNA testing laboratories in the 1990s. Guideline 7.5.1.1 states: "Negative controls to be included with each sample set are: a) a reagent blank and b) an amplification blank." All chemicals and solutions added to the test samples during PCR testing are simultaneously added to the reagent blank tube as it is tested along with all of the associated samples throughout the entire PCR testing process. At the end of the test, it is expected that the reagent blank control should have no detectable results, thus, confirming that no human DNA was inadvertently introduced by the laboratory in the materials used during the test. In the absence of verified negative reagent blank controls, extreme caution must be used when interpreting the DNA test results from this case, particularly any results of reduced intensity to the primary results, such as the DQ/PM results that include Mr. Simmons.

44. Dr. Baird testified in trial (page 1455, line 21 through page 1456, line 6):"We also have quality controls built into the testing that we do ourselves at Lifecodes which include a human control DNA that we test at the same time of the samples. We also have a negative control built into our analysis. In other words, to make sure that we are not inadvertently introducing DNA from an outside source into the testing procedure." We believe that in this testimony, he is only referring to the positive and negative amplification controls, which are introduced into the testing process at the DNA amplification step. Since these two controls are introduced at the amplification step, which is the step that follows DNA extraction and quantitation, they can in no way act as any type of control for the various chemicals and reagents that were introduced during the many sample manipulations used in DNA extraction of samples containing sperm.
45. Due to the inconsistencies in the DNA testing results described in paragraphs #32 and #33 above, it is critical to verify that the DQ/PM test results were true results that were accurately reported and not due to known artifacts that occurred during this type of testing. Without good quality reproductions of the original DQ/PM strip results it is not possible to verify the quality of the DNA test results in relation to each other or in relation to the "S" and "C" control dots present on each test strip. It is also not possible to determine if the 1.1 dot observed with the DQA1 test is a dark or faint result. Faint 1.1 results

were commonly observed with this test in samples that did not contain the DQA1 1.1 allele (see Crouse, et al. *Analysis and Interpretation of the HLADQα "1.1 Weak-Signal" Observed During the PCR-Based Typing Method*,. J. Forensic Sciences 39:41-51, 1994). Since this is the only allele detected at this locus that may be potentially associated with the sperm donor in this case, it is important to determine that the result is, in fact, a true result rather than an artifact of the testing.

46. Dr. Baird's testimony on the bottom of page 1476 of his trial transcript is contradictory to the information stated in the Lifecodes report dated February 2, 1998, and in discovery materials (Bates page #167) regarding the data bases used for calculations. The trial transcript states that databases from the manufacturers Perkin-Elmer and Promega were used, the laboratory report instead references a database published by the FBI and from Palm Beach County Sheriff's Office, whereas the letter from Dr. Baird dated October 22, 1998, in response to a discovery request states that the databases used were from the FBI and Perkin-Elmer.
47. Review of the laboratory notes suggests that either there are pages of documentation that were not provided or significant portions of the testing procedures were not documented in the notes. For example, there is no documentation regarding the gel run for the CTT results dated 1/23/1998, although there are notes documenting the amplification of the samples and the product gel.
48. There are notes regarding a sample from another individual received and tested for this case on Bates page 083. No additional notes for this sample were provided and we could find no report stating the results obtained from this sample.
49. In conclusion, it is our opinion that:
    a. The totality of the DNA data in this case that can be used for comparison purposes to assist with the determination of the possible source of the DNA from the vaginal samples that cannot be accounted for by L. Boyd is only 4 alleles. Based on the frequency of these alleles in the population, it is very likely that many other people in the United States (and the world) would share this series of alleles.
    b. The final report from the Lifecodes laboratory stating the failure to exclude Kenneth Simmons as a contributor of DNA while presenting inappropriate

statistical frequencies along with the testimony of the DNA expert witnesses was confusing and can only be viewed as misleading to anyone without the whole set of accurately presented data.

c. The table of results presented at trial to the jury and relied upon by the witnesses was fraught with errors that can only be viewed as prejudicial to the defendant.

d. The work performed in the Lifecodes laboratory was not performed according to generally accepted practices and procedures in crime laboratories.

e. Much of the testing performed on the samples in this case was not documented in a laboratory report at any time, including data that were misrepresented to the jury at trial.

f. Discrepancies in the test results in this case were not addressed in the laboratory notes, reports or testimony.

g. It is important that trained DNA expert(s) review the original case file, retained at the Orchid Cellmark laboratory in Dallas, TX, to include all notes, original data and photographs to be able to fairly evaluate and interpret the data, review case notes that have not been previously recognized as part of the case file and provided, and to independently reach conclusions regarding the data obtained for this case, the laboratory's testing procedures, and the discrepancies in the test data.

We affirm, under penalty of perjury, that the foregoing is true and correct to the best of our knowledge.

Dated: March 12, 2011

Charlotte J. Word, Ph.D.

Robin W. Cotton, Ph.D.

SUBSCRIBED AND SWORN to before me this 12th day of March 2011.

Leontine Cunningham

State of Maryland, County of Montgomery

My commission expires 12/1/2015

Attachment 1

Curriculum Vitae

Charlotte J. Word, Ph.D.

Education

Ph.D. Microbiology, University of Virginia, Charlottesville, Virginia, 1981

B.S. Biology, College of William and Mary, Williamsburg, Virginia, 1976

Professional Experience

Consultant, Human DNA Identification and Paternity Testing, 2005-present

Consultant, Orchid Cellmark, Germantown, MD; Dallas, TX, 2005-present

Consultant, Applied Biosystems, Inc. 2006-present

Project Staff Associate, Northeast Regional Forensic Institute, Research Foundation of State University of New York, Albany, New York, 2006-2007

Senior Manager, Forensics and Laboratory Director, Orchid Cellmark, Germantown, Maryland, 2001 - 2005

Deputy Laboratory Director, Forensic Laboratory, Cellmark Diagnostics, Inc., Germantown, Maryland, 1997 - 2001

Senior Scientist, Cellmark Diagnostics, Inc., Germantown, Maryland, 1995 - 1997

Scientist, Cellmark Diagnostics, Inc., Germantown, Maryland, 1990 - 1995

Research Assistant Professor, Department of Cell Biology, University of New Mexico School of Medicine, Albuquerque, New Mexico, 1984 -1990

Research Fellow, Dr. Philip W. Tucker, Department of Microbiology
University of Texas Southwestern Medical School, Dallas, Texas, 1981 - 1984

Graduate Research Student (Ph.D.), Dr. W. Michael Kuehl, Department of Microbiology, University of Virginia. Thesis Title: "Murine B Lymphomas: Models for Immunoglobulin Expression in B Cell Development.", 1976-1981

Sabbatical with Dr. Randolph Wall, University of California at Los Angeles Molecular Biology Institute, Los Angeles, California, 1980

Participant, Histopathobiology of Cancer Workshop, Keystone, Colorado, 1979

Professional Associations

American Society of Human Genetics

American Academy of Forensic Sciences

Mid-Atlantic Cold Case Homicide Investigators Association (MACCHIA)

CE Users Group

Honors and Research Support

Grant Review for National Institutes of Justice, 2006-present.

Auditor for the National Forensic Science Technology Center, 2005 – present

Inspector for the American Society of Laboratory Directors/Laboratory Accreditation Board 2004 – 2005, 2010.

Editorial Board, The Journal of Forensic Sciences, 2004 – present

Guest Reviewer, The Journal of Forensic Sciences, 2002 – 2004

Member, Post-Conviction Issues Working Group of the National Commission on the Future of DNA Evidence, 1998-1999. Co-author of "Postconviction DNA Testing: Recommendations for Handling Requests" 1999, U.S. Department of Justice Office of Justice Programs.

United States Department of Defense, 1996-1998, Enhanced DNA Recovery, $318,000.

NIH 1 RO1 HD20409. Immunoregulatory Factors in Human Colostrum. $88,218 (direct). 07/01/87 – 06/30/90. Co-PI: S. Crago.

American Heart Association Grant-In-Aid 1985-1989, Regulation of B Cell Immunoglobulin Isotype by T Cells, $99,000.

American Cancer Society Junior Faculty Research Award 1985-1988, Regulation of B Cell Immunoglobulin Isotype by T Cells, $90,500.

Recipient of AAI travel award for 6th International Congress of Immunology, 1986.

Fellow, Damon Runyon –Walter Winchell Cancer Fund Award, 1982-1984.

Semi-Finalist, 1981 Distinguished Dissertation Award from the Council of Graduate Schools/University Microfilms International.

Publications

Word, C.J. and Kuehl, W.M. 1981. Expression of surface and secreted IgG_{2a} by a murine B lymphoma before and after hybridization to myeloma cells. Mol. Immunol. 18:311-322.

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Chen, Y.-W., Word, C.J., Dev, W., Uhr, J.W., Vitetta, E.S. and Tucker, P.W. 1986. Double isotype production by a neoplastic B cell line: II. Allelically excluded production of μ and γ1 heavy chains without C_{H1} gene rearrangement. J. Exp. Med. 164:562-579.

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Cotton, R.W., Kriss, J.E., Forman, L., Word, C.J. 1992. The effects of sample buffer composition on migration of DNA fragments. 44th Annual Meeting of the American Academy of Forensic Sciences, New Orleans, LA.

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Word, C.J., Cotton, R.W., Ranadive, A.A., and Weber, M.A. 1995. Forensic casework analysis using STRs, DQα and PM in combination. Sixth International Symposium on Human Identification, Scottsdale, AZ.

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Word, C.J. 1996. DNA Interpretation Issues Workshop. Northwest Association of Forensic Sciences Meeting, Salt Lake City, UT.

Word, C.J. 1996. Interpretation of mixed samples. Human Identification Users Meeting. Rockville, MD.

Word, C.J. 1997. STR data goes to court - A laboratory perspective. Eighth International Symposium on Human Identification, Scottsdale, AZ.

Word, C.J. and Gregory, S.A. 1997. Optimization of recovery and PCR amplification of DNA from stamps and envelopes. Eighth International Meeting on Human Identification, Scottsdale, AZ.

Reynolds, J.E., Weber, M.A., Colombo, K., Swienton, A.R., Word, C.J., Yates, P.J., Cotton, R.W. 1997. DNA typing of the transfused individual. Am. J. Hum. Genet. 61(4):A1311; Poster presentation at the 47th Annual Meeting of the American Society of Human Genetics, Baltimore, MD.

Reynolds, J.E., Weber, M.A., Colombo, K.A., Swienton, A.R., Word, C.J., Yates, P.J., and Cotton, R.W. 1998. The effects of blood transfusion on RFLP and PCR DNA typing: Forensic casework examples. 50th Annual Meeting of the American Academy of Forensic Sciences, San Francisco, CA.

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Word, C. J. 1998. DNA quantitation and PCR inhibition issues. Florida DNA Training Session IV: STRs - The Next Generation, Orlando, FL.

Grosswciler, L.L., Gee, M.A., Crance, K.A., Sipes, D.E., Word, C.J., and Reynolds, J.E. 2000. Successful DNA extraction from serum samples. 11th International Symposium on Human Identification, Biloxi, MS.

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Word, C.J., Danielsen, L.A., Reynolds, J.E., Maddox, L.O., and Cotton, R.W. 2000. Multiple-laboratory validation of fluorescent STRs using proficiency test results. 11th International Symposium on Human Identification, Biloxi, MS.

Word, C.J., Reynolds, J.E., Cotton, R.W., Grossweiler, L.L., Maddox, L.O. 2001. Solving old crimes with new DNA testing - contracting "cold" cases. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA. (presented by Melissa B. Thompson)

Cotton, R.W., Word, C.J., Danielsen, L.A., Reynolds, J.E., and Maddox, L.O. 2001. Demonstration of general acceptance of STR data to the court. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Cotton, R.W., Kriss, J.E., Colombo, K.A., Word, C.J., and Maddox, L.O. 2001. Defining alleles for four Y chromosomal markers without benefit of allelic ladders as part of Y chromosome validation studies. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Maddox, L.O., Suit, B., Word, C.J., Cotton, R.W. 2001. Advantages of enhanced sensitivity of product gel staining using GelStar™ nucleic acid stain. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Gee, M.A., Grossweiler, L.L., Crance, K.A., Sipes, D.E., Word, C.J., and Reynolds, J.E. 2001. Recovery of DNA from serum samples. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Word, C.J. 2001. Panelist at Brooklyn Law School Symposium, DNA: Lessons from the Past, Problems for the Future, Brooklyn, NY.

Grgicak, C.M., Reynolds, J.E., Sipes, D.E., Rosier, L.R., Knickerbocker, C.J., Zimmerman, C.E., Shofkom, A.E., Befus, J.K., Cotton, R.W., Word, C.J. 2002. Relative sensitivity comparison between ABI fluorescent detection instruments using data from large scale no-suspect casework. 54th Annual Meeting of the American Academy of Forensic Sciences, Atlanta, GA.

Cline, R., Polhamus, C., Winebrenner, L., Leisy, C., Heller, A., Cicco, M., Grossweiler, L., Kokoszka, J. E., and Word, C. J. 2002. The night the lights went out in Germantown, An amplification study. 13th International Symposium on Human Identification, Phoenix, AZ.

Grgicak, C., Sipes, D.E., Grossweiler, L.L., Cotton, R.W., Word, C.J. 2003. Comparative Analysis of the DNA IQ™ and QIAamp DNA® Extraction Kits for the Processing of Forensic Evidentiary Samples. 55th Annual Meeting of the American Academy of Forensic Sciences, Chicago, IL.

Grossweiler, L.L., Word, C.J., Maddox, L.O., 2003. Decision Branches for Testing of No Suspect Casework. 55th Annual Meeting of the American Academy of Forensic Sciences, Chicago, IL.

Word, C.J. Co-presenter 2005. Presenting DNA Evidence in Court. Sixteenth International Symposium on Human Identification, Dallas, TX

Word, C.J. 2006. Presented Workshop: Statistics in the Courtroom. 5th Annual Bode East Coast Advanced DNA Technology Workshop, Captiva Island, FL

Word, C.J. and Clarke, G. W. 2006. Presented Workshop: Courtroom Testimony: What You Need to Know. 17th Annual International Symposium on Human Identification, Nashville, TN

Word, C.J.and Dale, W. M. 2006. Quality Management System Concept and Tools "Mistakes Happen-What to do when it Happens to you & How to Prevent Them". 17th Annual International Symposium on Human Identification, Nashville, TN

Word, C.J. and Clarke, G. W. 2007. Presented Workshop: Expert Witness Testimony. 18th Annual International Symposium on Human Identification, Hollywood, CA.

Word, C.J. 2009. Presented Workshop: Expert Witness Testimony for New and Advanced DNA Analysts. Albany, NY

Word, C.J. 2009. What is LCN? Definitions and Challenges. 20th International Symposium on Human Identification, Las Vegas, NV

Word, C.J., Cotton, R.W., Grgicak, C., Butler, J. and Coble, M. 2010. Mixture Interpretation Workshop, San Antonio, TX

Seminars/Workshops

American Academy of Forensic Sciences Annual Meeting, Chicago, IL 2011

NIJ/OLES-funded Research Symposium, Office of Law Enforcement Standards, National Institutes of Standards and Technology, Gaithersburg, MD 2010

American Society of Human Genetics, 60th Annual meeting, Washington, DC 2010

21st International Symposium on Human Identification, San Antonio, TX 2010

American Society of Crime Laboratory Directors Meeting, Baltimore, MD 2010

15th National CODIS Conference, Reston, VA 2009

20th International Symposium on Human Identification, Las Vegas, NV 2009

Ethics Workshop, 20th International Symposium on Human Identification, Las Vegas, NV 2009

The NIJ Conference 2009, Crystal City, VA. 2009

14th National CODIS Conference, Crystal City, VA. 2008

19th International Symposium on Human Identification, Hollywood, CA. 2008

Ethics and Forensic Science Workshop, 19th International Symposium on Human Identification, Hollywood, CA. 2008

Troubleshooting Common Laboratory Problems Workshop, 19th International Symposium on Human Identification, Hollywood, CA. 2008

The NIJ Conference 2008; Criminal Justice Research, Development and Evaluation in the Social and Physical Sciences, Crystal City, VA. 2008

60th Annual Meeting of the American Academy of Forensic Sciences, Washington, DC 2008

Human DNA Quantification Using Real Time PCR Assays Workshop, 60th Annual Meeting of the American Academy of Forensic Sciences, Washington, DC 2008

DNA Mixture Interpretation: Principals and Practice in Component Deconvolution and Statistical Analysis Workshop, 60th Annual Meeting of the American Academy of Forensic Sciences, Washington, DC 2008

Eighteenth International Symposium on Human Identification, Hollywood, CA, 2007.

The NIJ Conference 2007; Forensic DNA: Tools, Technology, and Policy, Arlington, VA 2007

Grant Progress Assessment Training, Washington, D.C. 2007

HID 3130 Systems Training Program, Applied Biosystems, Rockville, MD 2007

Twelfth National CODIS Conference, Arlington, VA 2006

Seventeenth Annual International Symposium on Human Identification, Nashville, TN, 2006

5th Annual Bode East Coast Advanced DNA Technology Workshop, Captiva Island, FL, 2006

58th Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA, 2006

Eleventh National CODIS Conference, Crystal City, VA 2005

Sixteenth International Symposium on Human Identification, Dallas, TX, 2005

DNA Auditors Training Class, Quantico, VA, 2004

Tenth National CODIS Conference, Crystal City, VA, 2004

56th Annual Meeting of the American Academy of Forensic Sciences, Dallas, TX, 2004

American Prosecutors Research Institute National Conference: Justice Speaks, Crystal City, VA, 2003

Ninth National CODIS Conference, Lansdowne, VA, 2003

ASCLD/LAB Inspector's Training Class, Harrisburg, PA, 2003

Population Genetics Workshop, Taught by Dr. George Carmody, Rockville, MD, 2003

54th Annual Meeting of the American Academy of Forensic Sciences, Atlanta, GA, 2002

Y Chromosome Analysis and its Application to Forensic Casework Workshop, 54th Annual Meeting of the American Academy of Forensic Sciences, Atlanta, GA, 2002

Forensic Mitochondrial DNA Analysis: A Community Forum Workshop, 54th Annual Meeting of the American Academy of Forensic Sciences, Atlanta, GA, 2002

Statistics II – Forensic Mixture Interpretation & Analysis, Thirteenth International Symposium on Human Identification, Phoenix, AZ, 2002

Thirteenth International Symposium on Human Identification, Phoenix, AZ, 2002

Brooklyn Law School Symposium, DNA: Lessons from the Past, Problems from the Future, Brooklyn, NY, 2001

Twelfth International Symposium on Human Identification, Promega, Biloxi, MS, 2001

DNA Audit Class, Quantico, VA, 2000

52nd Annual Meeting of the American Academy of Forensic Sciences, Reno, NV, 2000

Fifth Annual Conference on the Future of DNA: Implications for the Criminal Justice System, New York, NY, 2000

Florida DNA Training Session V: DNA 2000, Miami Lakes, FL, 2000

Eleventh International Symposium on Human Identification, Promega, Biloxi, MS, 2000

Casework Guidelines and Complex Mixture Interpretation Workshop, Promega, Biloxi, MS, 2000

Statistics Workshop, Promega, Orlando, FL, 1999

Mitochondrial DNA Sequence Analysis in Forensic Casework Methods and Issues Workshop, Promega, Orlando, FL, 1999

Tenth International Symposium on Human Identification, Promega, Orlando, FL, 1999

50th Annual Meeting of the American Academy of Forensic Sciences, San Francisco, CA, 1998

Florida DNA Training Session IV: STRs - The Next Generation, Orlando, FL, 1998

Ninth International Symposium on Human Identification, Promega, Orlando, FL, 1998
49th Annual Meeting of the American Academy of Forensic Sciences, New York, NY, 1997

Eighth International Meeting on Human Identification, Promega, Scottsdale, AZ, 1997

A Workshop in Statistics for Forensic Scientists, St. Petersburg Junior College, St. Petersburg, FL, 1996

The Seventh International Symposium on Human Identification, Promega, Scottsdale, AZ, 1996

Northwest Association of Forensic Sciences, Salt Lake City, UT, 1996

Human Identification Users Meeting, Rockville, MD, 1996

47th Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA, 1995

Florida DNA Training Session III: Advanced PCR Applications, Altamonte Springs, FL, 1995

The Sixth International Symposium on Human Identification, Promega, Scottsdale, AZ, 1995

The Mid-Atlantic Association of Forensic Scientists Present "The Gilbert and Trias Murders," Gaithersburg, MD, 1995

46th Annual Meeting of the American Academy of Forensic Sciences, San Antonio, TX, 1994

The Fifth International Symposium on Human Identification, Promega, Scottsdale, AZ, 1994

BioEast '94 Workshop, Washington, D.C., 1994

45th Annual Meeting of the American Academy of Forensic Sciences, Boston, MA, 1993

The Second International Symposium on the Forensic Aspects of DNA Analysis, Quantico, VA, 1993

Florida DNA Training Session II: PCR Applications, Orlando, FL, 1993

The Fourth International Symposium on Human Identification, Promega, Scottsdale, AZ, 1993

44th Annual Meeting of the American Academy of Forensic Sciences, New Orleans, LA, 1992

The Third International Symposium on Human Identification, Promega, Scottsdale, AZ, 1992

AmpliType HLA DQα Forensic DNA Amplification and Typing Workshop, 1992.

43rd Annual Meeting of the American Academy of Forensic Sciences, Anaheim, CA, 1991

The Second International Symposium on Human Identification, Promega, Madison, WI, 1991

Eighth International Congress of Human Genetics, Washington, D.C., 1991

Association of Biotechnology Companies, Washington, D.C., 1991

International Symposium on Continuous Cell Lines - An International Workshop on Current Issues, Bethesda, MD, 1991

The Institute of Continuing Legal Education in Georgia, Criminal Law and DNA meeting, Atlanta, GA, 1990

California Association of Criminalist Meeting, Long Beach, CA. (taught course), 1990

Revised March 2, 2011

Attachment 2

Curriculum Vitae

Robin W. Cotton, Ph.D.

Education

Ph.D. Molecular Biology and Biochemistry, University of California at Irvine, Irvine, California, 1980, Dissertation Title: Studies in Chromatin Structure

M.S. Biology, Southern Methodist University, Dallas, Texas, 1974

B.S. Biology, Southern Methodist University, Dallas, Texas, 1971

Professional Experience

Program Director: Biomedical Forensic Sciences and Associate Professor, Department of Anatomy and Neurobiology, Boston University School of Medicine, October 2006 to Present

Senior Director, Technical Forensic Science, Orchid Cellmark - November 2005 to August 2006

Laboratory Director and Technical Leader, Orchid Cellmark, Germantown, Maryland, 2001 – October 2005

Laboratory Director and Technical Leader, Forensic Laboratory, Cellmark Diagnostics, Germantown, Maryland, 1992 - 2001

Deputy Director, Cellmark Diagnostics, Germantown, Maryland, 1990 – 1992

Manager, Research and Development, Cellmark Diagnostics, Germantown, Maryland, 1988 - 1990

Guest Researcher, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, Bethesda, Maryland, 1988 - 1990

Senior Staff Fellow, Section of Genetic Studies, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, Bethesda, Maryland, 1983 - 1987

Postdoctoral Fellow, Laboratory of Dr. Roger Chalkley, Department of Biochemistry, College of Medicine, University of Iowa, Iowa City, Iowa, 1980 - 1983

Professional Associations and Committees

American Society of Human Genetics

American Academy of Forensic Sciences – Fellow

International Society for Forensics Genetics

ASCLD/LAB Board of Directors, Elected Position – November 2002- November 2006

ASCLD/LAB Volunteer Inspector, Legacy Program, 1995 –Present

ASCLD/LAB Board of Directors, Public member – October 2010 to present

Editorial Board, Journal of Forensic Sciences – May 2002-Present

Testimony Experience

Testimony provided in approximately 250 cases in approximately 35 States

Publications

Cotton, R.W., Manes, C. and Hamkalo, B.A. (1980) Electron Microscopic Analysis of RNA Transcription in Preimplantation Rabbit Embryos. Chromosoma. 79: 166-178.

Cotton, R.W. and Hamkalo, B.A. (1980) Nucleosome Dissociation at Physiological Ionic Strength. Nuc. Acids Res. 9: 455-457.

Tonelli, L.A., Rubenstein, K.R., Anderson, M.B., Green, D.J., Herrin, G.L., Cotton, R.W., Dykes, D.D. and Garner, D.D. (1989) Use of DNA "Fingerprints" for Identity Determination: Comparison to Traditional Paternity Testing Methods - I. J. Forensic Sci. Vol. 35: 1265-1269.

Rubenstein, K.R., Tonelli, L.A., Anderson, M.B., Green, D.J. Herrin, G.L., Cotton, R.W., Gottschall, J.L. and Garner, D.D. (1989) Use of DNA "Fingerprints" Identity Determination: Comparison to Traditional Paternity Testing Methods - II. J. Forensic Sci. Vol. 35: 1270-1276.

Lundgren, B., Cotton, R.W., Lundgren, J.D., Edman, J.C., Kovacs, J.A., (1990) Identification of Pneumocystis carinii Chromosomes and Mapping of Five Genes. Infection and Immunity, June 1990, p.1705-1710.

Kriss, J., Herrin, G., Jr., Forman, L. and Cotton, R.W. (1990) Digestion Conditions Resulting in Altered Cut Site Specificity for Hinf1. Nucleic Acids Research, Vol. 18, No. 12 p. 3665.

Walsh, D.J., Corey, A.C., Cotton, R.W., Forman, L., Herrin, G.L., Jr., Word, C.J. and Garner, D.D. (1992) Isolation of DNA from Saliva and Forensic Samples Containing Saliva. J. For. Sci., Vol. 37, No. 2, p.387-395.

Horsman, K.M., Hickey, J.A., Cotton, R.W. Landers, J.P., and Maddox, L.O. (2006) Development of a Human-Specific Real Time PCR Assay for the Simultaneous Quantitation of Total Genomic and Male DNA. J. For. Sci., Vol. 51 No. 4, p.758-765.

Perlin, M.W., Kadane, J.B., and Cotton, R.W. (2009) Match Likelihood Ratio for Uncertain Genotypes. Law, Probability and Risk, Vol. 8, p. 289-302.

Grgicak, C.M., Urban, Z.M., and Cotton, R.W. (2010) Investigation of Reproducibility and Error Associated with qPCR Methods Using Quantifiler® Duo DNA Quantification Kit. J. For. Sci., Vol.55, No. 5, p. 1331-1339.

Presentation Abstracts

Cotton, R.W. and Hamkalo, B.A. (1980) Electron Microscopic Analysis of Transcription During Mammalian Embryogenesis. J. Cell Biol. 79:160a.

Cotton, R.W. (1980) Nucleosome Dissociation at Physiological Ionic Strength. Fed. Proc. 39: 2008.

Cotton, R.W. and Chalkley, R. (1984) Variations in Nucleosome Position on the 93bp Tandemly Repeated DNA from HTC Cells. J. Cell Biol. 99: 136a.

Cotton, R.W. and Goldman, D. (1987) The Three Class I Alcohol Dehydrogenases on Chromosome 4 are Genetically Linked and in Close Physical Association. Joint Meeting of the Research Society on Alcoholism and the Committee on Problems of Drug Dependence.

Cotton, R.W. and Goldman, D. (1987) Detection of Extensive Y-chromosomal Polymorphism Using the 3.4 kb Y-specific Repeat. Amer. J. of Human Genetics. 41: 629.

Garner, D.D., Green, D.J., Herrin, G.L., Cotton, R.W., and Anderson, M.B. (1988) Validation Studies Utilizing the Jeffreys' DNA Probes. 40th Annual Meeting of the American Academy of Forensic Sciences, Philadelphia, PA.

Garner, D.D., Cotton, R.W., Green, D.J., Rubenstein, K.R., Tonelli, L.A. and Anderson, M.B. (1988) Comparison of Jeffreys' DNA Probes to Standard Techniques for Identity Determination. 40th Annual Meeting of the American Academy of Forensic Sciences, Philadelphia, PA.

Sheridan, K.T., Cotton, R.W., Herrin, G.L., Green, D.J. and Garner, D.D. (1989) Isolation of DNA From Forensic Samples and Removal of Contaminants Which Inhibit Restriction Enzyme Digestion. 41st Annual Meeting of the American Academy of Forensic Sciences, Las Vegas, NV.

Herrin, G.L., Cotton, R.W., Green, D.J. and Garner, D.D., (1989) Population Data Using the Jeffreys' Single-locus Probes. 41st Annual Meeting of the American Academy of Forensic Sciences, Las Vegas, NV.

Herrin, G.L., Cotton, R.W., Corey, A.C., David, K., McNeil, T.A., Rubenstein, K.R., Tonelli, L.A., and Garner, D.D. (1989) Case Examples Using Differential Extraction Procedures. International Symposium on the Forensic Aspects of DNA Analysis, Quantico, VA.

Sheridan, K.T., Cotton, R.W., and Foster, I.M. (1989) Effect of Nonoxynol-9 Recovery of DNA From Sperm. International Symposium on the Forensic Aspects of DNA Analysis, Quantico, VA.

Cotton, R.W., Herrin, G.L., Corey, A.C., Kriss, J., Wadhams, M.J., Garner, D.D. (1990) Match Criteria for Agarose Gel Electrophoresis Systems. 42nd Annual Meeting of the American Academy of Forensic Sciences, Cincinnati, OH.

Forman, L., Kriss, J., Wadhams, M.J., Herrin, G.L., Cotton, R.W., Garner, D.D. (1990) VNTR Survey of Subdivided Populations: I) Amerindians & Finns. 42nd Annual Meeting of the American Academy of Forensic Sciences , Cincinnati, OH.

Herrin, G.L., Cotton, R.W., Forman, L., Corey, A.C., Garner, D.D. (1990) Contaminant Effects on RFLP Patterns. 42nd Annual Meeting of the American Academy of Forensic Sciences, Cincinnati, OH.

Quandt, K.R., Cotton, R.W., Forman, L., Cooper, J.A., Walsh, D.J., Yates, P.J. and Garner, D.D. (1991) The Use of DNA Analysis in Criminal Investigations Involving Missing Person. 8th Int'l. Congress of Human Genet. Washington, D.C.

Forman, L., Wadhams, M., Roby, R.K., Stacy, T.D., Word, C.J., Garner, D.D. and Cotton, R.W. (1991) Comparison of Allele Frequency Distributions in Four Populations Using Probe YNH24. 43rd Annual Meeting of the American Academy of Forensic Sciences, Anaheim, CA.

Kriss, J.E., Forman, L., Word, C.J. Garner, D.D. and Cotton, R.W. (1991) Factors Affecting Migration and Resolution of DNA Fragments. 43rd Annual Meeting of the American Academy of Forensic Sciences, Anaheim, CA.

Cotton, R.W., Kriss, J.E., Forman, L., Word, C.J. (1992) The Effects of Sample Buffer Composition on Migration of DNA Fragments. 44th Annual Meeting of the American Academy of Forensic Sciences, New Orleans, LA.

Wadhams, M.J., Hammond, H., Roby, R.K. and Cotton, R.W. (1992) Use of PCR-Amplified Short Tandem Repeats for Military Identifications. 44th Annual Meeting of the American Academy of Forensic Sciences, New Orleans, LA.

Forman, L., Roby, R.K., Wadhams, M.J., Stacy, T.D., Word, C.J., Garner, D.D. and Cotton, R.W. (1992) Effects on the Calculation of Frequencies from Statistically-Differentiated Databases for Multiple VNTR Loci. 44th Annual Meeting of the American Academy of Forensic Sciences, New Orleans, LA.

Forman, L., Word, C.J., Cotton, R.W., Cooper, J.C., McCoy, M.J., Roby, R.K., Stacy, T.D., Walsh, D.J., Wadhams, M.J., Weber, M.A., Yates, P.J. (1992) Use of Single-locus and Multilocus DNA Probes in Forensic Paternity Cases Involving Incestual Relationships. 44th Annual Meeting of the American Academy of Forensic Sciences, New Orleans, LA.

Cotton, R.W., Forman, L., Word, C.J. and Sozer, A.C. (1993) Minisatellite Variant Repeats and Forensic Analysis. 45th Annual Meeting of the American Academy of Forensic Sciences, Boston, MA.

Weber, M.A., Cotton, R.W., Forman, L., Garner, D.D. and Word, C.J. (1993) RFLP Analysis of Apparent Partially Restricted DNA Samples from Forensic Casework. 45th Annual Meeting of the American Academy of Forensic Sciences, Boston, MA.

Kriss, J., Corey, A.C., Cooper, J.A., Yates, P.J., Weber, M.A., Cotton, R.W., Garner, D.D. and Word, C.J. (1993) Validation Studies Using the HLA DQα Forensic Kit. 45th Annual Meeting of the American Academy of Forensic Sciences, Boston, MA

Cotton, R.W., Kriss, J., Wadhams, M.J. and Word, C.J. (1993) Quantitation of Human DNA. Fourth International Symposium on Human Identification, Scottsdale, AZ.

Stacy, T.D., and Cotton, R.W. (1994) Chemiluminescent Detection in RFLP Analysis of Forensic Casework. Fifth International Symposium on Human Identification, Scottsdale, AZ.

Cotton, R.W., Wadhams, M.J., Kriss, J., Sipes, D., Forman, L. and Word, C.J. (1994) Validation of Three STR Loci in Preparation for Casework Implementation. Fifth International Symposium on Human Identification, Scottsdale, AZ.

Stacy, T.D., Meehan, B.W., Mason, J.M., and Cotton, R.W. (1994) Chemiluminescent Detection of Restriction Fragment Length Polymorphisms. 46th Annual Meeting of the American Academy of Forensic Sciences, San Antonio, TX.

Kriss, J., Forman, L., Cotton, R.W., and Word, C.J. (1995) Validation Studies Using the AmpliType PM PCR Amplification and Typing Kit. 47th, Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Cotton, R.W., Kriss, J., Sipes, D.E., Wadhams, M., Forman, L., and Word, C.J. (1995) Experimental Validation of Three STR Loci for Forensic Casework. 47th Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Cotton, R.W., Chakraborty, R., Crouse, C., Forman, L., Kriss, J., Ranadive, A. A., Sipes, D.E., Weber, M.A., Weir, B., Word, C.J. (1996) Analysis of Casework Samples Using a Combination of the DQα, PM, and 3 STR loci. 48th Annual Meeting of the American Academy of Forensic Sciences, Nashville, TN.

Reynolds, J.E., Weber, M.A., Colombo, K., Swienton, A.R., Word, C.J., Yates, P.J., and Cotton, R.W. DNA Typing of the Transfused Individual. (1997) Am. J. Hum. Genet. 61(4):A1311. The Amer. Soc. of Hum. Genet., 49th Ann. Mtg. Baltimore, MD.

Kriss,J., Ferguson, T., Sipes, D., Maddox, L., Cotton, R.W. (1999) Validation of the AmpFℓSTR Profiler Plus and COfiler Kits Using the ABI PRISM 310 Genetic Analyzer. Tenth International Symposium on Human Identification, Lake Buena Vista, FL.

Word, C.J., Danielsen, L.A., Reynolds, J.E., Maddox, L.O., and Cotton, R.W. (2000) Multiple-laboratory Validation of Fluorescent STRs Using Proficiency Test Results. 11th International Symposium on Human Identification, Biloxi, MS.

Cotton R.W., Word C.J., Danielsen L.A., Reynolds J.E., and Maddox L.O. (2001) Demonstration of General Acceptance of STR Data to the Court. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Cotton R.W., Kriss J.E., Colombo K.A., Word C.J., and Maddox L.O. (2001) Defining Alleles for Four Y Chromosomal Markers Without Benefit of Allelic Ladders as Part of Y

Chromosome Validation Studies. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Maddox L.O., Suit. B., Word C.J., Cotton R.W. (2001) Advantages of Enhanced Sensitivity of Product Gel Staining Using GelStar™ Nucleic Acid Stain. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Word C.J., Reynolds J.E., Cotton R.W., Grossweiler L.L., Maddox L.O. (2001) Solving Old Crimes With New DNA Testing - Contracting "Cold" cases. 53rd Annual Meeting of the American Academy of Forensic Sciences, Seattle, WA.

Cotton, R.W., Reynolds, J.E., Kriss, J.E., Maddox, L.O., Rosier, L.R., Grgicak, C.M., Matibag, B.J., Knickerbocker, C.J. (2002) Variation Observed in Amplification Levels of Mixture Components Using Large STR Multiplex Systems. 54th Annual Meeting of the American Academy of Forensic Sciences, Atlanta, GA

Grgicak, C.M., Reynolds, J.E., Sipes, D.E., Rosier, L.R., Knickerbocker, C.J., Zimmerman, C.E., Shofkom, A.E., Befus, J.K., Cotton, R.W., Word, C.J. (2002) Relative Sensitivity Comparison Between ABI Fluorescent Detection Instruments Using Data From Large Scale No-Suspect Casework. 54th Annual Meeting of the American Academy of Forensic Sciences, Atlanta, GA

Sipes, D.E., M.S., Harris, J.A., M.C.J., Bethune, M.T., M.F.S, Cotton, R.W., Ph.D. (2003) Validation of the AmpFlSTR® Identifiler™ PCR Amplification Kit Using the ABI Prism 310 Genetic Analyzer. 14th International Symposium on Human Identification, Phoenix, AZ.

Cotton, R.W., Bethune, M. (2003) Quantitation and Characterization of Spectral Overlap Observed in Data Obtained From the 310 and 3100 Genetic Analyzers and the Use of These Data in Formulating Interpretation Guidelines. 55th Annual Meeting of the American Academy of Forensic Sciences, Chicago, IL

Grgicak, C., Sipes, D.E., Grossweiler, L.L., Cotton, R.W. (2003) Comparative Analysis of the DNA IQ™ and QIAamp DNA® Extraction Kits for the Processing of Forensic Evidentiary Samples. 55th Annual Meeting of the American Academy of Forensic Sciences, Chicago, IL

Cotton, R.W., Kahn, R., Word, C.J. (2006) Use of PCR Controls in Forensic DNA Laboratories: Standards, Practices and Limitations. 17th International Symposium on Human Identification, Nashville, TN.

Cotton, R.W., (2007) Clearly Unethical. Annual Meeting of the American Society of Crime Laboratory Directors.

Reviews

Cotton, R.W. and Goldman, D. (1988) Review of the Molecular Bbiology of the Human Alcohol Dehydrogenase Genes and Gene Products. Advances in Alcohol and Substance Abuse. Vol. 7 p.171-182.

Cotton, R.W., Anderson, M.B., Herrin, G.L., Jr., Corey, A.C., Sheridan, K.T., Tonelli, L.A., Waskowski, C.A. and Garner, D.D. (1989) Current Case Experience With Single-locus Hypervariable Probes. Banbury Conference on DNA Technology and Forensic Science. DNA Technology and Forensic Sci. Banbury Report 32. 191-206.

Cotton, R.W., Forman, L. and Word, C.J. (1992) MiniSatellite Variant Repeats (MVR's): Another Layer of Polymorphism in Repeated DNA Sequences. Proceeding from the Third International Symposium on Human Identification, Scottsdale, AZ.

Cotton, R.W. (1995) DNA Analysis and Maintaining Focus in an Extraordinary Case. Proceedings from the Sixth International Symposium on Human Identification, Scottsdale, AZ.

Attachment 3

ATTACHMENT 3

Table 1. DQA1 and PM test results.

	PM					HLADQA1
Sample Name	**LDLR**	**GYPA**	**HBGG**	**D7S8**	**GC**	**DQA1**
Possible types	**AB**	**AB**	**ABC**	**AB**	**ABC**	**1.1, 1.3, 2, 3, 4.1, 4.2/4.3**
FI56382 Vaginal slide	AB	AB	AC	A	B	2,4.2/4.3
FI56886/FI56884§ Non-sperm fraction Vaginal	AB	AB	AC	A	B	2, 4.2/4.3
FI56886/FI56884§ Sperm Fraction Vaginal	AB	AB	AC	A(B)	B (AC)	1.1,2, 4.2/4.3*
FI56389 L. Boyd	AB	AB	AC	A	B	2, 4.2/4.3
FB68555 Kenneth Simmons	B	AB	AC	AB	AC	1.1,1.2
Assumption set 1 – Types Included	All	All	AA, AC, CC	All	All	1.1,1.1; 1.1,1.2; 1.1,2; 1.1,4.2; 1.2,1.2; 1.2,2; 2,2; 2,4.2; 4.2,4.2
Assumption set 1 – Types Excluded	None	None	BB, AB, BC	None	None	Any 1.3, 3, 4.1
Assumption set 2 – Types Included as 2nd contributor	All	All	AA, AC, CC	AB, BB	AC	1.1, 1.1; 1.1,1.2; 1.1, 2; 1.1,4.2
Assumption set 2 – Types Excluded	None	None	BB, AB, BC	AA	AA, AB, BB, BC, CC	Anyone without 1.1

* indicates the 1.2 allele may be present (in a mixture)

§ same DQA1 and PM results for FI56884 (non-sperm and sperm)

Note: the alleles 4.2 and 4.3 cannot be distinguished with this assay and therefore the two types are reported together. For simplicity, only the 4.2 result is listed in the bottom part of the chart; wherever 4.2 is seen, it really means 4.2/4.3.

Assumption set 1: Mixture of DNA, no assumptions regarding contributors, no assumptions regarding presence of DNA from L. Boyd.

Assumption set 2: Mixture of DNA, assume only two contributors, and assume L. Boyd is a contributor. Therefore, all results not consistent with L. Boyd must be from the second contributor.

Table 2. Amelogenin and CTT Test Results

		CTT†		
	Amelogenin	CSF1PO	TPOX	TH01
Possible results	XX (female) XY (male)	7, 8, 9, 10, 11, 12, 13, 14, 15	6, 7, 8, 9, 10, 11, 12, 13	5, 6, 7, 8, 9, 10, 11
FI56382 Vaginal slide	ND	ND	ND	ND
FI56884 Non-sperm fraction Vaginal	NR	NR	NR	NR
FI5884 Sperm fraction Vaginal	ND	ND	ND	ND
FI56886 Non-sperm fraction Vaginal	X	10,12	9	8
FI56886 Sperm fraction Vaginal	X	10,12	9	8
FI56389 L. Boyd	ND	10,12	9	8
FB68555 Kenneth Simmons	ND	10,12	10,11	7,8

ND = Test not done

NR = No results

† The possible results listed for the CTT loci indicate the more common alleles that can be readily detected using the allelic ladder as a reference. Other more rare alleles with other designations do exist (see http://www.cstl.nist.gov/div831/strbase/var_tab.htm for a list of observed variant alleles).

Table 3. Frequency Calculations for the Sperm Fraction of the Vaginal Samples.

Kenneth Simmons v. South Carolina

FI56384 and FI56384 sperm fractions

Assumption Set1			
		African American	Caucasian
HBGG	AA	0.257	0.221
	AC	0.301	0.007
	CC	0.088	0.000
		0.646	0.228
DQA1	1.1,1.1	0.014	0.015
	1.1,1.2	0.073	0.043
	1.1,2	0.023	0.029
	1.1,4	0.079	0.080
	1.2,1.2	0.099	0.031
	1.2,2	0.061	0.042
	1.2, 4	0.212	0.115
	2,2	0.009	0.014
	2,4	0.066	0.077
	4,4	0.114	0.108
		0.750	0.554
HBGG x DQA1		0.485	0.126
1 in __ individuals		2	8

Assumption Set 2			
		African American	Caucasian
HBGG	AA	0.257	0.221
	AC	0.301	0.007
	CC	0.088	0.000
		0.646	0.228
D7S8	AB	0.474	0.474
	BB	0.149	0.148
		0.623	0.622
GC	AC	0.039	0.293
DQA1	1.1,1.1	0.014	0.015
	1.1,1.2	0.073	0.043
	1.1,2	0.023	0.029
	1.1,4	0.079	0.080
		0.189	0.167
product of 4 loci		0.00298	0.00692
1 in __ individuals		336	145

Allele Frequencies and Calculations Used for Table 3.

ALLELLE FREQUENCIES

	Locus	Allele	African American	Caucasian	Genotype	African American 2pq	African American p*p	Caucasian 2pq	Caucasian p*p
Table 4	HBGG	A	0.507	0.470	AA		0.257		0.221
		C	0.297	0.007	AC	0.301		0.007	
					CC		0.088		0.000
Table 7	DQA1	1.1	0.117	0.122	1.1,1.1		0.014		0.015
		1.2	0.314	0.176	1.1,1.2	0.073		0.043	
		2	0.097	0.118	1.1,2	0.023		0.029	
		4	0.338	0.328	1.1,4	0.079		0.080	
					1.2,1.2		0.099		0.031
					1.2,2	0.061		0.042	
					1.2, 4	0.212		0.115	
					2,2		0.009		0.014
					2,4	0.066		0.077	
					4,4		0.114		0.108
Table 4	GC	A	0.103	0.257	AC	0.039		0.293	
		C	0.190	0.571					
Table 4	D7S8	A	0.614	0.615	AB	0.474		0.474	
		B	0.386	0.385	BB		0.149		0.148

The genotype frequencies were calculated from the reported allele frequencies in the FBI J. of Forensic Sciences article relied upon by Lifecodes laboratory.

Attachment 4

ATTACHMENT 4.

Lifecodes Results Chart

01

ITEM	LDLR	GYPA	HBGG	D7S8	GC	HLADQA1	CSF1PO	TPOX	THO1
LILLY BELL BOYD BLOOD FI56389	A, B	A, B	A, C	A	B	2, 4.2 / 4.3			
KENNETH SIMMONS BLOOD FB68555-60	B	A, B	A, C	AB	AC	1.1, 1.2	10, 11	10, 11	7, 8
VAGINAL SWAB IN SALINE FROM MUSC - MALE FRACTION FI56384	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2, * 4.2 / 4.3	10, 11	10, 11	7, 8
VAGINAL SWAB IN SALINE FROM MUSC - FEMALE FRACTION FI56384F	A, B	A, B	A, C	A	B	2 4.2 , 4.3			
2 VAGINAL SWABS FROM SLED - MALE FRACTION FI56386	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2, * 4.2 / 4.3	10, 11	10, 11	7, 8
2 VAGINAL SWABS FROM SLED - FEMALE FRACTION FI56386F	A, B	A, B	A, C	A	B	2, 4.2 / 4.3			

* indicates that a 1.2 allele may be present

( ) indicates allele of lesser intensity

Attachment 5

ATTACHMENT 5.

Corrected Lifecodes Results Chart

015

ITEM	LDLR	GYPA	HBGG	D7S8	GC	HLADQA1	CSF1PO	TPOX	THO1
LILLY BELL BOYD BLOOD F156389	A, B	A, B	A, C	A	B	2, 4.2 / 4.3	10,12	9	8
KENNETH SIMMONS BLOOD FB68555-60	B	A, B	A, C	AB	AC	1.1, 1.2	~~10, 11~~ 10,12	10, 11	7, 8
VAGINAL SWAB IN SALINE FROM MUSC - MALE FRACTION F156384	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2, * 4.2 / 4.3	~~10, 11~~ Not done	~~10, 11~~ Not done	~~7, 8~~ Not done
VAGINAL SWAB IN SALINE FROM MUSC - FEMALE FRACTION F156384F	A, B	A, B	A, C	A	B	2 4.2 / 4.3	No results	No results	No results
2 VAGINAL SWABS FROM SLED - MALE FRACTION F156386	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2, * 4.2 / 4.3	~~10, 11~~ 10,12	~~10, 11~~ 9	~~7, 8~~ 8
2 VAGINAL SWABS FROM SLED - FEMALE FRACTION F156386F	A, B	A, B	A, C	A	B	2, 4.2 / 4.3	10.12	9	8

SUPPLEMENTAL AFFIDAVIT OF CHARLOTTE J. WORD, Ph.D.

Charlotte J. Word, being duly sworn according to law, upon her oath deposes and says:

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2012 JUL 11 PM 1:53
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

1. I, Charlotte Word, am a forensic DNA Consultant and a former Laboratory Director at Cellmark Diagnostics (which became Orchid Cellmark) in Germantown, MD. I have been retained by Ms. Emily Paavola as a consultant to review the case file and DNA testing data generated by Lifecodes Corporation of Stamford, CT in the case of *Kenneth Simmons v. State of South Carolina*.
2. This affidavit is a supplemental affidavit to the original affidavit dated March 12, 2011, and signed by Dr. Robin Cotton and me, which was previously provided to the court. Please refer to the prior affidavit for my qualifications as an expert in forensic human DNA identification testing as well as my opinions regarding the testing performed by Lifecodes Corporation and the testimony of the State's witnesses in this case based on my review of the initial documentation provided.
3. On June 7, 2011, I visited the Orchid Cellmark facility in Dallas, TX for the purpose of reviewing the original case file and data produced in the Lifecodes laboratory related to the case of *State of South Carolina v Kenneth Simmons*. During my review I determined that there were a total of 9 Lifecodes case files related to this case. Upon review of these files I found original films documenting the DQA1/PM results in this case. These original films were of superior quality to the data previously provided as photocopies of films in the laboratory notes and were sufficient for review of the DQA1/PM data generated by Lifecodes. In addition, I reviewed the films containing the CTT STR testing results and determined that the scanned copies of the CTT data previously provided are high quality copies and accurately reflect the original data. There were no original photographs of the "sperm pictures" from the case file (Bates page 066). Due to the poor quality of the photocopies of the sperm slide photographs, it was not possible for me to confirm the presence of sperm for any of the samples based on the information available from any of the copies of the photographs.

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4. I compared the data from the original DQA1/PM films and the CTT STR films to the table of results from Lifecodes (provided again in this Affidavit as Attachment 1 and provided in the previous affidavit as Attachment 4). It is my understanding that this table was relied upon and presented to the jury during the testimony of the Lifecodes' witnesses at the original trial.
5. Based on my review of the original film data and according to the general practice and recommendations for the interpretation of dot blot data, it is my opinion that the reported PM data in parentheses for the FI56386 vaginal swabs male (sperm) fraction (i.e., B at the D7S8 locus and AC at the GC locus), should not have been reported or interpreted since the intensity of the dots is below the level of the "S" dot on the PM test strip. In addition, the 1.1 DQA1 result for the FI56386 male fraction should have been reported in parentheses since the intensity of the 1 and 1.1 dots is below that of the other dots. I agree with the reported DQA1 and PM results for the remaining samples tested and reported in the table in Attachment 1. The correct presentation of the data based on my review of the original films is presented here as Attachment 2. Attachment 2 is an update of the table previously provided as Attachment 5 to reflect the additional changes for the DQA1/PM data. A scanned copy of the PM data test strip and the DQA1 data test strip is provided in Attachment 3.
6. The conclusions and the corrections to the Lifecodes table of results previously set forth in the Affidavit dated March 12, 2011, for the CTT STR data remain the same after my review of the original CTT STR film data.
7. My conclusions based on my review of the original case files are:
   a. I was unable to confirm the presence of sperm in any of the samples.
   b. The corrected results presented in red type in Attachment 2 are the results that should have been reported in a final report from Lifecodes prior to testimony and presented to the jury at the trial.
   c. There are no CTT STR data in the case file to support the results for the sperm fractions of the two vaginal swab samples (FI56384 and FI56386) that were presented in the table. The CTT results from both the sperm fraction and the female fraction of the vaginal swabs are all consistent with the results from Lilly Bell Boyd. There is no indication of DNA from a second individual in any of the samples tested with the CTT test system.

d. The only DNA testing results obtained by Lifecodes that were foreign to Lilly Bell Boyd are the fainter B result at the D7S8 locus, the fainter AC result at the GC locus and the 1.1 result for the sperm fraction of the vaginal swabs in sample FI56384, and the 1.1 result only for the sperm fraction of the vaginal swabs in sample FI56386. The frequency in the population of the results from a contributor(s) other than Lilly Bell Boyd range from 1 in 2 individuals to 1 in 336 individuals as reported in the previous Affidavit.
e. The inconsistency between the DQA1/PM and CTT results remains unresolved.

I affirm, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Dated: September 27, 2011

Charlotte J. Word, Ph.D.

SUBSCRIBED AND SWORN to before me this 27th day of September 2011.

Leontine Cunningham
State of Maryland, County of Montgomery
My commission expires 12/13/2014

ATTACHMENT 1.

Lifecodes Results Chart

.. 015

ITEM	LDLR	GYPA	HBGG	D7S8	GC	HLADQA1	CSF1PO	TPOX	THO1
LILLY BELL BOYD BLOOD FI56389	A, B	A, B	A, C	A	B	2, 4.2 / 4.3			
KENNETH SIMMONS BLOOD FB68555-60	B	A, B	A, C	AB	AC	1.1, 1.2	10, 11	10, 11	7, 8
VAGINAL SWAB IN SALINE FROM MUSC - MALE FRACTION FI56384	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2, * 4.2 / 4.3	10, 11	10, 11	7, 8
VAGINAL SWAB IN SALINE FROM MUSC - FEMALE FRACTION FI56384F	A, B	A, B	A, C	A	B	2 4.2 , 4.3			
2 VAGINAL SWABS FROM SLED - MALE FRACTION FI56386	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2,* 4.2 / 4.3	10, 11	10, 11	7, 8
2 VAGINAL SWABS FROM SLED - FEMALE FRACTION FI56386F	A, B	A, B	A, C	A	B	2, 4.2 / 4.3			

* indicates that a 1.2 allele may be present

( ) indicates allele of lesser intensity

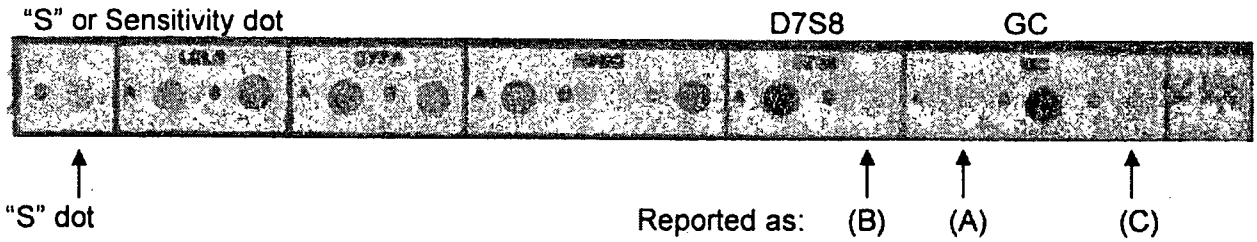
ATTACHMENT 2.

Updated and Corrected Lifecodes Results Chart – modified September 2011 from original Attachment

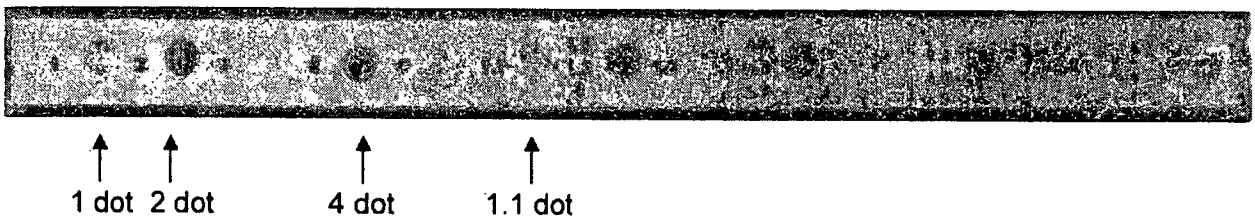
ITEM	LDLR	GYPA	HBGG	D7S8	GC	HLADQA1	CSF1PO	TPOX	THO1
LILLY BELL BOYD BLOOD FI56389	A, B	A, B	A, C	A	B	2, 4.2 / 4.3	10,12	9	8
KENNETH SIMMONS BLOOD FB68555-60	B	A, B	A, C	AB	AC	1.1, 1.2	~~10, 11~~ 10,12	10, 11	7, 8
VAGINAL SWAB IN SALINE FROM MUSC - MALE FRACTION FI56384	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2, * 4.2 / 4.3	~~10, 11~~ Not done	~~10, 11~~ Not done	~~7, 8~~ Not done
VAGINAL SWAB IN SALINE FROM MUSC - FEMALE FRACTION FI56384F	A, B	A, B	A, C	A	B	2 4.2 / 4.3	No results	No results	No results
2 VAGINAL SWABS FROM SLED - MALE FRACTION FI56386	A, B	A, B	A, C	A, ~~(B)~~	B, ~~(AC)~~	(1.1) 2, * 4.2 / 4.3	~~10, 11~~ 10,12	~~10, 11~~ 9	~~7, 8~~ 8
2 VAGINAL SWABS FROM SLED - FEMALE FRACTION FI56386F	A, B	A, B	A, C	A	B	2, 4.2 / 4.3	10,12	9	8

Attachment 3.

PM data test strip for 56386 (male/sperm fraction of vaginal swab)



DQA1 data test strip for 56386 (male/sperm fraction of vaginal swab)



ATTACHMENT 2.

Updated and Corrected Lifecodes Results Chart – modified September 2011 from original Attachment

.. 015

ITEM	LDLR	GYPA	HBGG	D7S8	GC	HLADQA1	CSF1PO	TPOX	THO1
LILLY BELL BOYD BLOOD FI56389	A, B	A, B	A, C	A	B	2, 4.2 / 4.3	10,12	9	8
KENNETH SIMMONS BLOOD FB68555-60	B	A, B	A, C	AB	AC	1.1, 1.2	~~10, 11~~ 10,12	~~10, 11~~ 9	~~7, 8~~ 8
VAGINAL SWAB IN SALINE FROM MUSC - MALE FRACTION FI56384	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2, * 4.2 / 4.3	~~10, 11~~ Not done	~~10, 11~~ Not done	~~7, 8~~ Not done
VAGINAL SWAB IN SALINE FROM MUSC - FEMALE FRACTION FI56384F	A, B	A, B	A, C	A	B	2 4.2 / 4.3	No results	No results	No results
2 VAGINAL SWABS FROM SLED - MALE FRACTION FI56386	A, B	A, B	A, C	A, ~~(B)~~	B, ~~(AC)~~	(1.1,)2, * 4.2 / 4.3	~~10, 11~~ 10,12	~~10, 11~~ 9	~~7, 8~~ 8
2 VAGINAL SWABS FROM SLED - FEMALE FRACTION FI56386F	A, B	A, B	A, C	A	B	2, 4.2 / 4.3	10,12	9	8

X

X

X

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CHERYL WATSON
CLERK OF COURT
DORCHESTER CO., SC

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PM TYPES

LDLR	A	B	
GYPA	A	B	
HBGG	A	B	C
D7S8	A	B	
GC	A	B	C

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2012 JUL 11 PM 1:41
CHERYL CRAWFORD
CLERK OF COURT
DORCHESTER COUNTY, S.C.

PLAINTIFF'S EXHIBIT
11-212-E

5107

PM GENOTYPES

LDLR	AA	AB	BB			
GYPA	AA	AB	BB			
HBGG	AA	AB	BB	AC	BC	CC
D7S8	AA	AB	BB			
GC	AA	AB	BB	AC	BC	CC

5108

DQα ALLELES

1.1
1.2
1.3
2
3
4.1
4.2/3

5109

DQα GENOTYPES

1.1,1.1
1.1,1.2
1.1,1.3
1.1,2
1.1,3
1.1,4.1
1.1,4.2/3
1.2,1.2
1.2,1.3
1.2,2
1.2,3
1.2,4.1
1.2,4.2/3
1.3,1.3
1.3,2
1.3,3
1.3,4.1
1.3,4.2/3
2,2
2,3
2,4.1
2,4.2/3
3,3
3,4.1
3,4.2/3
4.1,4.1
4.1,4.2/3
4.2/3,4.2/3

Curriculum Vitae

Robin W. Cotton, Ph.D.

Education

Ph.D. Molecular Biology and Biochemistry, University of California at Irvine, Irvine, California, 1980, Dissertation Title: Studies in Chromatin Structure

M.S. Biology, Southern Methodist University, Dallas, Texas, 1974

B.S. Biology, Southern Methodist University, Dallas, Texas, 1971

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2012 JUL 11 PM 1: 53
CHERYL [illegible]
CLERK OF COURT
DORCHESTER COUNTY

Professional Experience

Program Director: Biomedical Forensic Sciences and Associate Professor, Department of Anatomy and Neurobiology, Boston University School of Medicine, October 2006 to Present

Senior Director, Technical Forensic Science, Orchid Cellmark - November 2005 to August 2006

Laboratory Director and Technical Leader, Orchid Cellmark, Germantown, Maryland, 2001 – October 2005

Laboratory Director and Technical Leader, Forensic Laboratory, Cellmark Diagnostics, Germantown, Maryland, 1992 - 2001

Deputy Director, Cellmark Diagnostics, Germantown, Maryland, 1990 – 1992

Manager, Research and Development, Cellmark Diagnostics, Germantown, Maryland, 1988 - 1990

Guest Researcher, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, Bethesda, Maryland, 1988 - 1990

Senior Staff Fellow, Section of Genetic Studies, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, Bethesda, Maryland, 1983 - 1987

Postdoctoral Fellow, Laboratory of Dr. Roger Chalkley, Department of Biochemistry, College of Medicine, University of Iowa, Iowa City, Iowa, 1980 - 1983

PLAINTIFF'S EXHIBIT
F 7-2-12 LO

Professional Associations and Committees

American Society of Human Genetics

American Academy of Forensic Sciences – Fellow

International Society for Forensics Genetics

ASCLD/LAB Board of Directors, Elected Position – November 2002- November 2006

ASCLD/LAB Volunteer Inspector, Legacy Program, 1995 –Present

ASCLD/LAB Board of Directors, Public member – October 2010 to present

Editorial Board, Journal of Forensic Sciences – May 2002-Present

Testimony Experience

Testimony provided in approximately 250 cases in approximately 35 States

Publications

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Sheridan, K.T., Cotton, R.W., and Foster, I.M. (1989) Effect of Nonoxynol-9 Recovery of DNA From Sperm. International Symposium on the Forensic Aspects of DNA Analysis, Quantico, VA.

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STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER KENNETH SIMMONS *Applicant,* v. STATE OF SOUTH CAROLINA *Respondent.*	IN THE COURT OF COMMON PLEAS Case No.: 05-CP-18-1368 **APPLICANT'S POST-HEARING BRIEF**

INTRODUCTION

Applicant, Kenneth Simmons, by and through undersigned counsel, files this Post-Hearing Brief in support of his Application for Post-Conviction Relief. Mr. Simmons filed his original PCR application on September 2, 2005, and amended it on December 21, 2009, and December 15, 2011.[1] 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 and exhibits and the depositions of Dr. Richard Leo, Dr. Michael Baird, and Ms. Lauren Crane. Although Mr. Simmons raises a variety of claims for post-conviction relief, this brief focuses on two primary issues: (1) the Mental Retardation Claim; and, (2) the DNA claim.[2]

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[1] The Court granted post-conviction counsel's oral motion to make this second amendment to include a claim that "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(a)(4).

[2] To be clear, Mr. Simmons does not waive any of the claims raised in the PCR Application. Undersigned counsel will be happy to provide additional briefing if the Court determines it necessary for any other claims.

MENTAL RETARDATION CLAIM

Mr. Simmons was found guilty of murder and sentenced to death by a Dorchester County jury on March 2, 1999. Two years later, the United States Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the execution of persons with mental retardation. *Atkins v. Virginia*, 536 U.S. 304 (2002). In so holding, the Supreme Court recognized 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. In light of this diminished capacity, the justifications for the death penalty are not satisfied. *Id.* at 319-20. Furthermore, the death penalty is inappropriate for persons with mental retardation because their reduced capacity enhances the possibility that a death sentence will be imposed despite factors that would normally result in a lesser penalty. *Id.* at 320. For example, people with mental retardation are more likely to give false confessions, less able to make a persuasive showing of mitigation, less able to give meaningful assistance to counsel, and are poor witnesses in their defense. *Id.* at 320-321.

I. THE DEFINITION OF MENTAL RETARDATION CONSISTS OF THREE PRONGS.

In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), 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)).[3] Thus, the definition of mental retardation consists of three prongs: (1) sub-average intellectual functioning; (2) deficits in adaptive behavior; and, (3) a manifestation of these attributes before age eighteen.

II. PRONG ONE: SUB-AVERAGE INTELLECTUAL FUNCTIONING.

A. SUB-AVERAGE INTELLECTUAL FUNCTIONING MEANS AN IQ OF 75 OR LESS.

The first prong of a mental retardation diagnosis requires an individual to display sub-average intellectual functioning. A person's intellectual functioning is measured primarily with intelligence quotient ("IQ") tests. IQ tests measure intelligence, which is defined as "a general

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[3] 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 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. Since *Atkins*, other courts throughout the country, including courts in South Carolina, have routinely applied these same definitions, noting that they are essentially identical. *See, e.g., Order Finding Defendant Mentally Retarded in South Carolina v. Pearson, [hereafter, "Pearson Order"], attached as Exhibit A, at pp.11-12; Order Granting Post-Conviction Relief in Elmore v. South Carolina, [hereafter "Elmore Order"], attached as Exhibit B, at pp.12-13; Order Granting Post-Conviction Relief in Mercer v. South Carolina, [hereafter, "Mercer Order"], attached as Exhibit C, at pp.31-43.* Moreover, at the PCR hearing, Dr. Marc Tassé testified that the AAMR and DSM-IV-TR definitions are essentially the same as South Carolina's statutory definition. *2010 PCR Tr. pp.110-113 and 199-200.*

mental ability. It includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience." INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 31 (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010) [hereafter AAMR MANUAL].[4]

A person with mental retardation has an IQ score that is "approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations." *Id.* at 31. Most standardized IQ tests are normalized so that the average score is 100 with a standard deviation of 15. *2010 PCR Tr. pp.113-114.* Therefore, an IQ score two standard deviations below the mean is approximately 70. *Id.* However, the standard error of measurement (SEM) in IQ assessments is approximately 5 points, therefore raising the operational definition of mental retardation to 75. *Id.* at pp.114-115; *see also*, AAMR MANUAL at p.36; DSM-IV-TR at pp.41-42 ("it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior"). Thus, a person meets the sub-average intellectual functioning component if his or her full-scale IQ score is "between 70 and 75 or lower." *Atkins*, 536 U.S. at 309 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition.").

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[4] As explained above, the AAMR is now known as the AAIDD. *2010 PCR Tr. p.103.* The association no longer uses the term "mental retardation." Instead, AAIDD uses the term "Intellectual Disability." Because the term "mental retardation" continues to be used consistently in the legal context, Mr. Simmons' brief will use the older term. Moreover, this brief cites several legal opinions that refer to the AAMR. Therefore, to avoid confusion, Mr. Simmons continues to use the term "AAMR" as well.

i. THE STANDARD ERROR OF MEASUREMENT MUST BE CONSIDERED.

Consideration of the SEM is not a matter on which reasonable, qualified experts in the field of mental retardation could differ. Rather, consideration of the SEM is *required*, by definition, by both the AAMR and the DSM-IV-TR, as an essential component of conducting an accurate IQ assessment. *2010 PCR Tr. p.115* ("Both systems are consistent in saying in the definition, in the text, that someone can have a score up to 75 and still be considered to meet prong one because again, these tests are not perfect and we know what the error is approximately and it . . . should be no more than five points or approximately 70 to 75 or lower."); *see also*, AAMR Manual at 36 ("Understanding and addressing the test's SEM is a critical consideration that must be part of any decision concerning a diagnosis of [MR]"); DSM-IV-TR at pp.41-42 ("It should be noted that there is a measurement of error of approximately 5 points in assessing IQ.").

Not only is it apparent from the literature that consideration of SEM is necessary for diagnosing mental retardation, but courts across the country – including those in South Carolina – have made clear that SEM is an important consideration when deciding whether a person is mentally retarded. In his pre-trial order finding that Johnny Ringo Pearson is a person with mental retardation, Judge John M. Milling stated "[b]ased upon the expert testimony and persuasive case law, this Court concluded that the standard error of measurement ("SEM") [is] helpful in accurately assessing Mr. Pearson's intellectual functioning." *Pearson Order at p.4.* Likewise, in his order granting post-conviction relief on an *Atkins* claim, Judge J. Mark Hayes, II, also wrote "consideration of SEM, which is an 'estimate of the amount of error usually attached to an examinee's obtained score,' is critical and 'must be part of any decision concerning a diagnosis of mental retardation'." *Elmore Order at p.8 n.5 (internal citations*

omitted). These findings are consistent with opinions from other courts across the country.[5] Clearly, IQ testing and scores must be analyzed in conjunction with the SEM to reflect an accurate measure of intellectual functioning.

ii. PRACTICE EFFECT

"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. *2010 PCR Tr. p.118*. "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." AAMR Manual at 38. The average artificial increase on a full-scale IQ score due to practice effect is 5 points, although it can be as high as 15 points. *See* Kaufman, A.S., *Practice Effects*, 2 Encyclopedia of Human Intelligence, 828-833 (1994). The impact of practice effect has also been recognized in numerous courts.[6]

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[5] *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").

[6] *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 477 (stating that the AAMR Manual instructs clinicians to recognize the impact of practice effect).

B. KENNETH SIMMONS' IQ SCORES DEMONSTRATE SUB-AVERAGE INTELLECTUAL FUNCTIONING.

Mr. Simmons 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. *See Affidavit of Linda Shwec, attached as Exhibit D, at ¶¶ 3-8.* He was 17 years old. *See School Records attached to Shwec Affidavit.* Resource was a special education program. *Shwec Affidavit at ¶ 3; Affidavit of Robert Polk, attached as Exhibit E, at ¶ 6.* 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." *Affidavit of Floy Hart Shuler attached as Exhibit F, at ¶ 3 and attached Red Book pages at pp. 8 and 9-20.* The actual testing records from Mr. Simmons' placement in the Resource program have been destroyed. *Shwec Affidavit at ¶ 9; Polk Affidavit at ¶ 5.* However, we do know that an individually administered IQ score of 50-70 is the only way Mr. Simmons could have been placed into the Resource Program. *Polk Affidavit at ¶ 3; Shuler Affidavit at ¶ 3.*

After the 1978 testing, Mr. Simmons' IQ was not tested again until 1998. The following chart reflects all of Mr. Simmons' 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 Mr. Simmons functions in the mentally retarded range. *2010 PCR Tr. p.138* ("All of these results meet the cut-off according to DSM and AAMR of approximately two standard deviations below the mean or 70 and 75 and below."). His highest IQ score is 75, which is within the range of acceptable IQ scores for a diagnosis of mental retardation. *See* AAMR Manual at 36; DSM-IV-TR at pp.41-42. 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 most likely artificially inflated due to practice effect because it was administered only one month after a previous WAIS. *ROA p.2614.*[7] Mr. Simmons had also taken this exact test, a WAIS-R, only 9 months before. Thus, Mr. Simmons 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. And, even with two recent opportunities to "practice," Mr. Simmons still scored within the MR range.

Mr. Simmons' IQ scores are remarkably consistent over time. *2010 PCR Tr. p.143.* Considering the five IQ scores from 1998 to 2008, the scores vary by only 9 points over a period of 10 years.[8] The average of these five scores is 69. Dr. 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

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[7] Dr. Sandler testified at trial: "I should indicate, your honor, that this test was said to have been administered by a psychologist working for the defense and was at a subsequent version of it, your honor, the WAIS-III, the version of it after the WAIS-R was administered by an intern and Dr. Vidic, my esteemed colleague from the Department of Mental Health, I believe it was December. So there would be the possibility of some practice effect in that there are some similar items in it." *ROA p.2614.*

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

administrations.[9] *Id. at pp.143-44.* Specifically, Dr. Tassé explained that Mr. Simmons' IQ testing history indicates "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." *Id.* at p.144; *see also, Allen v. Wilson*, 2012 WL 2577492, *7 (S.D. Ind. 2012) (finding that the best method for assessing the possibility of malingering in the context of mental retardation is to "look[] for consistency in testing over a long period of time.").[10]

In *Elmore v. South Carolina, supra*, Mr. Elmore had six full-scale IQ scores. Those scores were 72, 58, 71, 75, 72 and 65. The average of these scores is 69. The PCR court concluded that Mr. Elmore's scores "place him within the mental retardation range of significantly subaverage intellectual functioning. Even those scores that fall within the SEM area are consistent with mild mental retardation, and [Elmore] has no IQ scores that exceed the SEM." *Elmore Order at p.10.* The State did not appeal this order. In *State v. Pearson, supra*, Mr. Pearson had nine historical IQ scores ranging from 62 to 72. In that case, the PCR court found that "[b]ecause Mr. Pearson's . . . test scores are within the mildly mentally retarded range when the SEM is considered, this Court finds that he does meet the subaverage intellectual functioning prong." *Pearson Order at p.5-6.*

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[9] Moreover, Mr. Simmons 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.

[10] Dr. Tassé also testified that even the sub-components of Mr. Simmons' full-scale IQ scores have been consistent over time. *2010 PCR Tr. pp.144-145* ("There is a full-scale IQ . . . and then there is a verbal IQ, which is the verbal component, if you will, and there is non-verbal, which is called performance IQ. . . . Mr. Simmons seems to consistently have scored slightly higher on the non-verbal tasks of intelligence, on the PIQ, and seems to have consistently had a pattern of scoring lower on the VIQ.").

In the Pearson case, the PCR court also found that Mr. Pearson's IQ scores should be adjusted downward to account for the Flynn Effect. *Id.* In this case, Dr. Tassé testified that the Flynn Effect is a scientifically recognized fact, *2010 PCR Tr. p.117*, but he did not make any Flynn adjustments to Mr. Simmons' IQ scores. *Id. at p.145.* If Flynn adjustments had been made, Mr. Simmons' IQ scores would be even lower than listed above. Dr. Tassé testified that he ***did not need to consider any adjustments*** to Mr. Simmons' IQ scores ***because all of the scores (without any consideration of the Flynn effect or other adjusgments) already place him within the range of mental retardation***. *Id. at pp.198-199.* Clearly, Mr. Simmons' IQ scores demonstrate his intellectual functioning is sub-average.

In addition to IQ scores, Mr. Simmons' school records and academic testing indicate that his intellectual functioning is very low. Mr. Simmons began the first grade at Alston Elementary School in 1968. *See School Records attached to Shwec Affidavit.* Throughout his elementary school years, Mr. Simmons' academic achievement levels remained consistently below grade level. *Id.* For example, in the third grade, Mr. Simmons' 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, Mr. Simmons' academic achievement still remained at fourth grade levels. *Id.*

Once he reached middle school, Mr. Simmons' academic achievement declined even further. He did not pass a single grade in middle school. Instead, he was "placed" forward in each grade level, which was a form of social promotion. *Affidavit of Betty Profit, attached as Exhibit G.* Mr. Simmons' special education teacher, Linda Shwec, explained that "[s]tarting in the seventh grade when different levels of classes were available, Kenneth was in the lowest

level available in every class he had." *Shwec Affidavit at ¶ 21.* In high school, Mr. Simmons' teachers may have passed him along because he was "sweet and did not have any behavioral problems." *Id. at ¶ 8; see also, id. at ¶ 16* ("I think he was not identified [for special education] earlier because, as I have described above, he was easy to get along with, and he did try in school. I think a lot of teachers would have wanted to help him by passing him."). Mr. Simmons' played on the Summerville High School football team. His football coach described him as "extremely slow. He was an average football player. He played a defensive position that did not require significant intellectual abilities. It was more repetition than anything else." *Affidavit of William Long, attached as Exhibit H.* Because of his position of the football team, there would have been additional incentive for Mr. Simmons' teachers to help him along.[11]

And yet, despite any aid he may have received, Mr. Simmons continued to struggle academically. *Polk Affidavit at ¶ 6* ("Kenneth's records indicate that he was clearly impaired because he was failing some of his remedial courses even with Resource Program help."). He failed the eleventh grade and was finally tested and placed into the special education program. *Shwec Affidavit at ¶¶ 6-8.* School records show that he was testing at a fifth grade reading level and at the fourth grade level in math. *Id. at ¶ 23.* Mr. Simmons failed Driver's Education, Consumer Education and Personal Health. *Id.* Ms. Shwec explained:

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[11] *See Shwec Affidavit at ¶ 7* (stating sometimes an athletic coach would request that teachers allow students to "take a test over or do extra work to meet minimum requirements."); *Polk Affidavit at ¶ 7* ("Most teachers at Summerville High School at that time were willing to pass students, especially athletes, as long as they were quiet and cooperative and putting forth their best efforts. Although it was not an official policy in those days, it was common practice to give athletes with special needs some priority in terms of helping them get through school."); *Affidavit of Doris Russell, attached as Exhibit I, at ¶ 6* ("Kenneth was passed along in school because he was a football player."); *2010 PCR Tr. at p.49-51* (testimony of Marjorie Hammock stating that "football players often got some preference in terms of grades" and that she was "given information from more than one source" on that issue).

> [t]hese were very easy courses for most students. Consumer Education was basically about how to function in the world – how to make change, shop for groceries, and be a good consumer. Personal Health covered basic health, safety, and nutrition. The topics were pretty much just common sense kinds of things.

Id. At graduation, Mr. Simmons' grade point average was 0.8222. *See School Records attached to Shwec Affidavit.* He ultimately earned his diploma, but at that time, anyone could get a diploma as long as they came to school and attended the required number of classes. *Shwec Affidavit at ¶ 24.* Ms. Shwec stated that "[t]here is no doubt in my mind that Kenneth would be unable to earn his high school diploma by today's standards." *Id.*

Standardized academic achievement testing of Mr. Simmons in his adult years closely corresponds with his school history. Pre-trial testing in 1998 and 1999, and additional testing ten years later, all indicated that Mr. Simmons 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

Mr. Simmons' academic performance history is 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." *Id. at p.135.* Ms. Shwec likewise concluded that "Kenneth Simmons' performance in school is

consistent with the abilities of a person with mental retardation." *Shwec Affidavt at ¶ 23.* Thus, in addition to his IQ scores, Mr. Simmons' 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.

III. PRONG TWO: 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. "Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." AAMR Manual at 43.

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 in South Carolina. *See, e.g., Elmore Order at p.13; Pearson Order at p.12; Mercer Order at p.36.*

A. ADAPTIVE BEHAVIOR IS MEASURED BY STANDARDIZED TESTING, SUPPLEMENTED WITH MULTIPLE COLLATERAL SOURCES OF INFORMATION.

The measurement of limitations in adaptive behavior "should be established through the use of standardized measures." AAMR MANUAL at 43. "[L]ike intellectual functioning, significant limitations in adaptive behavior are operationally defined as performance that is approximately two standard deviations below the population average." *Id.* at 47. Dr. Tassé testified that there are several good standardized measures of adaptive behavior, including the Vineland Adaptive Behavior Scales, which is the measurement that was used in Mr. Simmons' case. *2010 PCR Tr. p.145* ("The Vineland Adaptive Behavior Scale is a very good standardized, individually listed measure of adaptive behavior."); *id.* at p.182 (the Vineland "is very well standardized and one of the gold standards in our field to measure adaptive behavior. That's what we rely upon every day."); *see also, Allen*, 2012 WL 2577492 at *7 (stating that the Vineland is one of "the gold standards as far as how to administer the scale for deficits in adaptive behavior.").

Standardized measures should be augmented by observations, interviews and other methods of assessment. *2010 PCR Tr. p.119.* Dr. Tassé explained that the following principles must govern a proper adaptive behavior assessment:

- Use multiple and knowledgeable informants who knew the individual in different contexts. *Id.*
- Make the assessment in an environment typical of the individual's age and culture. *Id. at 112.*
- Assess typical and actual functioning, not capacity or maximum ability. *Id. at 121.*
- Recognize that within each individual, limitations will coexist with strengths. There are no exclusionary criteria (i.e., the fact that a person is able to perform a large number of routine activities does not mean that he is not mentally retarded. A person with mild mental retardation may be able to master reading, writing or math up to a sixth grade

level, have a high degree of independence or even be totally self-supporting).[12] *Id. at 112.*

- Do not rely on criminal behavior or verbal behavior to infer a level of adaptive behavior or diagnosis of mental retardation.[13] *Id. at p.129.*

Finally, Dr. Tassé testified in detail about the numerous 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.* For example, Dr. Tassé explained that whether a person has mental retardation is not apparent from their looks or demeanor: "the vast majority of people with mental retardation have what we call mild mental retardation . . . and for the most part people with mild retardation look and walk and talk like anybody." *2010 PCR Tr. p.124; see also, id. at p.129* ("Somebody with mild mental retardation, you can't see that. They don't look retarded."). People with mild mental retardation can read a newspaper, drive a car, be successfully employed, play sports, get married, have children and even live independently. *Id. at p.126 and pp.130-136.* They know right from wrong and can tell a lie or make up a story in hopes of getting out of trouble. *Id. at p.135.* Moreover, "[p]eople with mild mental retardation

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[12] *See also, Davis*, 611 F.Supp.2d at 476 ("'Within an individual, limitations often coexist with strengths.' This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.") (quoting AAMR Manual at p.8).

[13] Self-reported information from people with mild mental retardation can be particularly unreliable, if not corroborated by other sources, because "for the most part people with mild mental retardation do everything not to act retarded. They try to fake that they know things and, you know, mask their disability because . . . it's a very pejorative label to have and nobody likes to be stupid. And so, when they can, they try and fake knowing things." *2010 PCR Tr. p.129-130.*

don't have bathing problems much beyond the young, three, four, five-year-old range. Generally, people with mild retardation are indistinguishable in terms of personal hygiene, toileting; they go to the bathroom on their own and so forth." *2010 PCR Tr. pp.128-129.* Reliance on stereotype is not a proper method of making an accurate and reliable diagnosis of mental retardation. The only way to determine if a person has mental retardation is to conduct a rigorous evaluation of his or her intellectual and adaptive functioning.

B. KENNETH SIMMONS SUFFERS FROM DEFICITS IN ADAPTIVE BEHAVIOR

The expert testimony of Dr. Marc Tassé and Ms. Marjorie Hammock, along with the affidavits and other documentary evidence introduced on Mr. Simmons' behalf, established that Mr. Simmons' suffers from deficits in adaptive behavior.

First, with regard to standardized measurement, Dr. Dennis Keyes completed the Vineland Adaptive Behavior Scales (VABS) in 1999 using two informants: (1) Ms. Eartha Smooth, who is Mr. Simmons' oldest sister; and, (2) Ms. Valerie Simmons, who is Mr. Simmons' ex-wife. *2010 PCR Tr. p.145.* Ms. Smooth was the eldest sister living in the home throughout Mr. Simmons' childhood. Because the Simmons family had so many children (Mr. Simmons has 18 siblings in total), the older children were expected to help care for the younger siblings. *Id. at p.15.* Thus, Ms. Smooth was in many respects like a mother to Mr. Simmons. Valerie Simmons met Mr. Simmons when they were both in high school. *Id. at p.57.* They married in 1981 and lived together for several years before they separated. *Id. at p.64.* As a result of the information collected from these two informants, Dr. Keyes obtained a composite score of 43 on the VABS. *Id. at p.145.* Dr. Tassé explained that the VABS has a population average of 100 and a standard deviation of 15. *Id. at p.146.* Thus, Mr. Simmons' score of 43 is

significantly below average. *Id.* The following chart reflects the results of all standardized measurements completed or attempted to measure Mr. Simmons' adaptive behavior.

Psychologist(s)	Test Date	Test Name	Composite Score
Drs. Sandler & McAbee	2/9/1999	Vineland Adaptive Behavior Scales	NO RESULTS – failed to recruit an appropriate informant
Dr. Keyes	2/5/1999	Vineland Adaptive Behavior Scales	43

Second, the standardized score for Mr. Simmons' adaptive behavior is corroborated by an extensive social history investigation. Ms. Hammock testified that she reviewed the school records of Mr. Simmons and his family members, read reports of teachers and doctors who had worked with or examined Mr. Simmons, developed a genogram of Mr. Simmons' family history, reviewed Mr. Simmons' work history and social security earnings reports, and conducted interviews with approximately twelve (12) people. *2010 PCR Tr. p.12-13.* Ms. Hammock also reviewed the sixteen (16) affidavits and other supporting documents that were introduced at the PCR hearing. *Id. at p.13.* From these reports, documents, affidavits and interviews, Ms. Hammock conducted a social history assessment that included information over the course of Mr. Simmons' entire life from his family, friends, teachers, employers, classmates, football coaches, fellow football players, and school administrators.

Ms. Hammock found that Mr. Simmons 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. *Id. at p.27.* The following chart summarizes the relevant information supporting Mr. Simmons' significant deficits in each of these areas.

Skill Area	Summary of Deficit
Functional Academics	• Mr. Simmons school history indicates "some very serious limitations from first grade on." *2010 PCR Tr. p.18.* His academic achievement levels were consistently low throughout his academic career. *See School Records Attached to Shwec Affidavit.* • Mr. Simmons did not pass a single grade in middle school. Instead, he was socially promoted. *Profit Affidavit at ¶¶ 4-5.* • Beginning in middle school, when different levels of courses became available, Mr. Simmons was in the lowest level available in every class he had. *Shwec Affidavit at ¶¶ 18-21.* • Mr. Simmons repeated the 11th grade. During his second attempt at the 11th grade, he was placed in the special education program at Summerville High School after individual testing by a school psychologist. *Id. at ¶¶ 4-5 and 8; Polk Affidavit at ¶ 6.* • Mr. Simmons consistently performed below grade level in all academic areas. *School Records attached to Shwec Affidavit.* For example, "Kenneth tested at a fourth grade level when he was in the sixth grade." *Profit Affidavit at ¶ 3.* • Mr. Simmons' special education teacher stated that his "performance in school is consistent with the abilities of a person with mental retardation." *Shwec Affidavit at ¶ 23.* He failed Driver's Education, Consumer Education, and Personal Health, which were very easy courses for most students. The topics were pretty much just common sense kinds of things. *Id.* • Mr. Simmons' high school teachers used reading materials for him that were written at a 4th grade reading level. *Shwec Affidavit at ¶ 15.* These materials "contained short paragraphs and sentences composed of simple words. There was a lot of repetition." *Id.* Ms. Shwec "had to go over and over the material in these books with Kenneth." *Id.* • Ms. Shwec helped Mr. Simmons with all of his subjects. "[H]is greatest weaknesses were with reading and reading comprehension." *Id. at ¶ 14.* Ms. Shwec read Mr. Simmons' assignments to him, gave him extra time on tests, and re-worded questions for him in simple terms so that he could comprehend. *Id.* • Mr. Simmons received a high school diploma because he came to school and attended the required number of classes. *Id. at ¶ 24.* His teachers passed him along because he was sweet and did not have any behavioral problems, and because he played on the football team. *Id. at ¶¶ 7-8 and 16; Polk Affidavit at ¶ 7; Russell Affidavit at ¶ 6; 2010 PCR Tr. at p.49-51.* • It would be impossible for Mr. Simmons to earn a high school diploma by today's standards. *Shwec Affidavit at ¶ 24.* • Academic achievement testing in 1998, 1999 and 2009 consistently showed that Mr. Simmons functions at the 2nd grade level in

	Reading, the 1st grade level in spelling, and the 3rd grade level in arithmetic.
Home Living	• Mr. Simmons was never able to live independently for any significant period of time. *2010 PCR Tr. pp.18-19.* • Mr. Simmons did not regularly cook, clean, buy groceries or pay bills. *Affidavit of Jack Simmons, attached as Exhibit J, at ¶ 5; Affidavit of Legare Simmons, attached as Exhibit K, at ¶ 5.* • After he married, Mr. Simmons was taken care of by his wife, Valerie Simmons. *2010 PCR Tr. p.19.* They lived in Mr. Simmons' father's home until he died. *Id.* Mr. Simmons' older siblings and extended relatives came to help with the cooking and cleaning. *Legare Simmons Affidavit at ¶ 5; 2010 PCR Tr. pp.62 and 94.* • During their marriage, Valerie was the spouse who was employed on a steady, regular basis. Mr. Simmons was unable to handle their finances, so Valerie paid all of their bills, opened a checking account for them, and managed the money. *2010 PCR Tr. pp.96-97.* • After Mr. Simmons and Valerie separated, he mostly lived in half-way houses and homeless shelters. *2010 PCR Tr. p.19.* He went to the Palmetto House Homeless Shelter regularly for meals because he had limited cooking skills. *Id. at pp.19 and 73; Russell Affidavit at ¶ 2; Affidavit of Margaret Halstead, attached as Exhibit L, at ¶ 3; Affidavit of Robyn Beach Schmeiding, attached as Exhibit M, at ¶ 2.* • Mr. Simmons once lived in a small building owned by his brother, Gene Simmons. But, Gene asked him to leave because he was not able to take care of the property. For example, Mr. Simmons would leave the doors and windows open in the winter time when he was not at home. *Affidavit of Gene Simmons, attached as Exhibit N, at ¶ 6.* • Mr. Simmons did not own a car. *2010 PCR Tr. pp.71-72; Jack Simmons Affidavit at ¶ 7.* He obtained his driver's license after attempting the examination multiple times. *2010 PCR Tr. p.69.* The examiner ultimately had to read the test questions to him. Mr. Simmons drove his wife, Valerie's car but soon lost his license after he was cited for driving uninsured and failing to pay traffic tickets. *2010 PCR Tr. p.70.* • After he lost his driver's license, Mr. Simmons had to rely on help from his sister to try and obtain a formal identification card. *2010 PCR Tr. p.24.*
Work	• All of Mr. Simmons' employment opportunities were secured for him by a network of family and friends. *Id. at pp.20-21.* He never formally applied for a job or filled out a job application. *Id. at p.21; Gene Simmons Affidavit at ¶¶ 2-5.*

	• Mr. Simmons' siblings and friends have never known him to have a single, steady job. Rather, his work history consists of odd jobs obtained through friends or relatives where he performed basic labor. *Gene Simmons Affidavit at ¶ 5; Jack Simmons Affidavit at ¶ 6; Legare Simmons Affidavit at ¶ 4; Schmeiding Affidavit at ¶¶ 4-5; 2010 PCR Tr. pp.21-22.* • Mr. Simmons' brother, Gene, helped him get a job with a contractor. No application or formal training was necessary for the job. Mr. Simmons worked for the contractor on an addition to Gene's home. His duties consisted of nailing boards and other very simple tasks. *Gene Simmons Affidavit at ¶¶ 2-5* • Mr. Simmons also worked for a brickwork subcontractor, Sam Glover. Mr. Glover hired Mr. Simmons because he knew his family and grew up in the same area. Mr. Simmons performed tasks like loading and unloading a wheelbarrow full of bricks and shoveling mortar. Mr. Simmons was a hard worker, but he never took initiative or performed complicated tasks. *Affidavit of Sam Glover, attached as Exhibit O.* • Mr. Simmons also obtained a job with a brick mason through his brother, Michael Simmons. His duty was to mix mortar. *Legare Simmons Affidavit at ¶ 4.*
Self-Direction	• Mr. Simmons is consistently unable to perform undirected tasks. *2010 PCR Tr. pp.20 and 22-23.* Ms. Margaret Halstead stated that he "could complete tasks if very simple instructions were given to him, for example, being told to stack the blue tiles against the red wall." *Halstead Affidavit at ¶ 5.* • Similarly, Ms. Doris Russell stated that he "could not do tasks without getting careful directions. For example, I could not tell him to measure a wall, but I could tell him where to place things on the wall." *Russell Affidavit at ¶ 5.* • Mr. Simmons also required direction from others as a member of the football team. His coach, William Long, stated that he was "extremely slow." He played a defensive position that did not require significant intellectual abilities. It was more repetition than anything else. *Long Affidavit at ¶¶ 2-3.* • A former teammate explained how Mr. Simmons once had a sore throat and drank a whole bottle of cough syrup because he thought that the more he took, the faster he would get better. *Affidavit of Bo Parks, attached as Exhibit P.* • Mr. Simmons is consistently described as a follower – not a leader. *Schmeiding Affidavit at ¶ 3; Long Affidavit at ¶ 3; Glover Affidavit at ¶ 5; Shwec Affidavit at ¶ 11.* • Ms. Hammock explained that Mr. Simmons benefitted from a rigid family structure. Inside the structure, with direction from his parents and family members, Mr. Simmons was able to function

	fairly well. But, after his parents died and the structure was gone, Mr. Simmons was unable to succeed in an independent, self-directed fashion. *2010 PCR Tr. pp.14-16 and 18.* • Mr. Simmons' resource teacher agreed with this assessment, stating: "[w]hen Kenneth graduated from high school, he did not have sufficient job skills or adequate academic skills. He was a follower, and he desperately needed structure. Without structure, I can see how Kenneth ended up into drugs or other trouble." *Shwec Affidavit at ¶ 25.*
Communication	• Mr. Simmons' ability to communicate in writing has consistently been very poor throughout his entire life. *See School Records attached to Shwec Affidavit; Halstead Affidavit at ¶ 8; Russell Affidavit at ¶ 8; Schmeiding Affidavit at ¶ 9.* • Mr. Simmons had a very serious stutter as a child. He was very embarrassed by his stutter and was often socially withdrawn and aloof because of it. *2010 PCR Tr. p.23.* • Mr. Simmons' ex-wife explained that she had to initiate all of their conversations. He was not able to just sit and chat. *Id.* • Ms. Robyn Beech Schmeiding, a classmate of Mr. Simmons' in middle school and high school, described him as gullable: "Everyone in high school liked Kenneth because he was so simple that there was no reason not to like him. In fact, I always thought it would be very easy for someone to take advantage of him." *Schmeiding Affidavit at ¶ 3.* • Ms. Shwec observed that, although he was on the football team, he did not seem to have any close friendships with his peers. He was very shy. *Shwec Affidavit at ¶ 11.*

Consequently, both standardized measurements and an extensive social history demonstrate that Mr. Simmons' suffers from significant deficits in adaptive behavior.

IV. PRONG THREE: ONSET BEFORE AGE 18.

Because mental retardation is a developmental disability, the final prong of the definition for mental retardation is onset before age eighteen. *2010 PCR Tr. p.121.* Dr. Tassé explained that a pre-eighteen IQ score is not required, nor must a person receive a diagnosis prior to the age of eighteen. *Id. at p.122.* Rather, it is simply necessary to have information to corroborate that a

person's current intellectual and behavioral impairments were present during the developmental period. *Id.*

Here, the PCR record is replete with evidence that Mr. Simmons' deficits began before he reached the age of eighteen. The 1978 IQ test was administered before Mr. Simmons turned eighteen. All of the information contained in the school records and collected from Mr. Simmons' teachers, classmates and football coach relates to his functioning before the age of eighteen. Mr. Simmons' stuttering and difficulties with written communications began when he was a young child. *2010 PCR Tr. pp.28-29.* Ms. Hammock explained that she focused on the pre-eighteen period in her interviews with Mr. Simmons' siblings and family members. *2010 PCR Tr. p.28.* Specifically with regard to Mr. Simmons' functioning before the age of eighteen, she testified that they used terms such as "we knew he was slow" and "he couldn't function as well as the other children did." *Id.* His brother, Gene Simmons, described to Ms. Hammock how he always understood that his brother's academic performance was very low. *Id.* Even when he had good grades on his report card, Gene knew that it was because Mr. Simmons was placed in the lowest level classes available. *Id.* Moreover, both informants who provided information to Dr. Keyes for the Vineland Adaptive Behavior Scales – Mr. Simmons' older sister and his ex-wife – knew Mr. Simmons during the developmental period. Viewed as a whole, the hearing evidence affirmatively demonstrates that Mr. Simmons' intellectual and adaptive functioning were significantly impaired before age eighteen.

V. THE STATE HAS OFFERED NO CREDIBLE EVIDENCE TO COUNTER THE MENTAL RETARDATION CLAIM.

This Court must evaluate Mr. Simmons' *Atkins* claim by a preponderance of the evidence standard.[14] *Franklin*, 356 S.C. at 280, 588 S.E.2d at 606. Mr. Simmons offered a straightforward factual basis to support his claim, including expert testimony supported by school records, academic achievement scores, IQ scores, and information from teachers, siblings, employers, classmates, coaches and school administrators. The State offered no evidence to counter Mr. Simmons' presentation and, instead, intends to rely 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 Mr. Simmons "was competent to cooperate with his attorney and to know the charges that he was being charged with." *ROA p.1721; see also, id. at p.1723* ("We were not doing an evaluation for anything other than the *Dusky* standard, sir."). Mr. Simmons 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 Mr. Simmons and obtained an IQ score of 75 that he felt was "reliable and valid," *id. at p.1724*, although he noted that this score was likely affected by the practice effect.

Dr. Sandler concluded, however, that Mr. Simmons cannot be mentally retarded and must be malingering because

> he was a graduate of Summerville High School [and] won two letters in football for a team that I'm told is quite prominent.

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[14] A preponderance of the evidence means "'proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence.'" *State v. Grooms*, 343 S.C. 248, 253 n.5, 540 S.E.2d 99, 102 n.5 (2000) (quoting 2 McCormick on Evidence § 339 (5th ed. 1999)) (alteration in original).

> While he repeated the eleventh grade, he failed English once but then had a remedial course and got an "A" in it. As I've been told, remedial courses are not indicative of mental retardation.

ROA p.1724. Dr. Sandler also pointed to "the fact that he had a driver's license [and] drove a car." *Id. at p.1725.* Mr. Simmons told Dr. Sandler that he had worked for a carpenter and a brick mason – jobs that Dr. Sandler assumed required tasks such as "computations and measuring and things of that nature." *Id. at p.1726.* And yet, when Dr. Sandler pressed for details, Mr. Simmons explained that he did not do any measuring or cutting, but just moved things from one side to another. *Id.* For the brick mason, Mr. Simmons reported that he "would roll the mortar in a wheelbarrow or roll the bricks in a wheelbarrow to the mason who actually performed the work." *Id. at pp.1726-27.* Although he performed no collateral interviews to corroborate any of this information, Dr. Sandler nonetheless doubted the accuracy of Mr. Simmons' statements and insisted that he felt Mr. Simmons could do more complicated tasks at work. *Id. at p.1726.* Finally, Dr. Sandler testified that "persons with mental retardation have trouble grooming themselves and attending to their own hygiene." *Id. at p.2623.* He concluded that Mr. Simmons cannot have mental retardation because "[t]here was no malodorous smells of any kind emanating from him, 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. Sandler's assessment was neither thorough nor proper according to clinical standards, and it did not comport with the directives of the AAMR or the DSM-IV-TR. Dr. Sandler did not conduct any standardized measure of Mr. Simmons' adaptive behavior. He did not interview any of Mr. Simmons' family members, teachers, friends, classmates, football coaches or employers. He did not talk to any school administrators to learn 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 factual errors about Mr. Simmons' life history and stereotypes about what people with mild mental retardation can achieve.[15]

If Dr. Sandler had conducted any collateral interviews, he would have learned that Mr. Simmons could not perform complex tasks at work. He would have further discovered that no grade point average was required for Mr. Simmons to participate on the football team and that his teachers, coaches and fellow football players all considered him "extremely slow." Dr. Sandler would have learned that Mr. Simmons was in special education, and that Ms. Shwec assigned him an "A" in remedial English because he came to class and put forth good effort toward individualized goals – not because he had achieved a certain intrinsic level of academic success. Dr. Sandler would have learned that Mr. Simmons had limited cooking skills, never successfully lived on his own, could not perform complicated tasks and required simple, concrete instructions from others. Dr. Sandler was not privy to any of the social history information that Mr. Simmons presented at the PCR hearing. His opinion defies the clinical standards and rests on nothing more than speculative assumptions and misconceptions. *See, e.g., Allen*, 2012 WL 2577492 at *8 (finding petitioner is mentally retarded and criticizing the State's expert for failing to make a proper individual assessment under AAMR and/or DSM-IV-TR standards); *Commonwealth v. Keaton*, 45 A.3d 1050 (Pa. 2012) (rejecting the defendant's claim of mental

[15] In fact, it is not clear that Dr. Sandler even had mild mental retardation in mind. During his trial testimony, Dr. Sandler compared Mr. Simmons 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*").

retardation because his expert did not perform standardized testing of adaptive skills, as the AAMR dictates); *Brumfield*, 2012 WL 602163 at *28 (finding that petitioner is mentally retarded and heavily criticizing the state's experts for failing to interview anyone other than petitioner for an assessment of adaptive skills).[16]

Not only is Dr. Sandler's opinion not credible for the reasons discussed above, but Dr. Sandler himself has a credibility problem. Dr. Sandler's medical license was issued by the State of Pennsylvania. In 1989, Dr. Sandler admitted to a Pennsylvania administrative court that he lied about administering a WAIS IQ test, along with several other tests. Specifically, Dr. Sandler admitted

> [he] did not administer these tests fully, nor did he record all of the results of these tests, and he purported to make a conclusive diagnosis based on these tests, without indicating any limitations on the reliability and validity of his conclusions.

See Dr. Sandler Disciplinary Orders, attached as Exhibit Q.[17] Moreover, Dr. Sandler confessed that he falsely stated his credentials under oath on two other occasions. *Id.* Dr. Sandler was

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[16] As Dr. Tassé explained, the use of objective standardized measures and corroboration through multiple interviews with collateral sources is essential. Self-reported information from people with mild mental retardation is often unreliable since they tend to overstate their abilities and "try to fake that they know things." *2010 PCR Tr. p.129-130.*

[17] Mr. Simmons alleges that the State unconstitutionally suppressed this evidence. *See PCR Application at Ground 10 & 11(d)(2).* A number of courts have found that prosecutors suppressed evidence "by failing to search for background information, such as a witness's criminal history, that is readily available through routine investigation of the prosecution's files or the files of other government agencies." *Chandras v. McGinnis*, 2002 WL 31946711, *7 (E.D.N.Y. 2002); *see also, Crivins v. Roth*, 172 F.3d 991, 997-998 (7th Cir. 1999); *Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998); *United States v. Brooks*, 966 F.2d 1500, 1502 (D.C. Cir. 1992); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980). Alternatively, Mr. Simmons alleges that trial counsel provided ineffective assistance of counsel by failing to investigate, discover and present this evidence at trial. *See PCR Application Ground*

sanctioned by the State Bureau of Professional and Occupational Affairs. His medical license was placed on probation and he was ordered to "undergo supervision in professional ethics and monitoring in psychological assessment" for a period of one year. *Id.*

By contrast, 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. In a recent opinion from the United States District Court for the Western District of Tennessee, Dr. Tassé's credibility was evaluated as follows:

> The Court finds Dr. Tassé to have been an exceptionally well-qualified and credible witness, and the Court concludes that his testimony deserves great weight. Not only is Dr. Tassé clearly a leading expert in the field of mental retardation, but he also impressed the Court with his honesty and frankness in responding to questions from counsel. Although the Government's witnesses both indicated that they have some familiarity with making mental retardation evaluations, neither can even begin to match the experience and expertise possessed by Dr. Tassé.

Order Granting Defendant's Motion for Pretrial Determination of Mental Retardation and Precluding Government from Seeking Death Penalty as to Defendant Shannon Shields, attached as Exhibit R, at p.8. Dr. Tassé's opinion in Mr. Simmons' case is supported by additional expert testimony from Ms. Marjorie Hammock, as well as IQ scores, academic achievement test scores, a standardized measurement of adaptive skills, and an extensive social history. Clearly, the preponderance of the evidence weighs in Mr. Simmons' favor.

10&11(a)(3). PCR counsel obtained the record of Mr. Sandler's disciplinary history by calling the Pennsylvania Medical Licensing Board and requesting a certified copy.

VI. CONCLUSION.

In sum, the evidence presented at the PCR hearing proved, by a preponderance of the evidence, that Mr. Simmons is mentally retarded according to South Carolina's definition of mental retardation. Thus, he is exempt from the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). This Court should enter an order vacating the death sentence and imposing a life sentence.

DNA CLAIM

The victim in this case, Ms. Lilly Bell Boyd, was found murdered in her home on Sunday, September 1, 1996. She had been beaten, strangled, and sexually assaulted. The Summerville Police Department actively investigated the case for a year, but failed to solve the crime. In August of 1997, the State Law Enforcement Division ("SLED") formed a task force to solve the case. The task force requested a suspect profile and then rounded up men from the neighborhood who generally fit that description.[18] In October, 1997, a task force member suggested Mr. Simmons as a potential suspect. One month later, Mr. Simmons was arrested for putting two family packs of steaks down his pants at the Food Lion in Columbia and held there until he could be questioned by task force members. From December 2-9, 1997, police detectives and/or SLED agents interrogated Mr. Simmons six times. During these interrogations, Mr. Simmons gave a variety of statements and ultimately confessed to the rape and murder of Ms. Boyd. Many of Mr. Simmons' statements are inconsistent, contradictory, do not correspond to any actual evidence, and/or are implausible. *See Affidavit of Dr. Richard Leo, attached as*

[18] The completed profile concluded that the likely suspect was a Black male; approximate age 25 or younger, but may be older if mentally retarded or had been drinking or using drugs; poor; low education; most likely single or if married having marital problems; uses alcohol and/or drugs; lives alone or with parent(s) or with an older female relative.

Exhibit S, at ¶ 18.[19] Moreover, Mr. Simmons' mental retardation is foremost among several individual risk factors associated with false confessions. *See Atkins*, 536 U.S. at 320 n.25 ("Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated.

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[19] For example, Mr. Simmons was first interrogated by Detective Everett Howard for approximately 1 ½ to 2 hours. At that time he gave a statement saying that a woman named Brenda Stevenson had paid two men to kill someone named Shorty. The next day, Detective Howard interrogated Mr. Simmons a second time. At the conclusion of this interrogation, Mr. Simmons confessed to killing the person named Shorty. During a third interrogation, Mr. Simmons confessed to a murder in Traveler's Rest, South Carolina. All of these stories were later determined to be fictional. *Id. at ¶ 19.*

Dr. Richard Leo, an expert in false confessions, explained in his affidavit that the detectives and agents who elicited Mr. Simmons' statements never recorded the entirety of his interrogations, but in some instances they recorded the "recap" or conclusion of the interrogation. Thus, there is no objective record of what transpired during most of Mr. Simmons' multiple interrogations, no record of what interrogation techniques were used and led him to make multiple changing confessions, and no record of most of what Mr. Simmons told the various interrogators throughout his various accounts. *Id. at ¶ 18.*

Dr. Leo identified several situational reasons in this case to doubt the reliability of Mr. Simmons' statements. *See id at ¶¶ 27-32.* Moreover, Dr. Leo noted that Mr. Simmons possesses many individual risk factors common in false confession cases, including:

(1) repeated testing has established that he is mentally retarded

(2) he has many personality traits that are consistent with mental retardation, including that he is eager to please, easily led, and submissive.

(3) he has memory problems, a history of blackouts, and diminished intellectual capacity.

(4) the mentally handicapped and cognitively impaired tend to be highly submissive, compliant, suggestible, and unable to withstand high levels of stress or conflict. For these reasons, it is not surprising that the mentally handicapped are disproportionately represented in the reported false confession cases.

Id. at ¶ 24.

These exonerations have included at least one mentally retarded person who unwittingly confessed to a crime that he did not commit.").

In addition to Mr. Simmons' statements, the State relied heavily on DNA evidence. In fact, these two pieces of evidence constituted the entirety of the State's case for guilt. The solicitor told the jury in his opening statement:

> The state's case consists basically of Kenneth Simmons' confession, statements that are on tape that he gave Kenny Mears. And it also consists of DNA evidence. You'll also hear that an effort was made at the crime scene to take fingerprints, to identify footprints and that kind of thing. And there will be no fingerprint evidence that matches up with Kenneth Simmons. There will be no footwear that matches up with him. We're looking at confessions and DNA.

ROA p. 1042. The State presented testimony from Ms. Lauren Crane and Dr. Michael Baird, of Lifecodes Corporation.[20] These witnesses testified that Mr. Simmons' DNA matched the crime scene evidence at "nine out of nine" genetic locations and that the statistical likelihood that someone other than Mr. Simmons' could have contributed to the evidence was approximately 1 in 8 Million in the African American population and 1 in over 1 Billion in the Caucasian population. *ROA pp.1470-1471 and 1480-1482.* This testimony was false in several respects. The relevant issues, discussed in greater detail below, are in sum:

(1) Ms. Crane and Dr. Baird falsely testified that Mr. Simmons' DNA matched the crime scene evidence at 9 out of 9 tested genetic locations. In fact, three of the tested locations (the CTT results) do not include Mr. Simmons at all, and Lifecodes testified to fabricated CTT results.

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[20] The State initially sent the DNA evidence from this case to SLED, but SLED was unable to complete DNA testing because there was an insufficient amount of DNA for SLED's testing capabilities at that time. *ROA pp.1432-1433.* Thus, the State retained Lifecodes to perform the DNA testing. *Id.*

(2) Dr. Baird falsely misrepresented the strength of the DNA evidence by claiming that the relevant odds were 1 in over a billion when, in fact, *if* – and only if – Lifecodes' test results for the remaining six genetic locations are reliable, the appropriate statistic is only approximately 1 in 100 Caucasians or 1 in 400 African-Americans.

(3) Gender typing tests indicate that *all* of Lifecodes' test results are likely unreliable, since the potential inclusion of Mr. Simmons hinges on a mixture of male and female DNA, and the gender typing tests showed that the crime scene evidence does not contain any male DNA at all.

(4) The State withheld evidence that would have revealed that Ms. Crane and Dr. Baird testified falsely.

I. RELEVANT FACTS.

A. THE STATE'S DNA EXPERTS ESSENTIALLY TESTIFIED TO A CONCLUSIVE DNA MATCH.

Ms. Lauren Crane was a forensic scientist at Lifecodes. She testified that she analyzed vaginal swabs taken from the body of Ms. Lilly Bell Boyd (hereafter, "the crime scene evidence") and found that they contained a mixture of DNA. *ROA pp.1460-61.* She received a known sample of Mr. Simmons' blood and compared it to the crime scene evidence. She stated that she tested Mr. Simmons' blood at nine (9) different genetic locations, and concluded that he could not be excluded as a contributor to the crime scene evidence at all nine genetic locations. *Id. at 1470-71.* The State introduced a chart, labeled State's Exhibit Number 24, which Ms. Crane discussed in detail.[21] *Id. at 1464*-1470. The chart, as it appeared before the jury, looked like this:

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[21] The chart depicts the nine genetic locations to which Ms. Crane testified. The first six locations are tested by the DQ Alpha Polymarker kit (hereafter referred to as "DQA/PM"), which tests for six genetic locations (named LDLR, GYPA, HBGG, D7S8, GC, and HLADQA1). The last three locations are tested by a single test known as CTT (to represent the three genetic locations it identifies: CSF1PO, TPOX and THO1).

ITEM	LDLR	GYPA	HBGG	D7S8	GC	HLADQA1	CSF1PO	TPOX	THO1
LILLY BELL BOYD BLOOD FI56389	A, B	A, B	A, C	A	B	2, 4.2 / 4.3			
KENNETH SIMMONS BLOOD FB68555-60	B	A, B	A, C	AB	AC	1.1, 1.2	10, 11	10, 11	7, 8
VAGINAL SWAB IN SALINE FROM MUSC - MALE FRACTION FI56384	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2, * 4.2 / 4.3	10, 11	10, 11	7, 8
VAGINAL SWAB IN SALINE FROM MUSC - FEMALE FRACTION FI56384F	A, B	A, B	A, C	A	B	2 4.2 , 4.3			
2 VAGINAL SWABS FROM SLED - MALE FRACTION FI56386	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2, * 4.2 / 4.3	10, 11	10, 11	7, 8
2 VAGINAL SWABS FROM SLED - FEMALE FRACTION FI56386F	A, B	A, B	A, C	A	B	2, 4.2 / 4.3			

* indicates that a 1.2 allele may be present

( ) indicates allele of lesser intensity

Dr. Michael Baird was Ms. Crane's supervisor. The State offered his testimony to explain the significance of Ms. Crane's results. First, Dr. Baird told the jury what it means for a DNA "match" to occur:

> Q: When does the DNA match occur?
>
> A: The match or non-match really is what is declared at the end of the testing. And if the DNA profile that you generate from an evidentiary sample is indistinguishable from the DNA profile of a known sample, it means that the DNA could have originated from the person whom the known sample came from.

ROA pp. 1451-52. Next, Dr. Baird testified that he had reviewed Ms. Crane's work, that she had done everything properly, and that everything on State's Exhibit Number 24 was consistent with Mr. Simmons being a contributor to the evidentiary sample. *Id. at 1474-75.* Then, he explained that the next step was to conduct a statistical analysis:

> The next step that is done is to review all the work that's done in the case . . . determine whether or not the match or mixture is there in the way that it appears to be or that each one of us has seen individually. And if that is confirmed, I then go through and do a statistical analysis to determine the frequency of occurrence that a particular profile would be present in population.

Id. at 1475. Dr. Baird reiterated that Mr. Simmons' DNA was included as a contributor to the crime scene evidence at nine different genetic locations. *ROA p.1481.* Dr. Baird concluded by testifying to the following statistical calculations:

> Q: What percentage of the Caucasian population would be excluded as the donor of that semen in the male fragment of the vaginal swab taken at Lilly Bell Boyd's autopsy?
>
> A: Well, virtually all of the Caucasian population would be excluded as contributing. We generally represent this frequency as a number, not a percentage. So the frequency of occurrence really represents how often you would see that particular combined profile in the Caucasian population, which is ***one in over one***

billion two hundred eighty million, two hundred forty-nine thousand nine hundred and sixteen.

Q: So to ask that question in a different way perhaps, doctor, using that chart; what is the probability of a randomly chosen person unrelated to Kenneth Simmons having the same genetic profile as to the genetic profile found in the semen from the vaginal swab taken from the autopsy?

A: Well, again it is extremely rare. It's very rare in the Caucasian population. When we look at the next chart of Black, the African-American population is not quite – but again it's still is a very rare event.

Q: All right, sir. And the one in one billion, two hundred and eighty million two hundred forty-nine thousand, nine hundred and sixteen; is that correct?

A: Yes, sir.

Q: All right, sir. If you'd get the chart for the Black data base, please. Dr. Baird, using that chart, please explain the probability of a randomly chosen person unrelated to Kenneth Simmons having that same genetic profile, the genetic profile found in the semen on this chart, the vaginal swabs taken from the autopsy.

A: There are nine different [genetic] tests done in this case. In the Black population it's about ***one in eight million people***. In other words, one person in eight million would have that profile that we see in Mr. Simmons.

Q: All right. And you also see that same profile in the male fragment of the vaginal swab?

A: Right; in the vaginal swab is a DNA profile consistent with Mr. Simmons being a contributor as well as the victim.

ROA pp.1480-82.

B. THE STATE'S DNA EVIDENCE WAS FALSE

Faced with this evidence at trial, there can be no dispute that the jury believed the DNA evidence conclusively identified Mr. Simmons as the source of non-victim DNA in the

evidentiary sample. Boiled down, the State's experts testified that Mr. Simmons' DNA "matched" the evidence from the crime scene at nine out of nine locations, and that the statistical probability of someone other than Mr. Simmons having contributed to this sample was 1 out of more than a billion Caucasians and 1 out of 8 million African-Americans. ***This testimony was false.***

i. THE STATE'S WITNESSES TESTIFIED TO FABRICATED CTT RESULTS.

Ms. Crane and Dr. Baird both testified that Mr. Simmons' DNA was consistent with the evidentiary sample at nine out of nine tested genetic locations. *ROA at pp. 1470-71 and pp. 1481-82.* State's Exhibit Number 24 represented to the jury that Lifecodes obtained CTT test results from Mr. Simmons' known blood that were exactly the same as results obtained on two separate vaginal swabs taken from the victim's body (sample number F156384 and sample number F156386). No CTT results were listed on the exhibit for the victim's known standard, and Lifecodes never reported having tested the victim's known standard with the CTT test.

With regard to sample number F156384, both Ms. Crane and Dr. Baird have now admitted that a CTT test was never conducted on this sample because the sample was consumed before any CTT testing could be performed. *See Baird Deposition at pp.16-17 and 26-27; Crane Deposition at p.13* ("There was no more of that DNA sample left to do any further amplifications. We had exhausted that sample for all the previous DNA analysis we had attempted). Lifecodes' lab notes also indicate that sample number F156384 was completely exhausted before the CTT testing even began. *See Applicant's PCR Exhibit 9, Lifecodes File, at p.150 (lab record dated 1/15/1998; "Note: No Sample 56384 left").*

Lifecodes did complete a CTT test on sample number F156386. However, the lab never reported that it tested this sample or that it had tested the victim's known blood standard with the

CTT test. *Crane Deposition at p. 43 and 45-46.* The first and only time that the lab reported any CTT results for sample number F156386 was when the State produced Exhibit Number 24 at trial. The CTT results reported on state's Exhibit Number 24, however, are completely false. The exhibit represented to the jury that CTT results for this evidentiary sample were the same as those obtained from Mr. Simmons' known blood sample. In fact, the results that Lifecodes obtained from sample number F156386 ***do not match Mr. Simmons' DNA.*** *Crane Deposition at pp. 22-25; 27-31; 36-40; 58-60.* The CTT results from this sample are consistent with the victim's DNA alone. *Affidavit of Drs. Word and Cotton, attached as Exhibit T, at ¶ 30.*

Thus, Exhibit Number 24 (and Ms. Crane's trial testimony regarding its contents) represented data that are completely unsupported by the laboratory's notes or test results. *Id. at ¶ 15.* There are no records in this case that would support including Mr. Simmons as a potential contributor to the CTT results from the evidentiary samples taken from the victim's body. *Id. at ¶ 37.* That is, the data presented to the jury at trial regarding the CTT tests were simply fabricated. The exhibit, when corrected, looks like this:

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ITEM	LDLR	GYPA	HBGG	D7S8	GC	HLADQA1	CSF1PO	TPOX	THO1
LILLY BELL BOYD BLOOD FI56389	A, B	A, B	A, C	A	B	2, 4.2 / 4.3	10,12	9	8
KENNETH SIMMONS BLOOD FB68555-60	B	A, B	A, C	AB	AC	1.1, 1.2	~~10, 11~~ 10,12	10, 11	7, 8
VAGINAL SWAB IN SALINE FROM MUSC - MALE FRACTION FI56384	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2, * 4.2 / 4.3	~~10, 11~~ Not done	~~10, 11~~ Not done	~~7, 8~~ Not done
VAGINAL SWAB IN SALINE FROM MUSC - FEMALE FRACTION FI56384F	A, B	A, B	A, C	A	B	2 4.2 / 4.3	No results	No results	No results
2 VAGINAL SWABS FROM SLED - MALE FRACTION FI56386	A, B	A, B	A, C	A, (B)	B, (AC)	1.1, 2,* 4.2 / 4.3	~~10, 11~~ 10,12	~~10, 11~~ 9	~~7, 8~~ 8
2 VAGINAL SWABS FROM SLED - FEMALE FRACTION FI56386F	A, B	A, B	A, C	A	B	2, 4.2 / 4.3	10,12	9	8

The only official report that Lifecodes issued in this case regarding its CTT testing was a report showing the CTT results from Mr. Simmons' *known* blood standard.[22] The lab did not issue a report explaining its results for any CTT tests run on the victim's known standard or on the evidentiary samples taken from the victim's body. In her deposition, Ms. Crane explained that she did not issue any such report because she considered all of the CTT testing to be ***inconclusive*** and ***she did not rely on those results in any way***.

> A: There was no, in my opinion, conclusive result that I could generate that I felt was conclusive with the CTT result. Therefore, there was no official report that was generated.
>
> . . .
>
> Q: If you made no official report for the CTT results, what evidentiary value to they have --
>
> A: I don't know.
>
> Q: -- with regard to Mr. Simmons' case?
>
> A: I don't know. I would say that based on the results I'm seeing and based on the fact that I have no conclusive report from that, that those results were inconclusive.
>
> Q: So basically for comparison purposes to determine whether or not Mr. Simmons is or is not a contributor to the evidentiary samples in this case, you would not include any of the CTT results?
>
> A: Correct.

Crane Deposition at pp.44-46.

But the jury was never told that the CTT results were inconclusive or that they lacked any evidentiary value relevant to Mr. Simmons' case. On the contrary, both experts testified that Mr.

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[22] *See State's PCR Exhibit 2*, Lifecodes Report dated 2/2/1998, reporting CTT results for Mr. Simmons' known blood sample.

Simmons' DNA was consistent with the evidentiary samples at all nine locations, and they presented an exhibit purporting to show that his DNA matched the evidentiary samples at all nine locations, including those tested by CTT.[23] Ms. Crane has now admitted that she falsely testified regarding this point:

> Q: Now, you didn't explain [to the jury] that you were just relying on the DQ Alpha and polymarker results, not all nine loci?
>
> A: Correct.

Crane Deposition at p.47.

ii. DR. BAIRD'S STATISTICAL CALCULATIONS WERE FALSE, MISLEADING AND INCORRECT.

Dr. Baird performed his statistical analysis by calculating the frequency of Mr. Simmons' ***known*** alleles at all nine of the DQA/PM and CTT genetic locations. First, it was error for Dr.

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[23] This solicitor emphasized this point in his opening and closing statements. In his opening statement, the solicitor told the jury that the State's witnesses would testify that

> **nine out of nine locations** on DNA molecules that they compared with the semen in that vaginal swab matched the DNA from Kenneth Simmons' blood. And there will be testimony about the statistical significance of that DNA match.

ROA at p. 1041. In closing, the solicitor said:

> DNA is never going to be able to tell you with one hundred percent certainty this is the person who's semen is found here based on DNA match because they can't possibly look at each DNA allele. **They did nine of them in this particular case.** All they can do is say whether or not a person is excluded from that DNA profile or not excluded. Then they can do statistical probabilities of how often that particular profile exists in the population. And that's what these people testified to.

ROA at p. 2005.

Baird to include the CTT locations ***at all*** since, as explained above, the CTT results do not tell us anything about whether or not Mr. Simmons is included or excluded as a possible contributor to the evidentiary sample.[24] But the bigger problem is that Dr. Baird used the frequency of Mr. Simmons' ***known genetic profile***.

If Lifecodes' DQA/PM tests results can be considered reliable, Mr. Simmons' genetic profile would be "included" at some of the genetic locations tested by DQA/PM. However, Dr. Baird's statistical calculations inappropriately fail to account for the fact that ***countless other people, apart from Mr. Simmons, would also be "included" in these results***. In order for the jury to properly assess the weight of the DNA evidence in this case, they must know the likelihood that Mr. Simmons' "inclusion" could arise by chance or coincidence. Thus, the relevant statistical question in this case is "***what is the statistical probability of randomly selecting some other person, other than Mr. Simmons himself, whose DNA would likewise not be excluded as a potential contributor to the evidentiary sample?***" Performing the calculation necessary to answer this question is sometimes called conducting "mixture statistics." That is not the calculation that Dr. Baird performed. Instead, Dr. Baird testified to what are known as "single source statistics." In other words, Dr. Baird calculated ***the statistical probability of randomly selecting some other person in the world, other than Mr. Simmons, whose DNA is identical to Mr. Simmons (i.e., his genetic twin)***. This calculation bears no relation to and does

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[24] Again, the CTT results that Lifecodes obtained from the evidentiary samples were consistent with the victim's known blood sample only. In other words, the CTT results from the evidentiary samples do not appear to show a mixture of DNA at all. Rather, only the victim's DNA is evident. As Drs. Word and Cotton explained, this raises serious concerns about reliability, since the CTT tests were performed on the same samples that were examined with the DQA/PM test, which appeared to show a mixture of DNA. Given that the DQA/PM results appeared to show a mixture, "it is expected that DNA from a second individual should have been detected with the CTT testing of the same DNA." *Affidavit of Drs. Word and Cotton at ¶ 32.* This raises the possibility of testing error. *See* sub-section three, below.

not speak to the evidentiary weight of the evidence in this case.[25] Throughout his deposition, Dr. Baird repeatedly acknowledged that: (1) he testified at trial to a single source statistical calculation; *Baird Deposition at pp.14-15 and 31*; (2) there are other genetic profiles, other than Mr. Simmons' genetic profile, that are likewise included as potential contributors to the crime scene evidence; *id. at p.40*; and, (3) mixture statistics would account for those other genetic profiles and the mixture calculation offered in PCR by Mr. Simmons' experts is a correct mixture calculation. *Id. at pp.36-37.*

The following table shows how Dr. Baird calculated his "single source" statistics and how an appropriate "mixture calculation" should have been done.

[25] To use a simplified analogy, suppose a forensic test was able to identify that the perpetrator of a crime had red hair. If Mr. Simmons has red hair, then he would be "included" as a potential contributor. To properly assess the strength of that "inclusion," the jury would need to know how many other people, other than Mr. Simmons, also have red hair and therefore are likewise included. If 30% of the world's population has red hair, then the correct answer would be that roughly 30% of people, other than Mr. Simmons, are "included" as potential contributors. Instead of answering this question, Dr. Baird told the jury how many people in the world, other than Mr. Simmons himself, have the exact same genetic profile as Mr. Simmons – i.e., 0%. The fact that there is a 0% chance of finding Mr. Simmons' genetic twin is irrelevant, because it does not relate in any way to the crime scene evidence, and this figure is therefore grossly misleading.

SAMPLE	GENETIC LOCUS									Overall Frequency
	LDLR	GYPA	HBGG	D7S8	GC	DQA1	CSF1PO	TPOX	THO1	
Vaginal Swab Alleles	AB	AB	AC	A(B)	B(AC)	1.1,2,*,4.2/4.3				
Victim's Genotypes	AB	AB	AC	AA	BB	2, 4.2/4.3				
Kenneth Simmon's Genotypes	BB	AB	AC	AB	AC	1.1,1.2	10,12	10,11	7,8	
Single-source RMP's (frequency of Simmon's genotype) among Caucasians/ Blacks	.2992/ .6022	.4859/ .4991	.0066/ .3012	.4736/ .4740	.2935/ .0391	.0429/ .0735	.1415/ .1400	.0356/ .0438	.0271/ .1647	1 in 1.28 billion/ 8 million
Genotypes not excluded from vaginal swab	AA, BB, AB	AA, BB, AB	AA, AC, CC	AB, BB	AC	1.1,1.1 1.1,1.2 1.1,2 1.1,4.2/4.3				
Mixture RMPs (frequency of non-excluded genotypes) among Caucasians/ Blacks	1.0/1.0	1.0/1.0	.228/ .646	.622/ .623	.2935/ .0391	.135/ .125				1 in 172/ 419

The first row on this table shows the mixture of alleles present on the vaginal swabs taken from the victim's body (the evidentiary samples). The second row shows the victim's alleles from her known sample, and the third row shows Mr. Simmons' known alleles. The fourth row, highlighted in yellow, shows how Dr. Baird calculated his single source statistics. He simply calculated the frequency of occurrence of each of Mr. Simmons' known alleles and then multiplied them together to get astronomically large numbers (1 in 1.26 billion whites and 1 in 8 million blacks).

The fifth row on this table lists *all* of the genotypes that are not excluded from the evidentiary sample. At some of the genetic locations tested, a majority (or in some cases, all) of the world's population would be "included." For example, at the first genetic location, LDLR, there are only three possible genotypes that exist in the world: AA, BB, and AB. The victim's known genotype at this location is AB. The evidentiary sample reflects both the A and B alleles. Thus, any of the three possible genotypes, in combination with the victim's genotype of AB, would be "included." In other words, ***everyone in the world would be included at this location.*** This is also true for the next genetic location, GYPA. The third genetic location, HBGG, does not give us any information relevant to Mr. Simmons because he and the victim have identical genotypes at this location.[26] The remaining three genetic locations tested do include Mr. Simmons, but there are nonetheless a number of other genotypes that cannot be excluded as potential contributors at these locations as well as countless other people in the world who have the same genotypes as Mr. Simmons at these three locations. Dr. Baird's trial testimony completely ignored these factors and falsely represented to the jury that the weight of the DNA evidence was much stronger than it actually is. The correct statistical calculation, if one assumes that there were only two contributors to the evidentiary sample (the victim and a single perpetrator), is approximately 1 out of 172 whites and 1 out of 419 African-Americans.[27] This

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[26] Thus, the totality of the DNA data in this case that can be used for comparison purposes is only three genetic loci. This is a paltry amount compared to the typical 13 to 16 genetic loci that are typically tested by today's standards.

[27] Another problem with Dr. Baird's trial testimony is that it is wholly based on the assumption that there were only two contributors to the evidentiary sample (the victim and a single perpetrator). *Everyone* who has testified regarding the DNA issue in this case agrees that it is not possible to determine whether only a single male or multiple males contributed to the evidentiary sample. *See Testimony of Dr. Steven Lambert, 2010 PCR Tr. at pp.307-308; Crane Deposition at p. 40; Baird Deposition at p. 46; Affidavit of Drs. Word and Cotton at ¶¶ 26-27 and 29.* If

means that (assuming only two contributors to the sample) if one were to randomly select a person other than Mr. Simmons off of the street and test that person's DNA, approximately 1 out of 172 whites and 1 out of 419 blacks would also be "included."[28] These numbers are obviously significantly less probative than the figures that Dr. Baird reported of 1 out of a billion whites and 1 out of 8 million blacks.

Nevertheless, Dr. Baird insists that his trial testimony was somehow appropriate and "consistent with the field, as [he] understand[s] it." *Baird Deposition at p.11.* Dr. Baird's claim that his single source calculations were appropriate by field standards is not credible.[29] First, Dr. Baird himself acknowledged that THE EVALUATION OF FORENSIC DNA, by the National Research

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one makes no assumption about how many people contributed to the sample, the frequencies would be approximately 1 in 2 in the African-American population and approximately 1 in 8 in the Caucasian population. *Affidavit of Drs. Word and Cotton at ¶ 27.* The jury at Mr. Simmons' trial was never informed that Lifecodes' conclusions rested on the assumption of only a single perpetrator, nor were jurors told how the numbers would be different without that assumption. Moreover, the jury was never told that Lifecodes tested and excluded approximately twenty-six (26) other men as possible suspects before they tested Mr. Simmons' blood sample. 2010 *PCR Tr. at pp. 307-308.* Many of these other men were erroneously excluded based on the assumption of a single male contributor to the sample. If the possibility of two male contributors is considered, nine of these men cannot properly be excluded as potential contributors. *Id.* In fact, among the twenty-six other suspects who gave DNA samples, there are three pairs who, in combination with the victim, could fully account for all of the observed alleles on the vaginal swab. The jury was never told that twenty-six other men were tested and that some of them could have been contributors to the DNA found in the vaginal swab.

[28] Note that these are the correct statistical calculations assuming that no testing error occurred when Lifecodes performed the DQA/PM test. As explained in section four below, however, the gender typing test results raise a significant possibility of testing error and, therefore, the DQA/PM test results may be unreliable. If that is the case, no statistical calculation can be performed at all.

[29] Other courts have recognized that single source statistical calculations are grossly misleading in a mixed sample case. *See Commonwealth v. Grinkley*, 917 N.E.2d 236, 237, 242 (Mass.App.Ct. 2009) (holding single source statistical calculations in a mixed sample case are "irrelevant," "meaningless and improper.").

Council, is an authoritative text on the subject of DNA testing, reporting and testimony. *Baird Deposition at pp.50-51.* This book was published in 1996, three years before Dr. Baird testified at Mr. Simmons' trial. Dr. Baird was well aware of its contents. In fact, unscientific and irresponsible practices by Dr. Baird and the Lifecodes lab were actually the impetus for the NRC study that led to this publication. *See, e.g., Harvey v. State*, 2004 WL 60771 at *10 (Alaska App. 2004) ("Baird and his company, LifeCodes, were connected to controversial DNA testimony that prompted a National Research Council study of DNA evidence – a study that was critical of certain DNA testing, and that cautioned prosecutors and defense attorneys against 'over-sell[ing] DNA evidence' or arguing 'that DNA-typing is infallible.'"). Dr. Baird sent several chapters of THE EVALUATION OF FORENSIC DNA to Solicitor Bailey in preparation for Mr. Simmons' trial. *See Baird Deposition at p. 49* and *Letter from Michael Baird to Walter Bailey dated 2/4/1999, attached as Exhibit U.* Moreover, Dr. Baird admitted that this book specifically instructs experts ***not*** to report single source statistics in this kind of case:

> Q: Dr. Baird, I think I was referring you to page 129 in Evaluation of Forensic DNA, a publication by the National Research Council.
>
> A: Correct.
>
> Q: In that, on that page is where it details how to calculate the appropriate statistical frequencies for a mixed sample.
>
> A: Correct. And, again, this is copyrighted 1996.
>
> Q: And this testing was done in 1998?
>
> A: Correct.
>
> Q: And you'd agree with me that this is the book that every expert relies on in the appropriate calculation for DNA frequencies?

A: Yes.

Q: And in it, they say if it's a mixed sample, you have to use the mixed sample statistical techniques?

A: Correct.

Q: That's not what you did?

A: Correct.

Q: You used the single source frequency?

A: Correct.

Baird Deposition at pp. 50-51.

Second, Dr. Steve Lambert, Dr. Charlotte Word and Dr. Robin Cotton have all testified that this is not a matter on which reasonable experts could differ. As Drs. Word and Cotton explained in their affidavit:

> ***It is never appropriate to report results in the manner used by Dr. Baird.*** Presentation of the approximate frequency of the defendant's known sample completely misinforms the jury regarding the strength of the evidence. ***No credible forensic scientist would report the results from DNA testing in this manner.***

Affidavit of Drs. Word and Cotton at ¶ 16 .

Finally, Dr. Baird and his lab have a long and documented history of attempting to stretch the bounds of science in court. *See, e.g., People v. Castro*, 545 N.Y.S.2d 985, 996-997 (N.Y. Supreme Ct. 1989) (excluding testimony from Lifecodes because it "failed in its responsibility to perform the accepted scientific techniques and experiments in several major respects."); *id. at p.978* (finding, moreover, that even if Lifecodes' testing methods had been proper, Dr. Baird's statistical analysis "would have been precluded or substantially reduced" because he misrepresented the standard measurement of error he used to reach his conclusions and the

method that he actually used to perform the statistical calculations was "scientifically unacceptable."); *Caldwell v. State*, 393 S.E.2d 436, 444 (Ga. 1990) (rejecting Lifecodes' statistical calculations in favor of a more conservative calculation based on undisputed defense testimony that "seriously calls into question Lifecodes' enormous claimed power of identity."); *State v. Buckner*, 890 P.2d 460, 462 (finding reversible error where Dr. Baird's testified that DNA patterns in samples taken from the defendant and murder victim were unique in the population); *O'Dell v. Netherland*, 95 F.3d 1214, 1248-1249 (4th Cir. 1996) (finding Lifecodes testified to a DNA "match" when variations in the test results exceeded Lifecodes' own match criterion and therefore the results should have been deemed "inconclusive"); *Harvey*, 2004 WL 60771 at *9 (stating that Dr. Baird used "loose language" when he described the significance of his DNA paternity test results and improperly overstated the probability of paternity as 87.34% by basing his calculation on an "arbitrary" assumption). Clearly, Dr. Baird's trial testimony was false and improper, and Dr. Baird either knew, or should have known, that his testimony was false, misleading and incorrect.

iii. THE GENDER-TYPING TEST RESULTS.

As explained above, if we had no reason to doubt the reliability of Lifecodes' DQA/PM test results, the most that could be said about the State's DNA evidence is that Mr. Simmons is included as a potential contributor, and, assuming only a single perpetrator, roughly 1 in 100 whites and 1 in 400 blacks are also included. But, there is, in fact, great cause to doubt the accuracy of Lifecodes' DQA/PM test results.

As Drs. Word and Cotton explained, Lifecodes purported to find a mixture of DNA when it tested the crime scene samples with the DQA/PM test. It was assumed that this mixture included both male and female DNA because of the two-step extraction process, which is called

"differential lysis." This process uses two chemical washes (first a weaker chemical wash, followed by a harsher chemical wash) to break open the cells. It is assumed that any male DNA will be located in the second extraction, using the harsher chemical, because male sperm cells are more difficult to break open than female cells. Thus, the second extraction is often labeled the "sperm fraction" or the "male fraction."

However, it is far from clear in this case that there was ever any sperm in these samples at all. This is true for several reasons. First, Lauren Crane issued a preliminary report on October 25, 1996, stating "[d]ata suggests that sperm was visualized in samples F156382, F153384, and F156386." *Applicant's PCR Exhibit 9, Lifecodes File at p.18.* Drs. Word and Cotton explained that this is not the typical way one would describe the presence of sperm – either sperm is visible in the samples or it is not. Ms. Crane's "statement is awkward and hints that there may have been a problem confirming the presence of sperm." *Affidavit of Drs. Word and Cotton at ¶ 21.* Second, there is no documentation in the Lifecodes file verifying that sperm was identified in any of the crime scene samples. *Id. at ¶ 42.* Third, after the DQA/PM tests were completed, these same crime scene samples were tested with the CTT test. Although Lifecodes purported to find a mixture of DNA on the DQA/PM test, the CTT test results ***do not indicate a mixture.*** *Id. at ¶ 30.* The CTT test results showed only a single DNA profile – that of the victim. *Id.* This result is unexpected and indicates a likely testing error. Fourth, and perhaps most significantly, after the surprising CTT test results, Lifecodes ran an additional test on February 9, 1998, called an "amelogenin" test. *Id. at ¶ 31.* This testing determines the gender for the source of a DNA sample, and it is therefore more colloquially called a "gender-typing" test. All three samples tested with the gender-typing test showed only an "X" chromosome, consistent with the DNA being solely from a female source. *Id.* In other words, ***no male DNA***

was identified in these samples. *Id.* ("[t]here is no hint of a band at the Y chromosome (i.e., male) location"). Lifecodes never reported that it had completed a gender-typing test or that the results indicated that no male DNA was present in the crime scene samples.

The most likely explanation for the inconsistency between Lifecodes' purported DQA/PM results and the findings of the CTT and Gender-Typing tests is that some kind of testing error occurred during the DQA/PM testing. One significant possibility is that the crime scene samples never contained a mixture of DNA, but were contaminated with an outside source of DNA during the DQA/PM testing process.[30] A reagent blank control process (also called an extraction blank control) would have been a crucial step in preventing testing error, but Lifecodes failed to use these controls. *Id. at ¶ 17.* The need for a reagent blank control was well-known by the early 1990's, and it was specifically included in GUIDELINES FOR A QUALITY ASSURANCE PROGRAM FOR DNA ANALYSIS, published by the Technical Working Group on DNA Analysis Methods in 1991. *Id. at ¶ 43.* Once again, Lifecodes never reported that it was not using reagent blank controls – even when defense counsel specifically requested information about the lab's quality assurance program. *See State's PCR Exhibit 7, Motion for Discovery from defense counsel.*

iv. OTHER QUESTIONS ABOUT RELIABILITY.

Finally, Lifecodes failed to follow a number of generally accepted practices and procedures, raising concerns about the overall reliability of their work in this case. The lab failed

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[30] For example, Dr. Cotton testified that contamination can occur in a variety of ways. The samples could have been contaminated by the lab technician's own DNA. Or, the samples could have become contaminated with DNA from another case being tested at the same time. Ms. Crane's lab notebook indicates that she completed the DQA/PM testing for this case simultaneously with multiple samples from other cases.

to properly document and report much of its testing, including the data that were misrepresented to the jury at trial in state's Exhibit Number 24. Moreover, Lifecodes failed to address testing discrepancies in its lab notes, reports and testimony. These undisclosed errors would have served as additional impeachment evidence.

For example, Lifecodes made a computation error on its first report providing the statistical calculation for Mr. Simmons' known alleles from the DQA/PM test. *See State's PCR Exhibit 1, Report dated 1/23/1998.* The report gives a frequency of 1 in 81,103 in the African-American population. The correct number is 1 in 8,110. Lifecodes issued an amended report which corrected for the computation error on the DQA/PM results, and also included the CTT results in the statistical calculation, but failed to disclose that the lab had made an error on the first report. *See PCR Exhibit 2, Report dated 2/2/1998; see also, Baird Deposition at pp.13-14* (admitting that he made this error and that the jury was never told that he made the error).

Furthermore, Lifecodes actually performed the CTT tests in this case on two separate occasions. The first test was performed on January 23, 1998. The second CTT test was completed on January 29, 1998. Only the results of the second CTT test (and then, only the results from Mr. Simmons' known standard) were officially reported. There are also no records of the first test in the pages from the laboratory notebook that were provided to Mr. Simmons' trial counsel. Ms. Crane explained during her deposition testimony that she thought the first CTT test did not run properly. *See Crane Deposition at pp.25-26.* However, she never reported this test or explained to trial counsel that she was discounting it. Ms. Crane testified that the lab notes related to the first CTT test were likely not included in the files that trial counsel received because the lab would have only copied what she relied on, and she did not rely on this test. *Id.*

II. LEGAL PRINCIPLES.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The duty to disclose such evidence is applicable even where the defendant does not request disclosure, *see United States v. Agurs*, 427 U.S. 97, 107 (1976), and encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Moreover, *Brady*'s obligations apply regardless of whether the individual prosecutor is aware of the evidence, as long as it is in the possession of those acting on behalf of the prosecuting entity. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also, State v. Proctor*, 358 S.C. 424, 595 S.E.2d 480 (2004); *Boyd v. French*, 147 F.3d 319 (4th Cir. 1998).[31] Thus, a *Brady* violation includes three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999).

It is well-established that the "suppression" prong of *Brady* can be demonstrated in several ways – where the prosecution: (1) introduces testimony it knows, or should know, is

[31] The Due Process obligation extends to the prosecution as a whole, because it operates as "an entity" in serving as "the spokesman for the Government." *Giglio v. United States*, 405 U.S. 150, 154 (1972). This extension is "as it should be" because the prosecuting entity bears responsibility as "the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles*, 514 U.S. at 439 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

false; (2) does not honor a defense request for specific exculpatory evidence; or, (3) fails to volunteer exculpatory evidence not requested by the defense, or requested only generally. *Kyles*, 514 U.S. at 433. "In 'specific request' and 'general- or no-request' situations, 'favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Gibson v. State*, 334 S.C. 515, 525, 514 S.E.2d 320, 325 (1999) (quoting *Kyles*, 514 U.S. at 432-36); *see also, Bagley*, 473 U.S. at 682. The question is not whether a defendant would more likely have been acquitted had this evidence been disclosed, but whether, without the evidence, he received a fair trial "'resulting in a verdict worthy of confidence.'" *Riddle v. Ozmint*, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006) (quoting *Kyles*, 514 U.S. at 434).

A *Brady* violation in the first category – the prosecution's use of false testimony – requires a lower showing of materiality. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court reiterated the principle "that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Id.* at 269. The *Napue* Court also recognized that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* Under *Giglio* and *Napue*, "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

III. MR. SIMMONS IS ENTITLED TO A NEW TRIAL.

The testimony offered by Ms. Crane and Dr. Baird was false. Ms. Crane has admitted that her testimony was false, and the PCR evidence demonstrates that Dr. Baird knew, or should

have known, that his testimony was equally false. Mr. Simmons is entitled to a new trial if there is "any reasonable likelihood" that the false testimony could have "affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271). There can be no genuine dispute that the DNA testimony in this case could have affected the jury's decision. It has long been recognized that jurors place special trust in expert scientific testimony – perhaps none more so than DNA. *See, e.g., United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse."); *United States v. Hines*, 55 F.Supp.2d 62, 64 (D. Mass. 1999) ("[A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think, and give more credence to the testimony than it may deserve."). Mr. Simmons' jury was essentially told that DNA evidence conclusively identified him as the perpetrator of the crime. The jurors would have had no reason to disbelieve that testimony and it unquestionably affected their decision.

Moreover, Lifecodes suppressed a myriad of favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. In particular, Lifecodes withheld:

- The CTT results it obtained for the victim's known blood standard.
- The CTT results it obtained for the crime scene evidence.
- The fact that the CTT results did not incriminate Mr. Simmons; that the lab considered the CTT test results to be "inconclusive"; and, that Ms. Crane was not relying on the CTT results in any way.
- The fact that the CTT tests did not identify a mixture of DNA and that the CTT results identified only the victim's known profile.
- The Gender-Typing Test results, which indicated that no male DNA was identified in the crime scene samples.

- The fact that the lab failed to perform a reagent blank control process, contrary to national quality assurance guidelines.

- The fact that Dr. Baird's statistical calculations were based solely on Mr. Simmons' known genetic profile, contrary to scientifically acceptable practices, and that this calculation included CTT results even though the CTT results from the crime scene evidence did not "include" Mr. Simmons' DNA.

- The fact that the lab's conclusions were based on the assumption of only a single perpetrator and that at least nine (9) of the twenty-six (26) other suspects tested were excluded as potential contributors based solely on this assumption, even though there is no scientific basis for assuming that only a single perpetrator contributed to the crime scene samples.

- The fact that the lab performed the CTT test on two separate occasions but its first attempt failed to run properly.

- Dr. Baird's computation error on his initial report dated January 23, 1998.

The South Carolina Supreme Court has explained that "[w]hen determining whether the suppression of more than one item of evidence was material under *Brady*, we consider the collective impact of the undisclosed evidence." *Riddle*, 369 S.C. at 46, 631 S.E.2d at 74 (citing *Kyles*, 514 U.S. at 436). The United States Supreme Court has held that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434. In other words, the materiality test is not a preponderance of the evidence standard: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial." *Id.* In *Kyles*, the Court expressly admonished the dissenting opinion for assuming "that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." *Id.* at 435 n.8. Such "sufficiency" analysis is not the "touchstone." *Id.* One shows a

Brady violation by demonstrating that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

Viewed collectively, the undisclosed DNA evidence in Mr. Simmons' case "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* The State's case for guilt rested on two items of evidence. Without conclusive DNA, the State would have been left only with a confession that police extracted from Mr. Simmons (a man with an average IQ of 69) after multiple, un-recorded interrogations. The federal district court for the Southern District of Ohio recently found prejudice for a *Brady* violation in circumstances similar to those here. The court held:

> the evidence against Petitioner was not very strong. There was no physical evidence linking Petitioner to the crime. The police officers had only Petitioner's confession which, because of his mental retardation and his heightened susceptibility to police coercion, must be viewed with some skepticism. Under these circumstances, it would not take as much evidence to create reasonable doubt in the minds of the jurors.

Gumm v. Mitchell, 2011 WL 1237572 (S.D. Ohio, 2011). The outcome in Mr. Simmons' case simply cannot be deemed "fair" or one in which we can have confidence. The jury's verdict was obviously impacted by the State's representation that it had DNA evidence with virtually infallible odds (over 1 in a billion). This testimony was false. Moreover, the falsity of these representations was not uncovered at trial because the State suppressed any evidence that would have revealed the truth. The *Brady* violation in this case was clearly prejudicial.

Finally, even if the State's DNA presentation somehow did not amount to a constitutional violation, the DNA evidence developed during Mr. Simmons' PCR proceeding is, ***at a minimum***, "evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(a)(4) (2011).

CONCLUSION

In sum, Mr. Simmons meets, by a preponderance of the evidence, all three prongs of South Carolina's definition for mental retardation. He is therefore ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). As for Mr. Simmons' convictions, the State's case for guilt rested on the unreliable statements of a mentally retarded man and the false testimony of two DNA experts who suppressed a mountain of favorable evidence, thereby denying Mr. Simmons a fair and reliable trial. For all of the reasons stated above, this Court should enter an Order vacating the death sentence because Mr. Simmons is mentally retarded and granting him a new trial as to his convictions.

Respectfully submitted,

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September 19, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 05-CP-18-1368
COUNTY OF DORCHESTER	)	
	)	
KENNETH SIMMONS,	)	
Applicant,	)	
	)	**CERTIFICATE OF SERVICE**
v.	)	
	)	
GARY MAYNARD, COMMISSIONER,	)	
S.C. Department of Corrections	)	
Respondent.	)	
	)	

The undersigned certifies that a copy of the foregoing Applicant's Post-Hearing Brief was served by first class United States mail, postage prepaid, this 19th day of September, 2012, upon the following:

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Jill A. Rider

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS
Kenneth Simmons, #5066, Applicant, v. State of South Carolina, Respondent.	)	C/A No.: 2005-CP-18-1368 (Capital PCR Action) RESPONDENT'S POST-HEARING BRIEF

At the conclusion of the evidentiary hearing on July 2, 2012, this Court indicated that it would receive post-hearing briefs. Respondent would respectfully show this Court the following.

Procedural History

Applicant, Kenneth Simmons, Inmate #5066, was indicted in January 1998 for murder, burglary in the first degree, criminal sexual conduct in the first degree, kidnapping and armed robbery. The charges arose from the September 1, 1996 assault upon Lilly Bell Boyd. The state served a notice of intent to seek the death penalty. Jerry N. Theos, Esq., and James A. Bell, Esq., were appointed to represent Applicant. On February 28, 1999, after a trial before the Honorable Rodney A. Peeples, the jury found Applicant guilty of each offense. The penalty phase began on March 1, 1999. After hearing evidence in aggravation and mitigation, the jury was instructed on determining the existence of the following statutory aggravating circumstances:

1. Criminal sexual conduct
2. Kidnapping
3. Armed robbery
4. Physical torture
5. Burglary

The jury was advised to consider the following statutory mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(4) the age or mentality of the defendant at the time of the crime...

[5] ... that the defendant had mental retardation at the time of the crime. And mental retardation means significantly sub-average general intellectual functioning existing concurrently with deficits and adaptive behavior and manifested during the development period.

®. p. 2382-83).

The trial judge also instructed the jury to consider the following mitigating circumstances:

1. The defendant would not poses a danger if his life is spared but incarcerated.

2. The defendant's long term addiction to alcohol and drugs.

3. The defendant's intoxication at the time of the crime.

®. p. 2382).

On March 2, 1999, the jury found the existence of each aggravating factor. The jury unanimously recommended a sentence of death. ®. p. 2454-58). On that same date, Judge Peeples sentenced Applicant to death for murder, imposed no sentence on kidnapping due to statutory restrictions, and also imposed a life sentence on burglary first degree, thirty (30) years on armed robbery consecutive, and thirty (30) years on criminal sexual conduct in the first degree, consecutive.

Applicant moved after sentencing to have a life sentence imposed because "there is no question that the Defendant suffers from a diminished mental capacity. As such, the imposition of the death penalty would constitute cruel and unusual punishment in violation of the Eighth Amendment." (App.p. 3223-24). The Honorable Rodney A. Peeples denied relief on this issue.

(App.p. 3228). Judge Peeples noted the defense had introduced conflicting expert testimony as to the defendant's mentality. There was testimony that the defendant was either mildly mentally retarded, that mental retardation was suspected, but could not be diagnosed, that the defendant was not mentally retarded but was in the borderline range or that the defendant was not initially mentally retarded, but functioned at the diminished level due to chronic use of alcohol and drugs. (App.p. 3228). Judge Peeples also noted that in light of this conflicting evidence that he gave a series of mitigating circumstance instructions. Id. Applicant filed a timely notice of intent to appeal.

Robert M. Dudek and Eleanor Duffy Cleary, Assistant Appellate Defenders of the South Carolina Office of Appellate Defense, represented Applicant on appeal. On May 7, 2002, appellate counsel filed a Final Brief of Appellant in the Supreme Court of South Carolina raising issues on evidentiary rulings (statement invocation of right to counsel and disallowing appellant's cousin to testify in penalty phase he found the victim's death painful), dismissing a juror, failure to charge a lesser include offense of robbery. *Final Brief of Appellant,* pp. 1-2. Respondent filed its final brief on May 7, 2002.

On July 26, 2002, while the direct appeal was pending, Applicant made a "*Motion to Allow Supplemental Briefing in Light of Atkins v. Virginia.*" Respondent made its return opposing the motion on August 26, 2002. The motion was denied on September 10, 2002, without prejudice to appellant's right to renew the motion following the decision in *Franklin v. Maynard*, a petition for certiorari from a series of death sentenced individuals requesting procedures to be developed in light of *Atkins*. However, as Applicant was also participating in the *Franklin* joint petition, the South Carolina Supreme Court stayed his direct appeal pending the *Franklin* decision. On November 3, 2003, the Supreme Court of South Carolina entered a decision in *Franklin v. Maynard*, 356 S.C.276,

588 S.E.2d 604 (2003). On December 11, 2003, Applicant petitioned to allow supplemental briefing in light of *Franklin*. His petition was denied January 28, 2004.

The Supreme Court of South Carolina heard oral argument on the direct appeal issues on April 6, 2004. On June 14, 2004, the Court entered an opinion that reversed only the conviction and sentence for armed robbery, and affirmed the remaining convictions and sentences. *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004). Applicant filed a petition for rehearing on July 15, 2004, which was denied on August 9, 2004.

Applicant filed a petition for writ of certiorari in the United States Supreme Court on November 8, 2004, and presented the following questions for consideration:

1.

> Whether Petitioner's right to due process was violated under the holdings of Wainwright v. Greenfield, 474 U.S. 284 (1986), and Doyle v. Ohio, 426 U.S. 610 (1976), where the state used the invocation of Petitioner's right to counsel during a competency evaluation to purportedly prove he understood his Miranda warnings at the time he gave an earlier confession?

2.

> Whether the issue of Petitioner's mental retardation should be remanded to the South Carolina Supreme Court for reconsideration in light of the intervening cases of Atkins v. Virginia, 536 U.S. 304 (2002), and Ring v. Arizona, 536 U.S. 584 (2002), since the South Carolina Supreme Court twice refused to allow Petitioner to brief this issue on direct appeal, and the South Carolina procedure adopted following Atkins provides for a judge only determination of mental retardation for defendants sentenced prior to Atkins?

(Cert. Pet., p. 1).

Respondent made filed its Brief in Opposition on December 15, 2004. The Supreme Court of the United States denied the petition on January 24, 2005.

Respondent's Statement of Facts

On Sunday, September 1, 1996, between 5 a.m. and 6 a.m., Applicant, after having spent a night doing drugs, was riding home on his bicycle and came upon 89 year old Lilly Bell Boyd who was out feeding chickens at her home. He went to the back of her house. As the victim was coming back out of the house, Applicant caught her, and pushed her back inside. He asked her for money and she went and got it. She brought a brown envelop with money and he grabbed it and pushed her and she hit her head. He then beat her with a two foot long stick that he found on the porch. Simmons then raped her on her kitchen floor. He tied her hands and feet together. He continued to beat her, resulting in 14 broken ribs. She died as a result of blunt head trauma and manual strangulation. The victim's sister, Virginia Wilson, found the victim after the victim failed to attend church that Sunday. The victim was on the kitchen floor, bound and gagged, and savagely beaten.

Applicant, while a detainee at the Richland County Detention Center, initially reported that he knew something about the murder of a woman in Summerville. On December 5, 1997, he also initially told police that a guy named Shorty killed Mrs. Boyd, and that Shorty had planted Applicant's semen in Mrs. Boyd. Later, Applicant gave taped interviews on December 5 and December 9, 1997 confessing that he acted alone in the murder, rape, and robbery of Lilly Bell Boyd. DNA matching Applicant was found in a vaginal swab sample from the victim.

Applicant's Allegations

In his initial application for post-conviction relief, Applicant makes the following allegations and purported supporting facts:

> 10(a) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution during voir dire.

11(a) Applicant's trial counsel failed to conduct an appropriate and reasonable voir dire to identify jurors who were biased or who were predisposed to find applicant guilty and/or sentence applicant to death and to rehabilitate jurors who possessed legally appropriate scruples against capital punishment. *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 US 510 (2003); *Rompilla v. Beard*, 125 S.Ct. 2456, 2005 WL1421390 (June 20, 2005).

10(b) Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution during the guilt-or-innocence phase of the trial.

11(b) Applicant's trial counsel failed to present evidence and make appropriate objections challenging the relevance and significance of the DNA evidence presented by the prosecution. Trial counsel also failed to conduct a reasonable investigation which would have resulted in the discovery of other evidence relevant to a reliable determination of applicant's guilt-or-innocence. *Williams, Supra; Wiggins, Supra; Rompilla, Supra.*

10© Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution during the sentencing phase of the trial.

11© Applicant's trial counsel failed to conduct a reasonable investigation into all available sources of mitigation. Counsel also failed to present evidence in mitigation of punishment including, but not limited to, evidence supporting applicant's mental retardation, brain damage, mental illness and evidence of applicant's social history, and adaptability to confinement. *Williams, supra; Wiggins, supra; Rompilla, supra.*

10(d) Applicant's death sentence violates the Eighth Amendment to the United States Constitution due to the fact that he is mentally retarded.

11(d) Because Applicant has significantly subaverage intellectual

functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, he is ineligible for capital punishment. *Atkins v. Virginia*, 536 U.S. 306, 122 S.Ct. 2242, 153 L. Ed. 2d 335 (2002); *Franklin v. Maynard*, 356 SC 276, 588 SE.2d 604 (2003).

10(e) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and/or the corresponding provisions of the South Carolina Constitution due to the fact that he has significantly subaverage intellectual functioning existing concurrently with deficits in adaptive functioning.

11(e) The ground for relief states the relevant facts.

(July 1, 2005 Application, p. 3).

In his December 21, 2010 first amended application, Applicant made the following allegations:

1. IAC - Guilt - Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the guilt-or innocence phase of his capital trial when trial counsel: (1) failed to make appropriate objections challenging the relevance and significance of the State's DNA evidence and failed to effectively cross-examine the State's DNA witnesses or otherwise expose flaws in the DNA testimony; (2) failed to retain a false confession expert; and (3) failed to investigate, discover and present evidence that the State's witness, Leslie Sandler, had previously admitted in a court of law that he falsely purported to make a conclusive diagnosis of a former patient on the basis of various standardized tests, including the Wechler Adult Intelligence Scale, when he had not fully administered those tests, nor did he record the results of those tests. Moreover, counsel failed to discover and present evidence that Leslie Sandler falsely stated his credentials during testimony at a sworn deposition and during an arbitration hearing. *See Strickland v. Washington*, 466 U.S. 668 (1994); *Ard v. Catoe* 372 S.C. 318, 642 S.E.2d 590 (2007).

2. IAC - Sentencing - Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the sentencing phase of his capital trial when trial counsel: (1) failed to present evidence of Applicant's adaptability to confinement; and, (2) failed to object to the State's improper statements in closing argument. *See Strickland v. Washington*, 466 U.S. 668 (1994); *Van Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).

3. Eighth Amendment - MENTAL RETARDATION - Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded. Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, he is ineligible for capital punishment. *Atkins v. Virginia*, 536 U.S. 306 (2002; *Franklin v. Maynard* 356 S.C. 276, 588 S.E.2d 604 (2003).

4. DUE PROCESS - Applicant was denied due process of law and a fundamentally fair trial in violation of the sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the South Carolina Constitution, when: (1) the State presented false, misleading, inaccurate and unreliable DNA evidence and failed to disclose relevant, impeachment and other favorable and material evidence; and, (2) the State failed to disclose relevant and material impeachment evidence related to its witness, Leslie Sandler. *See Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); *Darden v. Wainwright*, 477 U.S. 168 (1986).

Discussion

The testimony was developed over a series of hearings (February 1-4, 2010; December15, 2011; and, July 2, 2012). This Court also allowed testimony to be taken by deposition (Dr. Leo, Ms. Crane, and Dr. Baird), and also admitted two affidavits (Drs. Charlotte Word and Robin Cotton). Respondent now presents this brief in support of Respondent's position that Applicant has failed in his burden of proof and is not entitled to any relief.

General Law of Ineffective Assistance of Counsel.

The law is well settled: In order to show ineffective assistance of trial counsel, an applicant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1985). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id. See also Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have

been the result of reasonable professional judgement." *Strickland*, 466 U.S. at 690.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" under the prevailing norms. *Id.* An applicant claiming error bears the burden of showing counsel's conduct did not constitute reasonable assistance. *Id.*

Applicant's Voir Dire Allegation

This issue in the original application was abandoned in the December 21, 2009 amendment. Applicant has failed to identify any act or failure on counsel's part that would indicate a valid ineffective assistance of counsel claim in regard to *voir dire*. Even so, the records before this Court show that trial counsel performed well within the range of competency expected of one who practices criminal law in this State in regard to the extensive jury qualification and selection process afforded defendants in capital trials. (*See generally* Vol. 1 and 2, jury qualification and selection). Applicant has failed in his burden of proof.

Applicant's Challenges to the DNA evidence

Applicant alleges the following errors in regard to the DNA evidence admitted at trial:

- Applicant was denied the right to effective assistance of counsel ... when trial counsel ... failed to make appropriate objections challenging the relevance and significance of the State's DNA evidence and failed to effectively cross-examine the State's DNA witnesses or otherwise expose flaws in the DNA testimony; ....

- Applicant was denied due process of law and a fundamentally fair trial ... when ... the State presented false, misleading, inaccurate and unreliable DNA evidence and failed to disclose relevant impeachment and other favorable and material evidence; ....

(December 21, 2009 First Amended Application for Post-Conviction Relief, pp. 2-3).

Applicant presented evidence at the PCR hearings in challenge to the accuracy of the DNA statistics offered at trial, and also the accuracy of the demonstrative aid used by the State. Respondent will address each of these general issues separately below.

The Challenge to Statistical Evidence

The DNA evidence is not exculpatory. The testimony developed at the PCR hearing reflects, however, that there is disagreement on how the statistical information should have been presented in explanation of its value. In essence, Applicant contends the statistical information presented was incorrect, not as to calculation but as to significance, which was misleading. The following excerpt from the February 2010 PCR Evidentiary Hearing transcript expresses Applicant's position, as offered by his PCR expert in DNA, Steve Lambert, regarding the challenge to the statistic provided by Life Codes and offered at trial:

> ... What they calculated was how rare Mister Simmons is in the population. What they should have calculated was how rare the DNA profile that showed up on the evidence was. Those are going to be two vastly different numbers, which we saw between millions down to 1 in 500. They calculated his frequency and reported that which is – they calculated it correctly fo him but it doesn't mean anything. I mean, I have a frequency associated with me but that doesn't have anything to do with evidence at the crime scene.

(February 2010 PCR Evidentiary Hearing Tr. p. 312, line 17 - p. 313, line 1).

According to random match calculations offered by Applicant at the February 2010 PCR Evidentiary Hearing, the DNA evidence demonstrates:

> The probability of selecting an unrelated individual that could have contributed to that evidence found on the vaginal swab of Ms. Boyd and then taking somebody at random out of the room and testing them, what is the probability that they are going to randomly match that evidence is approximately 1 out of every 500 individuals.

(February 2010 PCR Evidentiary Hearing Tr. p. 313, lines 4-9).

Applicant is included in that number. (February 2010 PCR Evidentiary Hearing Tr. p. 313, lines 10-15). Further, that number, according to Mr. Lambert, reflects a sequence that would "eliminate over 99% of the population, because 1 in a 100 is 99 and so it's probably, you know, its less than 1% of the population ... Like .2% of the population would be included." (February 2010 PCR Evidentiary Hearing Tr. p. 313, lines 18-22). Another of Applicant's PCR experts, Dr. Charlotte J. Word, similarly testified at the July 2, 2012 hearing that nothing in the results excluded Applicant, and also concluded more than 99% of the population would be excluded.

There is little question that statistical information may be characterized in vastly different ways – the same number can be used to wrongly suggest a probability of guilt, or a larger pool of possibilities:

> One of the most relevant sets of studies is by Thompson and his colleagues on the "Prosecutor's Fallacy" and the "Defense Attorney's Fallacy." These can occur when an expert opines that a match exists between crime scene evidence and evidence known to originate with the defendant, and data are offered so that the fact finders have some basis for evaluating the likelihood that the two samples shared a common source, namely, the defendant. ...
>
> In the Prosecutor's Fallacy, fact finders mistakenly think that the frequency of the trait in the population tells them something about the probability of guilt or innocence of the particular defendant. For example, if fact finders learn that a trait shared by the perpetrator and the defendant occur in 2% of the population, many of them infer that the chance that the defendant is not the source is only 2%. In the Defense Attorney's Fallacy, fact finders might realize that a population rate of 2% would mean that in a city of, say, 1,000,000 people, 20,000 would have the trait, and mistakenly regard the evidence as having virtually no probative value on the question

of identity. The first error overvalues the evidence and the second undervalues it.

Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings L.J. 1159, pp. 1178 -1179 (2008).

It is not disputed that care should be taken in referencing both results and statistics. However, not every error in this vein will negatively affect a trial to the extent that confidence in the result is undermined. To illustrate, Respondent submits that the Supreme Court case *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665 (2010), provides some clarification of the potential impact of such errors. The Court considered the concept of the "prosecutor's fallacy" and its impact on the trial, along with an allegation of statistical inaccuracies. Though *McDaniel v. Brown* was a federal habeas case reviewing a circuit appeal court's review of a sufficiency of the evidence claim, the Supreme Court's reasoning regarding the DNA evidence is instructive as it addresses both the incorrect linkage of mere statistics to guilt, and the value of DNA evidence even where the numerical assignment of statistics is challenged.

In *McDaniel v. Brown,* convicted defendant Troy Brown challenged the accuracy of the DNA evidence by submitting a new report in federal habeas proceedings. The new report indicated that the State's DNA expert "mischaracterized the random match probability and misstated the probability of a DNA match among his brothers." 558 U.S. at ___, 130 S.Ct. at 669. Brown argued discounting the inaccurate testimony in whole, "there was insufficient evidence to convict him." *Id.* Brown eventually agreed that the new report should not have been considered in regard to sufficiency of the evidence as the report was not part of the evidence before the jury. 130 S.Ct. at 672. However, the Court reasoned:

Even if the Court of Appeals could have considered it, the Mueller Report

> provided no warrant for entirely excluding the DNA evidence or Romero's testimony from that court's consideration. The Report did not contest that the DNA evidence matched Troy. That DNA evidence remains powerful inculpatory evidence even though the State concedes Romero overstated its probative value by failing to dispel the prosecutor's fallacy. And Mueller's claim that Romero used faulty assumptions and underestimated the probability of a DNA match between brothers indicates that two experts do not agree with one another, not that Romero's estimates were unreliable.

130 S.Ct. at 672-73.

The State's evidence at Brown's trial reflected essentially "a 1 in 6,500 chance that one brother would match," while the habeas defense expert whittled the figure to as low as "1 in 66." 130 S.Ct. at 673. The Court found "[e]ven under [the habeas defense expert's] odds, a rational jury could consider the DNA evidence to be powerful evidence of guilt." *Id.* It should be noted that the DNA evidence in that case was critical, with the State conceding at one point that absent the evidence, there was insufficient evidence to support a conviction. *Id.* The record under review here is quite different.

First, neither Dr. Crane nor Dr. Baird suggested guilt. Second, the solicitor suggested guilt *only* in context of viewing all the evidence together:

> ... DNA is never going to be able to tell you with a hundred percent certainty this is the person who's semen is found her based on DNA match because they can't possibly look at each DNA allele they did nine of them in this particular case. All they can do is say whether or not a person is excluded from that DNA profile or not excluded. Then they can do statistical probabilities of how often that particular profile exists in the population. And that's what these people testified to. And again, I'm not going to stand up here and tell you with 100 percent certainty that you should convict on DNA evidence alone. It's just part of the State's case.

(ROA, p. 2005, lines 1-14).

> ... So the bottom line, Ladies and Gentlemen, is everything that's in his vaginal swab is consistent with the combination of Mrs. Boyd's blood and Kenneth Simmon's

> blood. There's nothing inconsistent. There's nothing in here that is not in one of the other of Mrs. Boyd's blood or Kenneth Simmons' blood. So Kenneth Simmons is not excluded as a donor of that DNA.
>
> He's not excluded in the frequency of occurrence that Kenneth Simmons' blood in the Black population is one of 8,029,316. And again, I'm not asking y'all for a conviction based on DNA. DNA merely corroborates Kenneth Simmons' testimony, the confession where he says he raped her. Now, if you want to really stretch your imagination of these DNA figures, you might say somebody else could have that same DNA profile. And I guess that's conceivable. But the only person with that consistent DNA profile that confessed to raping Lilly Bell Boyd is Kenneth Simmons. That's one in the world, and he's the only one.

(ROA, p. 2012, line 5 - p. 2013, line 1).

The results and statistics may be criticized or questioned in individual parts, but, when reviewing the record as a whole, it is a fair and reasonable determination that the conclusions, and arguments, on the DNA evidence and testing presented at trial were "presented in a fair and reliable manner." *Id* at 675. *See also Id* at 673 ("That DNA evidence remains powerful inculpatory evidence *even though the State concedes Romero overstated its probative value by failing to dispel the prosecutor's fallacy.*") (emphasis added). Further, the statistic challenged here, by Applicant's own admission, goes only to occurrence of his profile and simply does not matter. (See February 2010 PCR Evidentiary Hearing Tr. p. 276, lines18-20, "... they were quoting a meaningless number. They are quoting Mister Simmons' frequency of his DNA profile which is completely irrelevant to the evidence."). At any rate, that number was not tied specifically to probability of guilt.

However, even though the DNA evidence did not specifically identify Applicant, the evidence was still relevant and valuable in that the evidence did not exclude Applicant. As noted, the value of the evidence specifically as to identity was not overstated. The testimony was neither

presented as nor could it be viewed as conveying the existence of a conclusive match. *See, for example, State v. Simmons*, 360 S.C. 33, 37, 599 S.E.2d 448, 450 (2004) (state supreme court on direct appeal review characterizing the evidence as "DNA testing indicated the semen taken from [victim's] body was consistent with Simmons' DNA."). Additionally, the evidence would be considered, even if challenged in the specifics of the chart or CTT testing. Those tests would still show that over 99% of the population is excluded, a significant, but still not conclusive result. *Cf. State v. Bostick*, 392 S.C. 134, 142, 708 S.E.2d 774, 778 (2011) (DNA testing of blood on defendant's clothes which eliminated 99% of the population but could not be matched to the victim, did not sufficiently tie defendant to murder so as to defeat a motion for summary judgment). *Bostick* is an interesting case to consider in regard to the narrowing possibility as it was the lack of definite circumstantial evidence in addition to the lack of definite DNA testing that resulting in the conclusion Bostick was entitled to a directed verdict. To the contrary here, we have a confession that includes details supported by forensic evidence; opportunity and connection to the victim; and DNA evidence that cannot exclude Applicant. Taken together, the evidence presents a powerful case for guilt.

Further, this is not a case where defense counsel failed to investigate the DNA testing and results, or failed to pursue a reasonable strategy. In fact, counsel retained a DNA expert, consulted with that expert,[1] and requested and received specific discovery on the DNA testing for his expert to review. (See February 2010 PCR Evidentiary Hearing Tr. pp. 329, line 6 - p. 336, line 4). Counsel, with the expert's aid, shaped the cross-examination not on incorrect entries on the chart or

[1] Defense counsel Theos testified that his expert was Dr. Ron Ostrowski from North Carolina. Mr. Theos also testified that he had retained and worked with Dr. Ostrowski in other cases. (February 2010 PCR Evidentiary Hearing Tr. p. 329, lines 14-24).

subjective consideration, but on the firm concession by Ms. Crane that a specific "1.2 allele" could not be confirmed, and it could be that Applicant was completed excluded:

Q. Isn't it true that with this type of test, as you say there is no direct dot?

A. Correct.

Q. For the 1.2 allele?

A. Correct.

Q. And that's why your report says it may be present?

A. Correct.

Q. That's why you cannot state with certainty that the 1.2 is present?

A. That's correct.

Q. So just as the 1.2 allele may be present, it may also not be present?

A. Correct.

Q. Now, if the 1.2 allele is present as you've testified - - and you said it may be - - then Kenneth Simmons cannot be excluded?

A. Correct.

Q. If the 1.2 allele is not present - - as you said it may not be?

A. Correct.

Q. Then Kenneth Simmons would have to be excluded?

A. Correct.

Q. He could not be the donor?

A. Correct.

Q. If the 1.2 allele were therefore not present and he could not be the donor, then he would have to be ruled out completely?

A. Correct.

Q. Regardless of what other matches there might be?

A. Correct.

(ROA, p. 1472, line 7 - p. 1473, line 11).

Defense counsel not only attempted to neutralize the DNA evidence results with questions on this key allele, but also to neutralize the statistical evidence with such questions. (See ROA, p. 1482, line 16 - p. 1484, line 13). Specifically, defense counsel underscored the possibility that all the results and statistics were meaningless if 1.2 allele is not present in cross-examination of Dr. Baird :

Q. Dr. Baird, your opinion related to these probabilities and percentages is based upon the assumption that the 1.2 allele is present; correct?

A. It's based on the assumption for the H.I.C.Q. Alpha [sic] system and as obviously combined in with the final number that - -

Q. Right; but it's based on the assumption that a 1.2 allele is print [sic] as Mrs. Crane previously testified?

A. Yes, it is.

Q. All right. If however the 1.2 allele is not present as Mrs. Crane testified it may not be; then Mr. Simmons would have to be excluded as a possible contributor or donor; correct?

A. Yes, he would.

Q. And if Mr. Simmons is excluded, then these numbers mean nothing, correct; as it relates to Mr. Simmons?

A. Sure. These numbers represent Mr. Simmons's DNA profile. If the 1.2 allele is not present in the mixture, then he's excluded, and there would be no calculation.

(ROA, p. 1482, line 16 - p. 1483, line 11).

Applicant's PCR expert in DNA, Mr. Lambert agreed that the 1.2 allele information was reported correctly, and that Mr. Simmons could be excluded under the theory advanced at trial. (February 2010 PCR Evidentiary Hearing Tr. p. 268, line 22 - p. 269, line 7; p. 321, lines 14-22).

Further still, the statistical evidence presented by Dr. Baird was not presented as a "match," rather Dr. Baird testified to a general "does not exclude" conclusion:

> A. There are nine different generic tests done in this case. In the Black population it's about one in eight million people. In other words, one person in eight million would have that profile that we see in Mr. Simmons.
>
> Q. All right. And you also see that same profile in the male fragment of the vaginal swab?
>
> A. Right; in the vaginal swab is a DNA profile consistent with Mr. Simmons being a contributor as well as the victim.

(ROA, p. 1481, line 24 - p. 1482, line 8).

Thus, the record does not support that defense counsel was deficient in the handling of the DNA evidence as whole. Defense counsel retained and consulted an expert and pursued a reasonable strategy of showing – regardless of matching points or statistics – that Applicant could be completely excluded and the possible similarities inconsequential. Moreover, defense counsel did so by way of the State's experts' own admissions. Further, the statistics at issue were identified as ones for Applicant's profile, which, according to Applicant's PCR expert, is correct but of no moment. Consequently, if Applicant could show deficient performance, he cannot, on this record show prejudice where the reasonable strategy followed sufficiently and effectively responded to the DNA evidence presented by the State. *Compare People v. Watson*, 965 N.E.2d 474, 482 (Ill. App. 2 Dist. 2012) (finding counsel ineffective where "[t]he error created by the absence of argument or evidence challenging the strength of a partial match is compounded by the absence of argument or evidence

challenging the statistical significance of a partial match.").

In sum, while DNA evidence is a "powerful tool," its impact should not be overstated by either the prosecution or the defense. Its importance should likewise not be overstated by viewing the evidence in isolation. Here, when reviewing the record as a whole, for all the reasons argued above, Applicant has failed to show either deficient performance or prejudice. As noted, defense counsel and his DNA expert prepared a defense that cleanly and precisely addressed both the "could not exclude" testimony, and any related statistics. Petitioner has failed to show defense counsel was constitutionally deficient in representation:

> ...In *Strickland,* this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S.Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.,* at 686, 104 S.Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.,* at 689, 104 S.Ct. 2052.
>
> Recognizing the "tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence," *ibid.,* the Court established that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *id.,* at 690, 104 S.Ct. 2052 . To overcome that presumption, a defendant must show that counsel failed to act "reasonabl[y] considering all the circumstances." *Id.,* at 688, 104 S.Ct. 2052. The Court cautioned that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.,* at 690, 104 S.Ct. 2052.

Cullen v. Pinholster, ___ U.S., ___, ___, 131 S.Ct. 1388, 1403 (2011).

Here, the evidence supports that defense counsel rendered thoughtful, careful, and extremely reasonable representation in regard to the DNA evidence. Petitioner has failed to establish deficient

performance.

At any rate, even if deficient performance is found, there is no prejudice. To establish *Strickland* prejudice, an applicant must demonstrate that there is a "reasonable probability" that "the factfinder would have had a reasonable doubt respecting guilt." *Strickland,* 466 U.S. at 694-95. *See also Edwards v. State,* 392 S.C. 449, 459, 710S.E.2d 60, 66 (2011); *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 614-15 (Ct. App. 2012). Again, the results admittedly do not exclude Applicant, and those results, though they may be challenged as they have been in this action, still show that consistency. Based on the evidence presented during the PCR hearings, defense counsel could have asked additional questions about or objected to the chart, but defense counsel's theory was to undercut *all* testing and *all* results – if the 1.2 allele was not present, Applicant was not the donor regardless of any other consistencies. This avoids all the pitfalls of unpersuasive questioning on individual tests or on statistical formulas. That is a fair strategy consistently applied in the trial of this case. But, as in *McDaniel v. Brown*, the test results, and even questioned statistics, may still come in and be considered for their worth or challenged on cross-examination even if experts disagree on the value of the evidence. Applicant has failed to demonstrate that evidence was in anyway inadmissible. Further, Applicant's confession corroborates the possibility, and, together, create a substantial case for guilt. Again, Applicant has failed in his burden of proof.

The Solicitor's Chart

The Solicitor's chart of DNA samples and results, which was used as a demonstrative aid during the trial, has incorrect entries. Applicant contends that by relying on the charge, the State presented "false, misleading, inaccurate and unreliable DNA *evidence*." (See December 21, 2010 amended application). (emphasis added). Applicant has not proven his case.

As an initial matter, a demonstrative aid is not primary evidence but its value depends upon the testimony connected to the exhibit:

> Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony. Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance....

Clark v. Cantrell, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000). *See also Wharton's Criminal Evidence*, § 16:25 Summaries ("Courts permit the use of charts or summaries as demonstrative aids when they help organize and illustrate a witness's testimony. When used in this way, the summaries are not substantive evidence, but rather are designed to merely assist the witness when testifying. These demonstrative aids must be distinguished from the summaries admitted under Fed. R. Evid. 1006 and comparable state rules, which are admitted in place of voluminous documents that cannot be easily introduced or examined in court and which most courts treat as substantive evidence."). By definition, "[d]emonstrative evidence is not the thing itself; it only demonstrates or illustrates the facts given by other evidence." Danny R. Collins, South Carolina Evidence 400 (2d ed. 2000).

Applicant failed to show that the use of the chart at trial affected the presentation of the results and evidence offered by Life Codes scientist Ms. Lauren Crane. In short, Ms. Crane's testimony was an accurate reflection of her tests and her results. First, the jury was aware that the chart was "a combination of charts" otherwise prepared and not a chart from the laboratory as that was implicit in the question on identification. (ROA, p. 1464, lines 1-3). Ms. Crane not only clarified in her deposition in this action that she had not seen the combination chart prior to trial, but also confirmed that there was an error in the CF1PO column, ("It should be 10, 12, not 10, 11").[2] (Crane

[2] The mistake was consistent in three entries and did not reflect a difference from sample to sample. Moreover, these entries were not used in the official report by Ms. Crane. Indeed,

Deposition, pp. 14-15). Further, she stated in her deposition, "I didn't testify to the likelihood based on this chart." (Crane Deposition, p. 15). Ms. Crane that stated the chart, though admittedly having errors, still aided in the presentation of testimony "because it had the types that were listed there," and noted she did not "go through all the details of each allele" in her trial testimony but spoke in more general terms. (Crane Deposition, p. 19). This is confirmed by her testimony at trial that only referenced the incorrect "10, 11" when explaining banding patterns were explained by numbers, and the method of testing in general. (ROA, p. 1466, lines 15-23). In essence, Ms. Crane did not review each entry on the chart for the jury and it follows it was not critical for the jury to know each result, but the conclusion on inclusion or exclusion.[3] Further, at trial, though a question about a DNA "match" was posed, Ms. Crane's response did not address a "match," but reflected (much like Dr. Baird's conclusion testimony) a broad response indicating Applicant was not "eliminated" based on testing:

> Q. All right. Would you state whether or not, Mrs. Crane, based on the tests you've done that are reflected on that charge, whether the DNA profile for the male fraction of the vaginal swabs that was taken from Lilly Bell Boyd's autopsy by Dr. Nichols was identical to the DNA profile on Kenneth Simmons' blood in all nine loci or locations there?

PCR expert Mr. Lambert stated he would not use those results either. (See February 2010 PCR Evidentiary Hearing Tr. p. 278, line 6 - p. 286, line 19).

[3] The solicitor did use the chart and apparently reviewed some of the specific entries in his closing. (ROA, p. 2010, line 14 - p. 2012, line 5). But, the solicitor, as noted in detail above, concluded with a broad statements on "not excluded" and arguing that nothing in tests were inconsistent with *either* victim or Applicant. (ROA, p. 2012, lines 9-12). The solicitor also advised the jury that they were "to take the fact as you find those facts to be from the witness stand" and "[w]e had a lot of technical stuff of DNA and psychiatrists and psychologist; and I've tried to keep notes; and I try to be as accurate as I can. But if I accidently misstate something, you remember it differently. You go by your memories and not by what I said. And you do have the ability if you want to hear testimony again if you think that's necessary or if there's some dispute over it." (ROA, p. 1951, line24 - p. 1952, line 11).

A. Basically what we found was a mixture of DNA which we could not eliminate Kenneth Simmons' blood as being a contributor to.

(ROA, p. 1470, line 21 - p. 1471, line 5).

Applicant appears to have presented two different theories, however, on why the chart was incorrect – one, that the CTT results were incorrect on the chart and should not have been used at all (which Dr. Crane maintains they were not used in her official report, see Crane Deposition, pp. 24-25), and, two, some of the "dot" tests may have been misinterpreted.

Applicant repeatedly attempted to blend the lab testing and the solicitor's chart, but those items remained in separate lines of origin and authenticity. In other words, the solicitor's chart did not affect testing or the report of testing. Simply, errors on the chart do not equate with errors in testing or results. While Applicant presented initial testimony that some of the "dots" were not visible, Dr. Word candidly admitted at the July 2, 2012 hearing, that the "dots" may have been visible at the time of the initial test.

Thus, the resulting question of relevance here is whether defense counsel should have determined whether the chart was incorrect, and should have objected and/or explained the incorrect entries. *See generally Strickland, supra; Clark v. Cantrell*, 339 S.C. at 386, 529 S.E.2d at 538 (finding an abuse of discretion in admitting computer animation of accident where "the probative value of the animation did not substantially outweigh the danger of unfair prejudice and misleading the jury due to the inaccuracies it contained"). Defense counsel could have objected to the chart as far as the incorrect recording of the "10,11," but it makes little difference. Ms. Crane's testimony would not change based defense counsel addressing the error on the chart. Respondent submits that Applicant has failed to show an incorrect interpretation by Ms. Crane, though Applicant has

challenged the subjective dot testing and sufficiency of the gel slides today as opposed to the 1996 and 1997 tests, (see ROA pp. 1459, 1462). Again, Dr. Word testified that the "dot" simply may not be prominent or as prominent today (now 2012) as it was then. Further, Mr. Lambert testified he would not use any of the CTT testing. (February 2010 PCR Evidentiary Hearing Tr. p. 286, lines 18-19, "I'm not saying that he's excluded. I would throw this whole result out as inconclusive."). Thus, while Applicant produced some evidence that different questions could have been asked, and the errors on the chart could have been questioned, he has failed to show a stronger case could have been made on cross-examination. As discussed above, this is not a case where counsel did not investigate DNA testing and result.

Again, Applicant has failed in his burden of proof. To the extent Applicant claims ineffective assistance, he cannot demonstrate both *Strickland* deficient performance and resulting prejudice for all the reasons argued herein. To the extent he claims the presentation of false evidence or failure to provide impeachment materials, he has also failed in his burden of proof.

It is well settled that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment...." *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959). *See also Riddle v. Ozmint*, 369 S.C. 39, 47-48, 631 S.E.2d 70, 75 (2006), *quoting Giglio v. U.S.*, 405 U.S. 150, 153 (1972) ("A 'prosecutor's *deliberate* deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.'"). "In order to show a violation of *Napue,* petitioner must show that [the] testimony was false, that the prosecution knew of the falsity, and that the falsity affected the jury's judgment." *Porter v. Warden of Sussex I State Prison*, 722 S.E.2d 534, 540-41 (2012). As noted above, the chart is wrong, but there is no evidence of deliberate deception, or even that the

witness or the solicitor recognized the error on the chart at the time of trial. Further, there is no evidence that the "falsity affected the jury's judgment." *Id.* Ms. Crane stated in her deposition that her *tests* allowed her to conclude that Applicant could not be excluded; thus, the error – whether typographical or reading error in transferring the numbers to the chart – could not have affected Applicant negatively. Further, the error was consistent in the column and did not show created discrepancy in that respect. At any rate, whether the CTT results where included or not on the chart at all, the testimony would have been exactly the same as Ms. Crane's testimony did not rely on the chart. Further, the error does not present a key fact or even a specific fact for the jury to consider. Rather, the DNA evidence, as noted above, was consistently reference in broad terms along the lines that Applicant was not excluded and/or every marker was consistent with *either* Applicant or victim. Lastly, the numbers from Life Codes were correct and were disclosed to the defense. (See February 2010 PCR Evidentiary Hearing, p. 288, line 22 - p. 289, line 1).[4] The minor chart error remains just that. Applicant is not entitled to any relief.

Applicant's Mitigation Evidence Investigation and Presentation Claim

This issue in the original application was abandoned in the December 21, 2009

[4] Applicant presented his DNA expert Mr. Lambert to confirm the discovery received for the trial. Mr. Lambert made reference to "page 15" of the "Orchid CellMark file," (Exhibit 16) not being disclosed to the defense. (See February 2010 PCR Evidentiary Hearing Transcript, p. 261, lines 2-16). However, Mr. Lambert described the page as being attached to evidence that had been returned to the clerk of court. (February 2010 PCR Evidentiary Hearing Transcript, p. 321, lines 3-11). Mr. Lambert could only guess at its origins. (February 2010 PCR Evidentiary Hearing, p. 315, lines 15-21). Even so, Mr. Lambert indicated the page reflected a run that he considered not reliable. (See February 2010 PCR Evidentiary Hearing Transcript, p. 284, line 24 - p. 289, line 18). As such, Applicant has again failed in his burden of proof that any information, even impeachment information, was not disclosed – he can show neither origin nor relevance of the page.

amendment. Applicant has failed to identify any act or failure on counsel's part that would indicate a valid ineffective assistance of counsel claim in regard to mitigation evidence. Even so, the record shows that a case in mitigation was not only investigated, but also considered and actually presented. The record first shows that counsel presented a defense in the guilt-innocence phase, and introduced evidence of Applicant's mental condition. (*See generally* R. pp. 1526; 1606; 1675; 1690). That evidence was specifically adopted into the guilt phase. (R. p. 2198). The record also shows that counsel presented family and friends in the penalty phase to testify on Applicant's behalf. (*See generally* R. pp. 2200-01 [counsel's introduction to calling Calvin Linning; Charlie Wilson; Gene Simmons; Annette Geddis; Sandra Franklin; Robin Schmeiding; Doris Russell]).

False Confession Expert

In his application, he contends that trial counsel erred in failing to retain or call a false confession expert at the trial. In support of this claim, he present by deposition the testimony of Dr. Richard Leo, a social psychologist, to testify. [5] Respondent submits that Petitioner has failed in his proof to show either deficient performance or prejudice under the Strickland standard.

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[5] Although the South Carolina Supreme Court has held social science testimony is not required to fully meet the full rigors of expert scientific testimony of State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009) and Rule 702 in State v. Douglas, supra, Respondents submit that such false confession expert testimony fails to satisfy those requirements. See State v. Free, 798 A.2d 83 (N.J. 2002)(Kassin testimony rejected under Frye standard); People v. Kogut, 806 N.Y.S.2d 366 (S.Ct. Nass. Co. 2005)(similar testimony limited where interrogation technique evidence excluded U.S. v. Adams, 271 F.3d 1236 (10th Cir. 2001)(not admissible); State v. Tellier, 526 A.2d 941 (Me. 1987) (same); State v. Ritt, 599 N.W.2d 802 (Minn. 1999); State v. Davis, 32 S.W.3d 603, 608 (Mo. Ct.App. 2000). Respondents note that similar testimony, though, has been deemed admissible in U.S. v. Hall, 974 F.Supp. 1198 (C.D. Ill. 1997); Miller v. State, 770 N.E.2d 763 (Ind. 2002); Boyer v. State, 825 So.2d 418 (Fla. 1st DCA 2002).

Counsel reasonably investigated the Applicant's mental background and the evidence surrounding the three statements and chose to present his defense. Counsel chose to challenge the reliability of the statements based upon testimony from his mental health(and the state's) mental health experts. These experts and the evidence presented revealed the same risks that the proffered false confession expert would have testified. Further, the Respondent submit that in 1999, reasonable counsel would not have sought out a novel "false confession" expert under the circumstances where many of the factors were evident and could be understood by the jurors without the necessity of the expert in this case. He failed in his burden of proof.

During the PCR hearing, counsel Jerry Theos testified that he did not consider the possibility of finding a so-called false confession expert. PCR 348-349. He stated that he relied upon his mental health experts to bring into question whether the confession were coerced and whether it was under duress and whether the statement was credible. PCR 349. Counsel Theos stated that while he thought there were problems concerning the reliability of the confession, although calling a false confession expert was not on his radar screen and not consulted, Theos thought he could adequately cover that issue with the experts he had. He noted that he had done the same thing in State v. McHoney who was ultimately not sentenced to death. PCR 355-356.

This trial was in **February and March 1999.** At that time South Carolina had not addressed the admissibility of expert testimony, particularly related to false confessions. At the outset of the deposition, Respondents noted that it was objecting pursuant to Rule 702, 403, and 104(a). In particular, Respondent asserts that this type of evidence should be totally excluded because the issue of the credibility of the confession is within the province of the jury. As noted, even at this date, the South Carolina Supreme Court has not yet addressed the admissibility of

testimony concerning false confessions.

The admissibility of an expert's testimony is a matter within the trial court's sound discretion. State v. Douglas, 367 S.C. 498, 507, 626 S.E.2d 59, 63 (Ct.App.2006). The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. Id. at 507, 626 S.E.2d at 64. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Id. To warrant reversal, any error by the trial court in admitting or excluding expert testimony must result in prejudice. Id. at 508, 626 S.E.2d at 64.

Rule 702 of the South Carolina Rules of Evidence governs the admissibility of testimony by experts, providing:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE.

The state court first addressed the issue surrounding the admission of false confession expert testimony in 2004 in State v. Myers (Wesley Max), 359 S.C. 40, 596 S.E.2d 488 (2004). However, it must be noted that this case did not address the admissibility of the same false confession evidence that Applicant is seeking to present because the trial judge, in his discretion, had admitted some evidence from the expert. The issue was whether the exclusion of the other evidence was an abuse. In Myers, the expert was qualified as an expert in social psychology and testified about the psychology of confessions and false or coerced confessions. Id. at 50, 596

S.E.2d at 493. The trial court in Myers prohibited the expert from testifying about the facts of particular cases from Connecticut and Indiana in which people falsely confessed to crimes and were later exonerated. Id. In affirming the trial court, our supreme court found the expert related some facts about the specific cases but did not use names. Id. at 51, 596 S.E.2d at 494. Furthermore, the court found no prejudice in part because the expert "was able to testify at length about false and coerced confessions." Id. Therefore, the court found any error in excluding specific case studies from the expert's testimony was harmless as the evidence was merely cumulative to the expert's other testimony. Id. More recently in State v. Cope, 385 S.C. 274, 288, 684 S.E.2d 177, 184 (S.C.App.,2009), cert. granted (2012), the appellate court found no abuse of discretion in restricting a false confession expert's testimony. In Cope, the trial court's exclusion of testimony from an expert regarding specific details of two cases involving false confessions was held to not an abuse of discretion, where the expert testified as to the theories underlying false confessions, the techniques used by interrogators that could lead to false confessions, and also informed the jury that there were "innumerable actual cases" of coerced internalized false confessions.

Here, the issue is whether counsel acted reasonably in his investigation of the confessions in not consulting or presenting in 1999 an expert in false confessions to the court or the jury. In an ineffective assistance claim, the actions of counsel are viewed from counsel's perspective at the time. The two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), governs claims of ineffective assistance of counsel. To show a violation of the Sixth Amendment right to effective assistance of counsel, a petitioner must establish that his attorney's performance was deficient and that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687. An attorney's performance is deficient if "counsel's representation fell below an objective standard of reasonableness." Id. at 688. The defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Wiggins v. Smith, 539 U.S. at 521.

An attorney's deficient performance is prejudicial if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. The petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Unless the petitioner demonstrates both deficient performance and prejudice, "it cannot be said that the conviction [or sentence] resulted from a breakdown in the adversary process that renders the result unreliable." Id. at 687.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, _ U.S. _, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). [T]he Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–90. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge.... The question

is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690.[6]

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[6] Compare State v. Free, 798 A.2d 83 (N.J. Super. 2002) (trial court properly excluded testimony of social psychologist on subject of coerced confessions since the opinions offered were not scientifically reliable and proposed evidence failed to satisfy the evidentiary requirement that the nature of the expert testimony must be such as will assist the trier of fact to understand the evidence); State v. Davis, 32 S.W.3d 603 (Mo. Ct. App. 2000) (trial court properly excluded expert testimony of social psychologist on issue of false confessions). Miller v. State, 770 N.E.2d 763 (Ind. 2002) (trial court erred by excluding in its entirety proffered testimony of social psychologist concerning false confessions); Boyer v. State, 825 So.2d 418 (Fla. Ct. App. 2002) (same); United States v. Shay, 57 F.3d 126 (1st Cir. 1995) (in prosecution based mainly on defendant's inculpatory statements, defendant was entitled to present otherwise admissible expert psychiatric testimony that he suffered from recognized mental disorder which caused him to make false, grandiose statements of the type being used against him by the government); United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) (district court erroneously excluded testimony of social psychologist concerning false confessions), with People v. Son, 79 Cal. App. 4th 224, 93 Cal. Rptr. 2d 871 (2000) (trial court properly excluded expert testimony of social psychologist where there was no evidence that police engaged in tactics wearing down defendant into making a false confession and proffered testimony was cumulative to testimony by defendant that confession was false and made only because he had been promised lenient sentence in exchange for it); Moreover, our research has located no Alabama case in which this Court or the Alabama Supreme Court has specifically addressed the merits of the use of expert testimony concerning "false confessions," induced by interrogation techniques. Cf. State v. Smith, [Ms. CR–06–0898, October 1, 2010] ——So.3d —— (Ala.Crim.App.2010) (plurality opinion containing dicta referencing the circuit court's order as to the use of expert testimony on "false confessions").

"[A]s to the theory of false confessions, defendant has offered no Illinois decisions holding that such opinions are admissible. To be sure, expert testimony may be received under the helpfulness standard where it involves knowledge or experience that a juror generally lacks. Kimble v. Earle M. Jorgenson Co., 358 Ill.App.3d 400, 409, 294 Ill.Dec. 402, 830 N.E.2d 814, 823 (2005). However, we do not find any support for admissibility of false confession evidence in the authorities cited by defendant. See People v. Miller, 173 Ill.2d 167, 186–88, 219 Ill.Dec. 43, 670 N.E.2d 721, 730–31 (1996) (DNA evidence admissible where generally accepted in the relevant scientific community); People v. York, 312 Ill.App.3d 434, 437, 245 Ill.Dec. 227, 727 N.E.2d 674, 677–78 (2000) (counsel ineffective in failing to present exculpatory DNA evidence); People v. Smith, 236 Ill.App.3d 35, 42, 177 Ill.Dec. 492, 603 N.E.2d 562, 566 (1992) (upholding admissibility of child psychologist's opinion as to victim's truthfulness). We recognize that opinions concerning false confessions have been admitted in other jurisdictions. See United States v. Hall, 93 F.3d 1337, 1345 (7th Cir.1996), aff'd, 165 F.3d 1095 (1999); Miller v. Indiana,

The threshold question when expert testimony is proffered is whether the particular subject of the proposed testimony is within the ken of a typical juror. The notion that defense counsel had an obligation to hire an expert on false confessions in cases of this nature was certainly a novel one at the time of trial in 1999, and perhaps still is. Indeed, Dr. Leo testified that he did not begin testifying in this area until 2001 in State v. Gillard. Dr. Leo Deposition , p. 15. Dr. Leo stated that he had consulted in one case in 1999 in S.C. He noted that he had testified for the first time in the U.S. in 1997 in Washington in pretrial testimony, but not before the jury. Leo Deposition, p. 22. Although the Applicant may point out the decisions in Myers and Cope as examples of South Carolina trial courts that had permitted such testimony by 2005; no South Carolina appellate court had-or has-ever passed on, much less approved of, the admissibility of such evidence.

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770 N.E.2d 763, 774 (Ind.2002); Boyer v. Florida, 825 So.2d 418, 419 (Fla.App.2002). However, absent a threshold determination that such evidence meets Frye's general acceptance requirement, we have no position as to the admissibility of such evidence had it been offered. See Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923); In re Simons, 213 Ill.2d 523, 529–30, 290 Ill.Dec. 610, 821 N.E.2d 1184, 1188–89 (2004)."

People v. Harris, 389 Ill.App.3d 107, 134, 904 N.E.2d 1077, 1099, 328 Ill.Dec. 567, 589 (2009).

> "[W]e must keep in mind that this is an ineffective assistance claim. The issue is not whether the evidence could have come in, but whether Van Buren's counsel, by not offering [an expert's testimony on false confessions], fell below an objective standard of reasonableness as measured against prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. 2052. **Even if Van Buren is correct and false-confession expert testimony should be admitted, the published and unpublished cases contain only one instance of its introduction at a trial in Wisconsin, nearly fifty years ago. Given this fact, we could not hold that the failure to introduce such testimony falls below 'prevailing professional norms.'** "

State v. Van Buren, 307 Wis.2d 447, 459–61, 746 N.W.2d 545, 551–52 (Wis.Ct.App.2008) (emphasis added). Ray v. State , 80 So.3d 965, 991 -992 (Ala.Crim.App.,2011)

"[N]umerous state and federal courts have concluded that counsel's failure to advance novel legal theories or arguments does not constitute ineffective performance ... Nor is counsel required to 'change then-existing law' to provide effective representation ... Counsel instead performs effectively when he elects 'to maneuver within the existing law, declining to present untested ... legal theories.' " (Citations omitted.) Ledbetter v. Commissioner of Correction, 275 Conn. 451, 461-62, 880 A.2d 160 (2005), cert. denied, 546 U.S. 1187, 126 S.Ct. 1368, 164 L.Ed.2d 77 (2006).

Further, in 1999, the use of so-called false confession experts in trial was novel, at best. See Perez, Daniel, *The (In)admissibility of False Confession Expert Testimony*, 26 Touro Law Review 23 (2010). In U.S. v. Adams, 271 F.3d 1236 (10th Cir. 2001), the court concluded that testimony concerning credibility should be excluded because it is prejudicial and unduly influences the jury. Similarly, courts have held that an expert is not authorized to testify about the truthfulness or believability of a witness. Vent v. State, 67 P. 3d 661, 670(Alaska Ct. App. 2003). See State v. Cobb, 43 P.3d 851, 869 (Kansas Ct. App. 2002)(same expert witness testimony of false confessions invades province of jury); State v. Davis, 32 S.W.2d 603, 609 (Mo. Ct. App. 2000) (common knowledge of jury regarding false confession was reasonable and unaided by expert opinion); Derrick v. State, 983 So.2d 443, 451 (Fla. 2008) ("We question whether the testimony of an expert "confessionologist" would even be admissible"). New York has consistently, rejected the admissibility of the evidence. With the apparently singular exception of People v. Kogut, 10 Misc.3d 305, 806 N.Y.S.2d 366 (Supreme Court, Nassau County, 2005) New York courts have consistently answered this threshold question in the negative regarding the subject of false confessions. See, for example, People v. Days, 31 A.D.3d 574, 817 N.Y.S.2d 535

(2nd Dept, 2006); People v. Shepard, 259 A.D.2d 775, 687 N.Y.S.2d 196 (3rd Dept, 1999); People v. Green, 250 A.D.2d 143, 683 N.Y.S.2d 597 (3rd Dept, 1998); People v. Lea, 144 A.D.2d 863, 534 N.Y.S.2d 588 (3rd Dept, 1988) and People v. Wiggins, 2007 N.Y. SlipOp 51715U, 16 Misc.3d 1136A (Supreme Court, Bronx County, 2007.)

The admissibility and bounds of expert testimony are matters addressed to the sound discretion of the trial court. It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefitted by the specialized knowledge of an expert witness. The subject of whether a person has falsely confessed "does not depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence," and therefore, "there is no occasion to resort to expert testimony."

Dr. Richard Leo, a social psychologist, was proffered by Applicant as a potential witness on this issue. Dr. Leo's affidavit suggested that Leo would testify generally about the psychology of police interrogations, the phenomenon of false confessions, and the erroneous but commonly held belief that people of normal mental capacity do not make untruthful and [inculpatory] statements. It was not proffered that the confessions given were false, but inconsistent and that there was no complete record of the interrogation techniques used, other than the written statements, including a written summary of the taped statements. However, Dr. Leo acknowledged that the police testified at the suppression hearing and trial and denied anything was amiss in the interrogation, but did not expressly discuss any techniques used. Dr. Leo averred that there were several risk factors present including his testing that suggested he may be mentally retarded and suffer from other mental disorders, Dr. Leo's reliance upon a questioned DNA study about

evidence used against Simmons, Dr. Leo's rejection about the existence of non-public information in the statement because none of the statements were recorded and speculated that there would have been community gossip about the facts. He opined that the initial statements about the involvement of a third party - Blackie - were bizarre and incoherent, that his second statement contained many errors of fact and asserted that there was no physical evidence to corroborate Simmons statements. Dr. Leo Affidavit., p. 11-15.

Dr. Leo has opined that his research classified each confession he believed to be false as either a "proven false" confession, a "highly probable false" confession, or a "probable false" confession. This categorization involved comparing the narrative of a defendant's confession with other evidence, checking whether the confession led to independent evidence, and looking for other indicia of reliability, with a researcher determining whether the confession fell into one of the three categories of false confessions. While some of the facts involved in this analysis came "directly from case files," many were gleaned from secondary sources, including popular media accounts. In his affidavit, in addition to classifying confessions by his confidence in their falsity, Leo also classified confessions as "voluntary false confessions," "stress-compliant false confessions," "coerced-compliant false confessions," "coerced-persuaded false confessions," or "non-coerced-persuaded false confessions." Leo categorized each confession in this manner by comparing the circumstances of each confession with those of other confessions he had already determined to be false.

Here, Dr. Leo in his deposition admitted the limits of his usefulness in this setting. He was unaware of the number of false confessions compared with truthful confessions. Deposition p. 22-23. He admitted that no data exists on how often certain interrogation tactics lead to false

confessions as compared with truthful confessions. Deposition p. 24-25. He is unable to estimate how often false confessions occur. Deposition , p. 25-26. He admitted that in his 1998 study, he did not have a statistically adequate sample , but merely an anecdotal collection of 60 cases. Deposition, p. 27. He admitted that at least 9 of the cases within that study had been criticized as even being included in the sample. Dr. Leo stated that while his study characterized 18 cases as "highly probable false", he admitted that it did not mean that they could prove that they were absolutely false. Deposition , p. 28. He admitted that the government was not in agreement with all the cases that his study had concluded were either proven false or highly probable false. Deposition , p. 28.[7]

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[7]Leo's research classifies a confession as "proven false" if "it can be objectively established that the suspect confessed to a crime that did not happen," that "the defendant could not have committed the crime," that "the true perpetrator of a crime is identified and his guilt can be objectively established," or that "scientific evidence—in recent years, most commonly DNA evidence—dispositively establishes the false confessor's innocence." Drizin & Leo, The problem of false confessions in the post-DNA world, 82 NC L R 891, 925–926 (2004). Confessions are classified as "highly probable false" if the researchers are satisfied that the confessor's innocence was established "beyond a reasonable doubt" and "probable false" if the researchers are satisfied the confessor's innocence was established only by a "preponderance of the evidence." Leo & Ofshe, The consequences of false confessions: Deprivations of liberty and miscarriages of justice in the age of psychological interrogation, 88 J Crim L & Criminology 429, 436–437 (1998).

Leo's research classifies a confession as a "voluntary false confession" when offered "either without police interrogation or in response to minimal police pressure." Leo, False Confessions: Causes, Consequences, and Solutions, in Westervelt & Humphrey, eds, Wrongly Convicted: Perspectives on Failed Justice (New Jersey: Rutgers University Press, 2001), ch 2, p 42. Confessions are classified as "stress-compliant false confessions" when "the stresses and pressures of custodial questioning overwhelm the suspect and she comes to believe that the only way to terminate the punishing experience of interrogation is by confessing." Id. Confessions are classified as "coerced-compliant false confessions" when " 'a suspect confesses in order to escape or avoid an aversive interrogation or to gain a promised reward.' " Id. at 43 (citation omitted). Confessions are classified at as "coerced-persuaded false confessions" when "the interrogator's use of coercive influence techniques causes [the confessor] to temporarily doubt the reliability of his memory; believe that he probably did, or logically must have, committed the crime under question; and confess to it, despite having no memory or knowledge of participating in or committing the offense. Id. "Non-coerced-persuaded false confessions" are similar to

Importantly, Dr. Leo testified that the interrogation techniques could lead to a truthful confession. Deposition , p. 31-32. Simply put, he stated that same techniques could lead to a truthful or a false confession. Deposition, p. 32. He admitted that guilty people do not always confess the first time that they are asked, that guilty people frequently make statements to put themselves in a more favorable light, and that a guilty person may want to place the blame on a third party to place themselves in a more favorable light. Deposition, p. 32.

Dr. Leo admitted that DNA testing had been done that did not eliminate Simmons as a contributor and that he had given multiple statements where he had confessed to being the perpetrator and the sole perpetrator in the matter. Deposition, p. 33. Dr. Leo admitted that he had reviewed the transcripts of the tape-recorded statements and stated that he did not read about any physical threats to the Applicant, did not see ant specific promises made to the Applicant, and was aware that law enforcement had denied that any threats had occurred. Dr. Leo further acknowledged that in the transcripts, he did not see any evidence that Simmons had been provided with information about the crime, but suggested that since most of the interrogation was not recorded that he could not show where the information given by Simmons came from. Deposition, p. 35. He admitted that he was not aware whether Simmons counsel had any information from his client that he was provided by a third source about the crime.

Importantly, Dr. Leo conclusively declared that while he may possess training to make a determination whether a confession is false which is different from a lay juror, " "I would never testify before a jury that I believe a confession is false because that would invade the province of

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coerced-persuaded false confessions but "[are] not elicited in response to coercive interrogation techniques." Id. at 44.

the [jury], that's not the nature or purpose of the testimony." Deposition, p. 36, l. 12-19. Dr. Leo concluded that Simmons gave several statements that he killed Lily Mae Boyd which were inconsistent with each other. In them, he admitted that he had sexual contact with the victim, that he strangled the victim, after he had given statements that a third party had killed, strangled and beaten the victim. Deposition, p. 38. He admitted that the victim was strangled and beaten about the head. Deposition, p. 38. Dr. Leo stated that while he was first consulted on the issues of false confession testimony in 1998, other experts such as Dr. Ofshe in California, Dr. Wrightsman in Kansas, Dr. Gudjonsson in London , Dr. Aronson in California and Dr. Lassiter in Ohio are involved in the area although he is not sure, other than Dr. Ofshe how often they may have testified by 1999. Deposition, p. 43. More particularly, Dr. Leo was unable to declare how often the experts had testified whether there was a guilty or not guilty verdict. Deposition, p. 44. He admitted that in the cases he had testified they involved both guilty and not guilty verdicts. Deposition, p. 44. He admitted that Paul Cassell had in an article criticized him assessment as being 45% wrong. Deposition, p. 45.[8] Dr. Leo then declared that "I really need to be clear that when I testify in a cases, it 's not necessarily because I have determined the . . . confession was false." Deposition, p. 46. " There may even be cases where I don't think they're necessarily false, but its not an analysis that I go through when I testify in court because that is not within my role as an expert testifying in court. It's for the jury . . to decide whether or not its false. It's only for me to give the jury information based on the scientific field that would be helpful to them generally in

[8] See Paul G. Cassell, Protecting the Innocent from False Confessions and Lost Confessions--And from Miranda, 88 J. Crim. L. & Criminology 497 (1998). Also, Paul G. Cassell, The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions, 22 Harv. J.L. & Pub. Pol'y 523, 582–587 (1999).

their analysis . . .Just because I testify, it doesn't mean that I think its false." Deposition, p. 46-47.

Thus, it does not appear that Dr. Leo's testimony concerning false confessions was sufficiently reliable to be admissible under Rule 702, SCRE. See State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (barefoot insole impression evidence was not scientifically reliable and was inadmissible); State v. Council, 335 S.C. at 20; 515 S.E.2d at 518 ("[w]hen admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable"). Because Applicant failed to establish that the study of false confessions is an area of specialized knowledge which would assist the jury in reaching its decision, e.g.,Saul M. Kassin and Karlyn McNale, "Police Interrogations and Confessions," 15 Law and Human Behavior No. 3, 233, 248 (1991) (admitting that conclusion the minimization and maximization ploys have the potential to coax innocent people into confessing to crimes they did not commit "is speculative"); Saul M. Kassin & Katherine L. Kiechel, "The Psychology of False Confessions: Compliance, Internalization and Confabulation," AM. PSYCHOL. 227, at 127 n. 16 (Mar. 1996) (recognizing inherent limitations of experimentation conducted), and there was no evidence presented that Appellant suffered from mental retardation, mental illness or other frailty beyond the comprehension of the jury, Dr. Leo's potential testimony concerning false confessions would not significantly assist the jury in determining the voluntariness of Appellant's statement and should have been excluded in its entirety.[9]

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[9] Dr. Leo's speculation about the questioning the existence of non-public information in the statement because none of the statements were recorded was something that would be evident to the jury and not need an expert opinion. Similarly, his speculation that there would have been community gossip about the facts. Simply put, there was a source available- the Applicant - would could have addressed the information and whether he received it from a source

Even assuming *arguendo* that the Court would find that the potential testimony would properly admitted testimony concerning false confessions, Applicant still cannot show counsel's unreasonableness resulting from counsel's decision not to seek out such expert evidence in 1999. First, any such testimony was irrelevant under Rule 401, SCRE. Particularly in light of the limitations Dr. Leo's study of false confessions admittedly has and his inability to determine better than the jury whether Applicant's statements was true or false, anecdotal cases involving different people and different sets of facts could not possibly be relevant. Cf. Green v. State, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002). Counsel reasonably sought to present testimony through a series of mental health experts concerning Applicant's limited functioning and his ability to be swayed. The inconsistencies between the actual statements and the forensic evidence in the Applicant's statements was revealed to the jury and pointed out by defense counsel in a request to reject their reliability. Dr. Leo's presentation would have added little to what the jury and counsel Theos already knew.

To present an ineffective assistance of counsel claim based on a failure to call a witness, a defendant must make an affirmative showing as to what the missing evidence would have been and prove that the witness' testimony would have produced a different result. Malcum v. Burt, 276 Supp.2d 664, 679 (E.D.Mich.2003) (internal citation omitted). Petitioner has failed to demonstrate that he was denied the effective assistance of counsel from his trial counsel's failure to use or call an expert witness concerning the issue of false confessions, because he has failed to present any testimony to establish that an expert witness could have been obtained in 1999 by reasonable to

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other than his own activities. This was not presented either at trial or in this hearing .

testify favorably for him on this issue. Id. at 682; see also Ben-Yisrayl v. Davis, 245 F.Supp.2d 960, 969–70 (N.D.Ind.2002) (capital murder defendant's trial counsel was not ineffective in failing to present expert testimony regarding false confessions; it was too speculative to determine that such evidence would have changed the decision on voluntary confession). In any event, Petitioner does not explicitly claim that his confession was, in fact, false.

Dr. Leo's concerns about the risk factors reliability of the confession were presented to the jury at trial as they existed in 1999, albeit not through a false confession expert. The suggestion that he gave bizarre and inconsistent statements and relied upon Blackie was present at the trial. Counsel Theos began his opening statement with the suggestion that Petitioner's statements were bizarre and unbelievable. ROA p. 1051-1052. As to the suggestion that he is mentally retarded and suffered from other mental disorders, counsel Theos started the trial by noting that Simmons thinks like a seven year old and acts like a second grader. ROA p. 1053. He further noted that based upon the statements he gave and their inconsistencies - "so we know that he will say something that is not true." ROA p. 1054. Counsel called as a witness Dr. John Foxworth who opined about his mental health history and the impact of substance abuse on his level of functioning. ROA p. 1517-19. (He tends to agree with just about anything he thinks that you want him to say or to agree with . . .he is easily led"). Dr. Foxworth also generally testified about IQ testing by Applicant. ROA p. 1530. He opined that his mental function at the time the statements were given " would not have been reliable." ROA p. 1537-1539. He stated that he had an impression - not a diagnosis that the Applicant was mentally retarded. And had alcohol related dementia. ROA p. 1545-46. At trial the defense also called forensic psychologist Dr. Barton Saylor who opined that Applicant was functioning in a mentally deficient range and had

consistently displayed significant deficits in his ability to make a knowing and intelligent waiver of his rights. ROA p. 1606, 1610. Dr. Saylor described Applicant as "kind of child like" and simplistic, very concrete , slow and had to have things explained to him several times. ROA p. 1627. Similarly, Dr. Thomas Behrmann, a forensic psychiatrist opined that he was concerned about Applicant's ability to waive his rights. ROA p. 1640-41. However, he also opined that he cannot identify a mental illness which would have prevented him from waiving his rights. ROA p. 1651-52. Dr. Vidic conducted an evaluation with Dr. Behrmann and similarly opined that when he attempted the evaluation, that Applicant was unable to make an intelligent waiver of his rights. ROA p. 1681-82. Dr. Leslie Sandler was also called by the defense and opined it took a lengthy period of time to go over the rights with Applicant, but did not agree that it was necessarily based upon an inability to articulate a sufficient understanding of the rights, suggesting that it could have been based upon an unwillingness to do so. ROA p. 1715 - 1724. The defense also called Dr. Randy Waid, a clinical psychologist, at trial testified that Applicant's mental capacity is diminished and that he had neuro-cognitive impairments. He opined that he had lost intellectual abilities due to his life-style involving poly-substance abuse. He opined that he did not believe that Applicant suffered from mental retardation, but believed that he was in the borderline to intellectual functioning range. ROA p. 1778, 1880. He opined that he was in a age equivalent range of a 7 to 9 years old or second or third grader. ROA p. 1780, 1880. He opined that the poly-substance abuse, involving cocaine and alcohol use contributed to the diminished functioning. ROA p. 1782 -1777, 1879-1881. Dr. Waid opined that in assessing the Miranda rights that he could not get reliable responses and stated that he did not believe that he was a reliable historian. ROA p. 1883-1884. In his guilt phase closing argument, counsel Theos emphasized the existence

of the Applicant's mental status, his inability to answer questions and be easily led as a factor to reject the confessions. ROA p.2037- 2046. In addition, he asserted that the statements were uncorroborated, inconsistent with the medical facts and the evidence and given by a person with a limited mental capacity. ROA p. 2059, l. 7-21.

Counsel Theos declared he made a strategic decision to use his mental health experts to present the issues as to why the statements were unreliable. These presented the same risk factors, evident to any juror, as to their reliance upon the Applicant's statements. In addition to not showing that counsel Theos's assessment was deficient, the Applicant has failed to show prejudice in light of similar testimony that the jury heard. The allegation must be dismissed.

Applicant's Mental Retardation Claim

As an initial matter, we note that, in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the U.S. Supreme Court held that executing mentally retarded individuals constitutes cruel and unusual punishment under the Eighth Amendment "in the light of ... evolving standards of decency." But the Court recognized that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus ."Thus, the Court left to the states "the task of developing appropriate ways to enforce th[is] constitutional restriction upon [their] execution of sentences." The Atkins decision was after the Applicant's trial in 1999. In 2003, the South Carolina Supreme Court addressed the mental retardation issue and allowed for the claims for prior capital cases to be raised in a post-conviction relief setting. *Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003)

In pressing a claim of mental retardation, "the applicant must show he or she is mentally

retarded by a **preponderance of the evidence.**" *Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003). "Mental retardation" is defined by statute as "'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 605-06, *quoting* S.C. Code § 16-3-20(C)(b)(10). In the Franklin decision, the South Carolina Supreme Court initially rejected the argument to adopt as a substantive definition of "mental retardation" different than that adopted by the legislature when Franklin was decided.[10]

This is a contested issue from the trial to the presentation at the state PCR hearing. Respectfully, Respondent submits that the Applicant did not meet his burden of proof. There is evidence in the record from the report and testimony from Dr. Leslie Sandler and Dr. Randy Waid which defeats the Applicant's burden of proof. This is admittedly a close issue, but the mere fact that

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[10]Atkins left it to each state to set standards and procedures for adjudicating the mental retardation of a defendant in a capital case; however, at the time Franklin was decided, bills had been introduced in South Carolina concerning the definitions of mental retardation and procedures, but no legislation had been passed. See Franklin, supra. 356 S.C. at 605, n. 1.

The American Association of Mental Retardation (AAMR) defines mental retardation as a "disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in the conceptual, social, and practical adaptive skills." Mental Retardation[: Definition, Classifications, and Systems of Supports 1 (10th ed.2002),] at 1. As of January 1, 2007, the AAMR has been known as the American Association on Intellectual and Developmental Disabilities.

The American Psychiatric Association defines mental retardation as "significantly subaverage intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive functioning." [Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1992) (DSM–IV),] at 37. Thus, ... both definitions of mental retardation incorporate three concepts: 1) limited intellectual functioning; 2) significant adaptive limitations; and 3) age of onset.

The primary distinction between these two classification systems is that the DSM–IV specifies severity levels of mental retardation, whereas the AAMR classification system no longer specifies levels of severity, but instead, recognizes that a diagnosis of mental retardation relies on both limitations in IQ and adaptive skills and focuses on the levels of support needed following an individual diagnosis. See DSM–IV [,] at 45; AAMR[,] at 26.

an issue is close does not satisfy the burden of proof. In addition the mere fact that a retained defense expert has opined that Applicant suffers from mental retardation does not address the issue or necessarily satisfy the burden of proof.

The State presentation primarily focuses on two witnesses. Dr. Leslie Sandler and Dr. Randy Waid. On February 10, 1999, Dr. Leslie Sandler, Ed. D., as lead psychologist and Dr. Thomas McAbee, as secondary psychologist of the Department of Disabilities and Special Needs issue a report pursuant to an Order of the Honorable Rodney Peeples concerning his competency to stand trial and criminal responsibility. The matter had been referred to SC DDSN due to indication of mental retardation. The report was introduced at trial as State Exhibit 8. In the report, Dr. Sandler and McAbee opined that Simmons was not mentally retarded with a reasonable degree of scientific certainty. In their conclusion, the SC DDSN reported:

> The American Psychiatric Association 's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition , [APA DSM-IV] specifies the following three criteria for a diagnosis of mental retardation: significantly subaverage intellectual functioning with concurrent deficits or impairments in present adaptive functioning with onset before age 18 years. The available records do not report a history of significant developmental delays or of him ever receiving services for mental retardation or a related disability. While Mr. Simmons did repeat the eleventh grade and take remedial; courses for high school credit, his 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. . . .

Report, p. 5. The February 1999 report further indicates that in addition to police records, the examiners had interviewed Simmons on four occasions for approximately two hours each meeting for around 8 hours. The examiners considered his high school transcript noting that he had completed

18 hours of credit and graduated from Summerville High School in 1980 earing two letters in football playing defensive end. In grades, the examiners pointed out that he had received a B in ninth grade Basic English, a C in tenth grade Basic English, B in 11th Grade Basic English and an A in remedial English in the 12th grade. They noted he had received grade equivalent scores in achievement tests in the 11th grade of fifth grade in reading and fourth grade seven months in math. He had passed the state driver's license test in October 1979. They also noted that he was married and had reported having three children. Simmons had self-reported a long-term use of alcohol, marijuana and cocaine.

The SC DDSN examiners noted that in forensic evaluations since his arrest that he had received a provisional diagnosis of mental retardation with testing in May 1998 of a Wechsler Adult Intelligence Scale - Revised [WAIS-R} of Verbal IQ 66 ; Performance IQ of 75 and Full Scale IQ of 69. A December 1998 WAIS - III test reported a Verbal IQ of 65, Performance IQ of 74 and Fill Scale IQ of 66. Concerning their own testing of the Applicant, the DDSN examiners reported:

> In the administration of the Wechsler Adult Intelligence Scale - Revised [WAIS-R] on 9 February 1999 he obtained the following IQ scores: Verbal 70; Performance 82; and Full Scale 75. A Full-Scale IQ of 75 is in the mid-range of the Borderline Intelligence Classification (IQ scores of 70-79). The fact that his Performance IQ score was12 points higher than his verbal IQ score is significant. **One interpretation of this 12 point spread which the examiners believe may be likely is that his true IQ is in the low average intelligence classification (IQ scores of 80 to 89) as revealed in the performance IQ, and intentionally suppressed by Mr. Simmons tendency to malinger.** His sub-tests raw scores can be converted into scaled scores along a continuum of 1 (the 0.1 percentile rank) to 19 (the 99.9 percentile rank). His highest sub-test scores were in the Object Assembly test (scaled score of 10: the 50th percentile); Picture Arrangement and Block Design tests (scaled scores of 8; the 25th percentile). His lowest sub-test scores were in the Information and Digit Symbol tests (scaled scores of 2; the 0.4 percentile rank. ... [11]

[11]This was also reported at the competency hearing by Dr. Sandler. ROA 2614-15. Dr. McAbee testified that Applicant was not mentally retarded at the hearing. ROA 2699-2702.

Report , p. 3. The examiners also noted that in the Trial -making tests his scores were elevated, yet showed no errors reflecting the impression that he was "intentionally producing exaggerated slow responses" as he did on the WAIS-R test. The Vineland Adaptive Behavior test was also attempted, but unsuccessful die to the incarceration which precluded performance of many of the adaptive skills in community living reflected in the test. A correctional officer was interviewed about Simmons current adaptive behavior which suggested that he took care of his persona; hygiene and grooming without assistance from others, got along well with others and had leisure skills on playing cards and reading magazines and discussed content of those materials after reading them. It was reported that he leads a Bible discussion with other inmates and followed the rules of chess while playing other inmates.

The examiners also report their own observations of Simmons. Report, p. 4. Although the examiners reported observing malingering during each session, his clinical presentation appeared to be substantially lower than what would be expected of a high school graduate and substantially lower than his vocabulary and other skills revealed in his 1997 oral and written statements to the police. They noted that he gave incorrect answers during each evaluation that closely approximated the correct answer which they saw a sign of malingering. Report, p. 5.

During the 1999 trial Dr. Sandler testified at competency hearing. ROA 2593-2671.[12] In

[12]An issue was raised concerning a disciplinary sanction against Dr. Sandler in 1989 in Pennsylvania. Neither counsel Theos or Solicitor Bailey were aware of the sanction at the time of the 1999 trial. PCR 245-248 (Bailey); p. 352 (Theos). Solicitor Bailey stated that he did not do background checks of expert witnesses and was not aware of its existence. There has been no showing that this information was in the possession of any law enforcement file. The defense counsel had equal access to information with S.C> DDSN as the prosecution. However. Solicitor Bailey stated that if he had that information about Dr. Sandler in 1999, he would have disclosed it because it could have potentially been used to impeach , although he would have resisted its

particular, Dr. Sandler opined that he was not mentally retarded. ROA 2623- 2625. In particular, Dr. Sandler summarized the information reported above. ROA 2614-2616. As for adaptive behavior, Dr. Sandler noted that in their interviews and the report for correctional officers that there was an absence of a problem in his self-care. ROA 2623. However, he opined that Simmons was a malingerer, noted that his memory was remarkable when he wanted it to be . ROA 2625. Dr. Sandler found no indication of any adaptive problems before age 22, but noted that Dr. McAbee was the primary examiner in that area. ROA 2626. Dr. Sandler noted on cross-examination that they took into consideration his elementary grade school scores into account. ROA 2658-59.

Dr. Thomas McAbee also testified at the competency hearing that Simmons was not mentally retarded. ROA 2702. Specifically, he noted that he found Simmons mental functioning above the range of mental retardation and suspected that Simmons was not trying his best during the testing. ROA 2702. He stated that he was assessing him that the February test scores were above the range of mental retardation. ROA 2699-70. He stated that there were some functional deficits in reading abilities , but they certainly would not be in the level of mental retardation. ROA 2700. Concerning his ability to take care of his own needs, Dr. McAbee testified that he did not see any evidence that

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use in court based upon remoteness since it was over 10 years. PCR 248. Solicitor Bailey noted that Sandler had never lost his license. Respondent submits that the evidence concerning Dr. Sandler does not reflect the he lost his license, but that he was subject to supervision. Contrary to a claim in the application it does not reflect either false or perjured testimony was given in the 1999 trial. While counsel, if they discovered it would have sought to impeach Dr. Sandler, Respondent submits that the prejudice prong of Strickland or the materiality prong of Brady had not been shown. Dr. Sandler was a court witness independently employed by the SC. D.D.S.N. He was adequately licensed to render an opinion. Further, it was not merely his opinion, but co-authored by Dr. McAbee. Importantly, there is no claim that the testing was not completed as reported in the examiners report. There is no reasonable probability the result of the 1999 trial would have been different, had the information been known and disclosed.

would suggest at age 18 or 22 that he did not have the ability to do that . ROA 2701.

During the trial, Dr. John Michael Foxworth, an expert in general and forensic psychiatry, testified Applicant suffered from "an alcohol related persisting dementia," but did not testify Applicant suffered from mental retardation. (ROA. p. 1526-30). Dr. Charles Barton Saylor, a forensic psychologist, testified Applicant functioned in a "mentally deficient range," but also testified that he was not asked to look for a diagnosis of mental retardation. (ROA. pp. 1606; 1620-21). Dr. Thomas William Behrmann, a forensic psychiatrist with William S. Hall, testified that he did not diagnose him with any "mental illness or defect that would have prevented him ... from waiving his rights," in regard to the voluntary nature of Applicant's statements. (ROA. p. 1652). Dr. Behrmann also noted in his report, based solely on IQ scores, that mental retardation could be suspected. (ROA. p. 1675). Jeffrey Vidic, a clinical psychologist with William S. Hall, testified that Applicant tested in "the intellectually deficient range" and such deficiency was part of "the three diagnostic criteria" required for a diagnosis of mental retardation. (ROA. p. 1690). Dr. Sandler, again testified that he concluded, from his testing and evaluation, that Applicant was not mentally retarded. (ROA. p. 1740).

Lastly, Lewis Randolph Waid, an expert in clinical and forensic psychology, and neuropsychology, testified, definitively, to an absence of mental retardation. (ROA. pp. 1882, 1897). In particular, Dr. Waid opined that because he suffers from neuro-cognitive impairments he has diminished mental capacity, but not from mental retardation. ROA 1778. As stated above, Dr. Waid opined that his life -style of poly-substance abuse hurt his brain. He opined that Simmons was not always at that level and " do not believe he suffered from mental retardation but believe his intellect is in the borderline to intellectually deficient range ..." ROA 1778. He stated that he was in the lower two percentile and stated that he was not an intellectual giant. He noted that Simmons academic

achievement was the first grade on was that he was falling behind. ROA 1781. "He was able to get through because he was not of the intellectual deficiency as he is now. He has diminished since high school and that's an acquired neuro-cognitive impairment .. related to his life-style that has involved poly-substance abuse and dependance. ROA 1781-82. He was low average, not mentally retarded. Dr, Waid noted that his years associated with his abuse as well as the potential blows to his head from his life style, including his high level of drinking would contribute to the diminished functioning. ROA 1782. The evidence of Simmons overdose he considered an incident with a high potential to affect his brain. ROA 1783. He opined that Simmons had a diagnosis of polysubstance abuse by history, dementia (loss of intellectual abilities) and history of alcohol abuse. In addition to concluding that mental retardation was not an appropriate diagnosis, Dr. Waid attributed the decline in Simmons mental capacity to chronic substance abuse including alcohol and crack cocaine. ROA 1881-1882. As Dr. Waid testified: " well, he's definitely not meeting the diagnostic criteria for mental retardation." ROA 1897, l. 5-6.

During the PCR hearing, the primary witness on Applicant's behalf was Dr. Marc Tasse, a clinical psychologist and psychology professor from the Ohio State University. PCR 100. He was qualified as an expert in mental retardation. PCR 106. Dr. Tasse stated that he reviewed records of the Applicant and opined that he had mental retardation based upon the records he reviewed as well as his consultation with social worker Dr. Marjory Hammock. PCR 137. He opined that all of the Applicant's test scores on IQ tests were below the cut-off for mental retardation. ROA 145. In addition, he opined that the adaptive function prong was satisfied by Dr. Keyes 1999 testing of Simmons , his ex-wife and older sister. On the Vineland Adaptive Scale which scored significantly below average. PCR 145-146. Dr. Tasse found that "onset before 18" prong was more challenging

to satisfy and he had to get more information from her in addition to his knowledge that Applicant was struggling in school which was a deficit in functional academics. ROA 146. He discounted the effect of drugs and alcohol. ROA 147-148.

Dr. Tasse conceded that Dr. Sandler and McAbee in February 1999 had a Full Scale IQ score of 75 which could be considered to fit within the range of metal retardation although it fit within the range of 70 +/- 5. PCR 162-163. He admitted that based upon that score an examiner could conclude that a person was not mentally retarded but would need to look at prong two and three. PCR 163. Dr. Tasse also relied upon the Vineland scales from an ex-wife and sister, although he could not recall the length of time the Applicant had ever lived with them. PCR 167. Dr. Tasse conceded that Applicant was not diagnosed for mentally retardation at any time in elementary school or high school. PCR 169-170. Dr. Tasse noted that the 2008 IQ testing done by Dr. Susan Knight at his request was the lowest test score on verbal comprehension , but discounted that score because he was solely concerned with the Full Scale IQ score. PCR 176.

Dr. Tasse stated that he never interviewed Simmons. For the purpose of doing any adaptive behavioral evaluation and only based his conclusion on his records. He admitted that there was information that he had a joint checking account with his wife and was not aware whether he understood the value of money. He stated that this concern about money concepts was based upon a Vineland test done by individuals who had little contact with Simmons for 17 years. PCR 182. He stated that he did not do another Vineland because Simmons had been incarcerated for a number of years and they would be unable to assess his adaptive behavior in the community because of his incarceration. PCR 182-183. Dr. Tasse conceded that while he had opined there were some deficits in daily living, he had to admit that there was evidence that when Simmons was living at home he was

caring for his mother , providing her medication and taking care of his younger sister who was identified as having mild mental retardation. PCR 185. He stated that he was also unaware any developmental delays by Applicant. PCR 187. He noted that Applicant played football but rejected that he had shown self-esteem for the record when he announced his pride in the team's record. PCR 188. Dr. Tasse further discounted that Applicant had gotten his driver's license, emphasizing that he lost his license when he was driving an uninsured vehicle. PCR 189. Dr. Tasse conceded that Applicant did not use only simple words, but multi-syllable words, that he had good hygiene, that he can read, that he had a bank account with his wife, that he got an A in drivers education and got a driver's license, and that he was able to attract girlfriends. PCR 197-199. Although these are not assessment specifically, Dr. Tasse admitted that each of these factors would be looked at to assess adaptive functioning.

Social Worker Marjorie Hammock testified about her social history report. It was pointed out that Simmons did participate in extra curricular activities in school, including football. She noted that he was able to receive letters for playing and was able to make grades. She stated that it was only speculation that some teachers had given him a preference, She admitted on cross-examination that there was no evidence that this happened to Simmons and they was no evidence that the grades were not an accurate reflection of what he earned. PCR 50. Ms. Hammock had noted that his academic performance declined in 1978 in the 11th grade, but then admitted that was when Simmons mother died from diabetes. PCR 52. She admitted that Simmons role up to then was that he would feed her, help her clean up and took care of her daily needs. PCR 53-54. She also noted that in 1978 he also began using marijuana and drinking, although she denied knowing about the frequency of his usage. PCR 55 - 56. She noted also that his class rank was 531 out of 615. PCR 56-57. She noted that

Simmons net his future wife Valerie in 1977 and they got married in 1982. PCR 59-62. She stated that his drinking and drug use began when he was 17 and became noticeable to others particularly after Mr. Simmons died. The use of cocaine began then according to her notes. PCR 63. She described his work history with a tree cutting firm, then a pest control company , a fiberglass company , a brick mason and then a tree service. PCR 60-64. She stated his marriage was from 1982 through 1988, with separations within the period. PCR 64. She state that she understood that his drug and alcohol problems caused the separation and his attendance problems at work. PCR 65-68. Concerning his driving, she noted that he only had one accident that was reported to her four years after he had received his license. PCR 69-71.

Ms. Hammock confirmed that at the Palmetto House, he would do chores, followed the rules and was well-liked. She confirmed that he care for himself, would go to school regularly, would go to church regularly upon his father's instructions and was trained in Bible studies that he held at the jail. PCR 77-78.

The evidence before this court reflects a mixed picture of the Applicant. As the SC DDSn examiners concluded there is evidence in the record to suggest that he does not satisfy the elements of mental retardation. His scale score in the 1999 testing of 75 could support a conclusion that his IQ was not 70 or below. His intense drug and alcohol use since the age of 17 could impact on his intellectual functioning unrelated to mental retardation as Dr. Waid concluded. His adaptive functioning, when pierced below the biased surface in evident in n the social history. The social history also reflects a person who was able to care for his mother and sister, continues to have good hygiene, and possessed an ability to follow rules, gained employment when he wanted to do and participate in activities, including success at football and receiving adequate grades to maintain his

presence on the team. It was reflected that the downward spin in his life not the product of mental retardation, but a combination of life style changes after the death of his mother and pursuit of drugs and alcohol. His lack of motivation in school and in testing is evident. However, this does not require this Court to find the existence of mental retardation where other expert witnesses, not motivated by by the potential of a death sentence or life sentence resting on their testimony - court witnesses Dr. Sandler, Dr. McAbee and Dr. Waid (a defense witness), concluded that it was not present.

The Applicant has not meet his burden of proof.

Applicant's Adaptability Evidence Claim

In his next claim, he asserts that defense counsel was ineffective in the penalty phase in failing to call a prison adaptability expert to testify. The Applicant presented James Aiken as a witness concerning the potential testimony he contends that should have been presented.

Counsel Jerry Theos testified that it was his understanding that Simmons was not a problem inmate in the detention center. PCR 346. He stated that he did not consider using a psychologist to render an opinion on whether based upon the mental makeup of Simmons that he was adaptable to prison as a mitigating factor. PCR 349. He stated that they did not call any expert witnesses for that purpose. He concluded that he did not consider retaining someone like James Aiken to testify about the ability of the prison system to keep an individual safe from himself and others. PCR 349. He admitted that he was captain of the ship and suggested that he left it up to James Bell, his co-counsel to interview jailors on potential testimony. He stated though that they did not consider either discussing or considering a prison adaptability expert. PCR 354. Counsel James Bell concurred that he did not consider contacting a prison adaptability expert, although he had adapted well to jail.

The Applicant called **James E. Aiken,** as an expert in inmate classification and risk assessment. PCR 213. He declared prisons now have a wealth of techniques and approaches in classification from using lethal force to single cells to tying inmates down if necessary in restraints. Aiken expressed an opinion that Simmons can be managed by South Carolina Department of Corrections for the remainder of his life without causing an undue risk of harm to staff, inmates, as well as the general public. PCR 217 . He opined that he would be a low-risk because of the nature of his crime as being criminal sexual violence. PCR 218. He opined that this would prevent him from being in a prison gang. PCR 218. This put him a potential victim of violence. PCR 218. He stated that he would be in a high security setting. PCR 218 - 221.

On cross-examination, he admitted that he was not saying that Simmons would not become violent in prison. PCR 223. He is only saying that the Department of Corrections is capable of managing the behaviors that Simmons had demonstrated. Id. He noted that while there is a history of violence with the victim and criminal domestic violence and drug use, it is unlikely that it is unlikely that he would become a gang member. He noted that he did not have a crystal ball and has made mistakes in the past. He admitted that Simmons could be victimized and act out violently in self-defense. PCR 226 - 228.

There is no question that adaptability to prison evidence is admissible mitigating evidence. *See generally Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (evidence of good behavior in prison admissible in mitigation as relevant to future adaptability); *State v. Shafer,* 352 S.C. 191, 573 S.E.2d 796 (2002) (evidence of violent behavior in prison relevant to future dangerousness); *State v. Tucker,* 324 S.C. 155, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a

capital case). Cf, *State v. Burkhart* 371 S.C. 482, 488, 640 S.E.2d 450, 453 (S.C. 2007).

The mere fact that the evidence is admissible and could have been considered by the jury does not mandate a new trial. In light of the overwhelming evidence of aggravation concerning his crime and the Applicant's criminal history, the Petitioner failed to show a reasonable probability that had the testimony of Aiken been presented, that it would have resulted in a life sentence. His claim must be dismissed.

Applicant's Ineffective Assistance Claim, Failure to Object to Improper Closing Argument

In this claim, he contends that his counsel should have objected to the prosecutor's closing argument, but makes no specific reference any portion of the argument. During the PCR hearing, counsel Theos testified that it was his responsibility to object to something that he felt was objectionable. PCR 351. The record reflect that counsel Theos objected at one point in the record to the solicitor's argument. ROA 2311-12. The Applicant has failed to specify what this allegation is addressing in the prosecution argument. His failure to specify is a failure in the burden of proof. A review of the testimony of counsel Theos and Bell reflects that no inquiry or evidence was presented concerning any portion of Solicitor Bailey's argument.

Conclusion

WHEREFORE, Respondent submits, for all the foregoing reasons, Petitioner has failed to carry his burden of proof and is not entitled to any relief.

Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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Senior Assistant Deputy Attorney General

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By: _____
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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina.
September 20, 2012.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
Kenneth Simmons, #5066,	)	
	)	C/A No.: 2005-CP-18-1368
Applicant,	)	(Capital PCR Action)
v.	)	
	)	CERTIFICATE OF SERVICE
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

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

James Morton, Esquire
Morton & Gettys, LLP
P.O. Box 707
Rock Hill, SC 29731

Emily C. Paavola, Esquire
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201

This 20th day of September, 2012.

DONALD J. ZELENKA

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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	Case No.: 05-CP-18-1368
KENNETH SIMMONS	)	
Applicant,	)	**REPLY TO RESPONDENT'S POST-HEARING BRIEF**
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	
	)	

Applicant, Kenneth Simmons, by and through undersigned counsel, hereby files his Reply to Respondent's Post-Hearing Brief. This Reply addresses Respondent's arguments regarding Mr. Simmons' mental retardation and DNA claims.

I. MENTAL RETARDATION CLAIM

Respondent argues that Mr. Simmons' claim of mental retardation is defeated by the pre-*Atkins* trial testimony of Dr. Leslie Sandler and Dr. Randy Waid. *Respondent's Brief at p.44.*

A. RESPONDENT'S RELIANCE ON DR. SANDLER'S OPINION IS NOT PERSUASIVE.

First, as Mr. Simmons has already explained, Dr. Sandler did not conduct a reliable assessment of mental retardation using appropriate clinical standards. Instead, Dr. Sandler began with an erroneous and misleading understanding of Mr. Simmons' school performance and pre-18 abilities and, from there, concluded that Mr. Simmons must be malingering any symptoms of mental retardation. This point is evident from the DDSN report quoted in Respondent's Brief, in which Dr. Sandler stated:

> [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. . . .

Respondent's Brief at p.45 (quoting DDSN report at p.5).

As the PCR evidence demonstrates, however, none of the factors cited by Dr. Sandler are true. Mr. Simmons was classified in school as "Educably Mentally Handicapped" after individualized testing, and he received special education services. *See Shuler Affidavit; Polk Affidavit and Shwec Affidavit.* His special education teachers used reading materials for him that were written at a fourth grade reading level. He received special help in all of his subjects. 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." *Shwec Affidavit.* Although Mr. Simmons received a high school diploma, there were no graduation criteria nor were any special certificates given for special education students. Instead, anyone could get a diploma as long as he or she came to school and attended the required number of classes. As Ms. Shwec noted, Mr. Simmons "would be unable to earn his high school diploma by today's standards." *Id.* Moreover, there was no required grade point average for students to play on the Summerville High School football team. *2010 PCR Tr. p.93.* Mr. Simmons' coaches and fellow players said he was extremely slow, acted as a follower and not a leader, and required specific, concrete directions from others. *Long Affidavit; Parks Affidavit.* Finally, Mr. Simmons 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.* Mr. Simmons 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.*

Further, despite Dr. Sandler's assumption, there is no evidence of malingering in this case. On the contrary, every expert who tested for malingering found no results indicating that Mr. Simmons ever attempted to malinger. *See ROA p.1609* (Dr. Saylor testifying that he did not find any evidence of malingering during his examination of Mr. Simmons); *id. at pp.1643-45* (Dr. Behrmann explaining that he and Dr. Vidic conducted several specific tests for malingering and all of the results showed that Mr. Simmons 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 Mr. Simmons 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). 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. Mr. Simmons' IQ scores, academic achievement scores, and limitations in adaptive functioning all converge into a tight, consistent pattern across his entire life history. It is baseless to conclude that Mr. Simmons has been faking symptoms of mental retardation across multiple domains from early childhood through to his present age of fifty-one.[1]

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[1] Respondent also argues that the disciplinary sanctions imposed against Dr. Sandler by the State of Pennsylvania are not relevant here because the sanctions were over ten years old and Mr. Simmons has not specifically claimed that Dr. Sandler failed to fully administer an IQ test in this case. *Respondent's Brief at p.47 n.12.* The sanctions, however, are relevant impeachment evidence because they demonstrate Dr. Sandler's character for untruthfulness in that he has admitted to his willingness to lie under oath in court. *See* SCRE 608. They also show Dr.

B. RESPONDENT'S RELIANCE ON DR. WAID'S TESTIMONY IS EQUALLY MISPLACED.

Respondent's arguments regarding Dr. Waid's trial testimony are easily refuted by Dr. Waid's own affidavit, which was entered into the PCR record by Respondent's stipulation. *2010 PCR Tr. pp.5-6.* Dr. Waid 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, attached as Exhibit A, at ¶ 4. Dr. Waid noted that his evaluation of Mr. Simmons occurred before the Supreme Court's decision in *Atkins*, and therefore, "distinguishing between mental retardation, borderline intellectual functioning or brain damage due to injury or drug use did not have the same legal significance that it has today." *Id. at ¶ 5.* Thus, Dr. Waid "did not make a formal assessment of Mr. Simmons' deficits in adaptive functioning or whether his significantly subaverage intellectual functioning manifested itself during the developmental period." *Id. at ¶ 6.*

Sandler's motive to misrepresent facts and take short-cuts rather than perform a thorough evaluation. *Id.* Dr. Sandler was sanctioned in Pennsylvania for testifying to a conclusive diagnosis when he did not fully administer the necessary tests nor did he indicate any limitations on the reliability or validity of his conclusions. Here, Dr. Sandler jumped to a conclusion of malingering – contrary to the objective test results – based on his misunderstanding of Mr. Simmons' social history which he failed to investigate through collateral interviews or standardized testing of adaptive functioning, contrary to clinical standards.

Dr. Waid testified at trial that Mr. Simmons "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 Mr. Simmons 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 Mr. Simmons 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 actual evidence that Mr. Simmons had ever sustained any serious head injuries. *ROA p.1797* ("I don't have documentation that would indicate a head injury."). He also acknowledged that some people can drink a lot of alcohol and, for whatever reason, it does not affect them. *ROA p.1800.* Finally, an MRI, neurological examination and EEG all showed no evidence of that Mr. Simmons suffered 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 [Mr. Simmons' 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. Tassé testifying that an MRI indicated that there was no brain damage).

Dr. Waid previously operated from an uninformed misunderstanding of Mr. Simmons' school history and pre-18 abilities, and he has since disavowed his prior testimony. Thus, Dr. Waid's testimony in 1999 in no way defeats Mr. Simmons' present *Atkins* claim.

C. RESPONDENT IGNORES THE FULL FACTS OF MR. SIMMONS' SOCIAL HISTORY AND RELIES ON STEREOTYPE.

Finally, Respondent incorrectly states many facts, largely ignores the bulk of Mr. Simmons' true social history, and heavily relies on stereotype to support its claim that the "[t]he evidence before this court reflects a mixed picture of the Applicant." *Respondent's Brief at p.53.* Respondent's "mixed picture" argument is simply not supported by the evidence. For example, Respondent states, without citation to the record, that Mr. Simmons led a Bible study and played chess with other inmates in prison. *Id. at p.47.* These alleged "facts" were cited in Dr. Sandler's written report to the trial court. *See DDSN Report at p.3* (reporting that Mr. Simmons leads Bible reading discussions and plays chess "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 Mr. Simmons play checkers and that Mr. Simmons 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 also contends that Mr. Simmons cared for his mother and sister, had a bank account with his wife, gained employment when he wanted to, was a successful football player and received adequate grades to maintain his position on the football team. *Respondent's Brief at pp.52-54.* Again, none of Respondent's allegations are supportable. In fact, the evidence before this Court reflects that Mr. Simmons' siblings regularly came to the house to help care for him and his mother. *Legare Simmons Affidavit; Jack Simmons Affidavit; Gene Simmons Affidavit; 2010 PCR Tr. p.94* Mr. Simmons' wife, Valerie, opened a checking account in their names and paid all of the bills because Mr. Simmons was unable to handle the finances. *2010*

PCR Tr. pp.96-97. Moreover, all of Mr. Simmons' employment opportunities consisted of odd jobs secured for him by a network of family and friends. *2010 PCR Tr. pp.20-21; Gene Simmons Affidavit; Jack Simmons Affidavit; Legare Simmons Affidavit; Schmeiding Affidavit.* He performed simple tasks and unskilled labor. *Id.* Mr. Simmons never formally applied for a job or filled out a job application. *2010 PCR Tr. p.21; Gene Simmons Affidavit.* In high school, Mr. Simmons played a defensive position on the football team that did not require significant intellectual abilities. *Long Affidavit.* Students were not required to maintain adequate grades to play on the football team. *2010 PCR Tr. p.93.* Mr. Simmons' final grade point average at Summerville High School was 0.8222. *See School Records attached to Shwec Affidavit.*

Respondent also points out that Mr. Simmons is able to use multi-syllable words, maintain his personal hygiene, read on a second-grade level, get a driver's license, follow rules and attract girlfriends. *Respondent's Brief at pp.52-53.* None of this evidence is inconsistent with mental retardation. Rather, as both the clinical literature and the case law establishes, these are stereotypes that lay people have about what a person with mental retardation is able to achieve.[2] *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

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[2] *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).

their families"); *Lambert v. State*, 126 P.3d 646 (Okla. Crim App. 2005) (holding evidence that the defendant abused drugs, committed prior crimes and could talk with police, relate events and answer questions was not inconsistent with mental retardation); *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); *2010 PCR Tr. p.126* ("people with mild mental retardation can learn to read and write up to a fifth and sixth grade reading level"); *id. at pp.128-29* ("[P]eople with mild retardation are indistinguishable [from people without mental retardation] in terms of personal hygiene"); *id. at p.130* ("people with mental retardation can acquire a driver's license"); *id. at p.133* (people with mental retardation can get married and have children); *see also, 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). Dr. Tassé did not, as Respondent claims, "admit[] that each of these factors would be looked at to assess adaptive functioning." *Respondent's Brief at p.52.* On the contrary, Dr. Tassé repeatedly explained that these are misconceptions, and they are irrelevant to an assessment of whether or not a person meets the diagnostic criteria for mental retardation. *2010 PCR Tr. pp.193-96.* Specifically, Dr. Tassé stated: "For lay people, when they look at somebody, these are things that come into conflict with their image, distorted however it may be, that someone with mental retardation should look and act like. It has nothing to do with diagnostic features." *Id. at p.197.*

In sum, the evidence in this case overwhelmingly shows that Mr. Simmons meets all three prongs of South Carolina's definition of mental retardation. Respondent has offered no credible, reliable or accurate evidence that would undermine Mr. Simmons' mental retardation

claim. This Court should enter an order finding Mr. Simmons ineligible for the death penalty under *Atkins*.

II. DNA CLAIM

Respondent's brief does not address Mr. Simmons' argument that the DNA issues in this case amount to a violation of the Due Process Clause. Instead, Respondent argues only that Mr. Simmons' trial counsel was not ineffective in his handling of the DNA issues. Moreover, Respondent attempts to re-characterize the problems with the State's DNA presentation at trial as merely: (1) a "disagreement on how the statistical information should have been presented"; and, (2) "a minor error" on the State's demonstrative aid. *Respondent's Brief at pp.10, 25.* Respondent is wrong on all counts.

The State's DNA witnesses, from Lifecodes Corporation, told the jury that Mr. Simmons' DNA was consistent with the crime scene evidence at nine out of nine tested genetic locations. *ROA pp.1470-71; 1474-75; 2005; see also, id. at p.1041* ("nine out nine locations on DNA molecules that they compared with the semen in that vaginal swab matched the DNA from Kenneth Simmons' blood"). They also told the jury that the statistical likelihood that someone other than Mr. Simmons contributed to the crime scene evidence was roughly 1 in a billion in the Caucasian population and 1 in 8 million in the African-American population. *ROA pp.1480-82.* Neither piece of testimony was true.

In fact, three of the tested genetic locations (the CTT test results) do not match Mr. Simmons' DNA at all. Ms. Lauren Crane, has admitted that this is true and that her testimony to the contrary at trial was false.[3] *Crane Deposition at pp.44-47.* With regard to the other six

[3] This false testimony cannot fairly be labeled merely "a minor chart error." *Respondent's Brief at p.25.* Respondent incredibly claims that "Ms. Crane's trial testimony was an accurate

genetic locations, Lifecodes purported to obtain a mixture of the victim's and the perpetrator's DNA from which Mr. Simmons could not be excluded as a potential contributor. However, because of the purported mixture of DNA and the limited nature of the available testing capabilities, only three of these test results give any information that is potentially relevant to Mr. Simmons for comparison purposes.[4] Furthermore, although the State's witnesses testified that the crime scene evidence contained a mixture of male and female DNA, the lab's own CTT results showed only a single profile (that of the victim's) and subsequent gender-typing test results indicated that the crime scene evidence did not contain any male DNA. Lifecodes never reported its CTT test results or the gender-typing test results. Finally, although Dr. Baird purported to testify at trial about the statistical likelihood that someone other than Mr. Simmons

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reflection of her tests and her results," and argues that "whether the CTT results were included or not on the chart at all, the testimony would have been exactly the same." *Id. at pp.21, 25.* Ms. Crane clearly testified at trial that Mr. Simmons DNA was consistent with the evidentiary sample at nine locations. She now admits that this is not true because the CTT test results do not incriminate him. *Crane Deposition at pp.44-46; see also, id. at p.46* ("Q: So basically for comparison purposes to determine whether or not Mr. Simmons is or is not a contributor to the evidentiary samples in this case, you would not include any of the CTT results? A: Correct."). Ms. Crane also admits that she failed to tell the jury that the CTT results were not incriminating. *Id. at p.47* (("Q: Now, you didn't explain [to the jury] that you were just relying on the DQ Alpha and polymarker results, not all nine loci? A: Correct."). Moreover, Ms. Crane represented to the jury that the lab obtained CTT test results from Mr. Simmons' known blood that were exactly the same as results obtained on two separate crime scene samples when, in fact, one of these samples was never tested with CTT at all because it was exhausted before the CTT testing began (*see Baird Deposition at pp.16-17; Crane Deposition at p.13*) and the results obtained from the second crime scene sample do not actually match Mr. Simmons' DNA. *See Crane Deposition at pp.22-25; 27-31; 36-40; 58-60; Affidavit of Drs. Word and Cotton at ¶ 30.* It is simply ridiculous to suggest that this false testimony amounted to nothing more than a minor error on the demonstrative aid.

[4] This is because two of the remaining six genetic locations (LDLR and GYPA) would include everyone in the world. A third genetic location (HBGG) does not give us any information relevant to Mr. Simmons because he and the victim have identical DNA at this location.

could have contributed to the crime scene evidence, his statistical calculations were actually based on the likelihood that someone other than Mr. Simmons could have all of Mr. Simmons' known genotypes (i.e., his genetic twin). Again, Dr. Baird has admitted that this is true. *Baird Deposition at pp.14-15, 31, 36-37, 40.* Regarding Dr. Baird's statistical testimony at trial, Dr. Steve Lambert, Dr. Charlotte Word and Dr. Robin Cotton all agree:

> It is never appropriate to report results in the manner used by Dr. Baird. Presentation of the approximate frequency of the defendant's known sample completely misinforms the jury regarding the strength of the evidence. No credible forensic scientist would report the results from DNA testing in this manner.

Affidavit of Drs. Word and Cotton at ¶ 16.

Thus, the DNA evidence in this case gives rise to two distinct Due Process violations. First, "the State's use of false evidence against a defendant violates the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This is true even when the State has not deliberately introduced the false evidence, but fails to correct it after it is introduced. *See Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue*, 360 U.S. at 269. Moreover, false or misleading testimony by a representative of the State is imputed to the prosecution. *See, e.g., Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998); *Wedra v. Thomas*, 671 F.2d 713, 717 n.1 (2d Cir. 1982); *Curran v. Delaware*, 259 F.2d 707, 712-13 (3d Cir. 1958). A new trial is warranted when there is reasonable likelihood that the false evidence could have affected the verdict. *Napue*, 360 U.S. at 271.

Second, the State's witnesses also withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Bagley*, 473 U.S. 667 (1985). A *Brady* violation includes three components:

(1) the evidence must be favorable to the accused, either because it is exculpatory or impeaching

(2) that evidence must have been suppressed by the State, either willfully or inadvertently, and by either the prosecutor himself or by those acting on behalf of the prosecuting entity; and,

(3) prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). For *Brady* purposes, prejudice is established "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 432-36; *see also, Bagley*, 473 U.S. at 682.

The evidence offered before this Court establishes both claims. Clearly, during deliberations at Mr. Simmons' trial, there is a reasonable likelihood that jurors could have considered the State's false DNA evidence in determining their verdict. *Napue*, 360 U.S. at 271. In addition, the evidence in this case meets all three prongs of a *Brady* violation. First, the true facts of the DNA testing results are favorable to Mr. Simmons. The facts that: (1) the CTT test results did not match Mr. Simmons' DNA; (2) the CTT results did not show a mixture of more than one person's DNA; and, (3) the gender-typing results did not show the presence of any male DNA are all, obviously, exculpatory. If the crime scene evidence does not contain a mixture of DNA and/or does not contain any male DNA, then Mr. Simmons must be absolutely excluded. Moreover, even if Lifecodes' purported finding of a mixture of DNA for the other six genetic locations were correct, Dr. Baird's statistical calculations were incorrect and grossly misleading.[5]

[5] Respondent's heavy reliance on *McDaniel v. Brown*, 558 U.S. 120 (2010) is misplaced because neither the legal claim nor the supporting facts in *McDaniel* are relevant to the situation here. In *McDaniel*, the Supreme Court held that it was error for the district court to consider a new report from the defendant's DNA expert when evaluating his claim under *Jackson v. Virgnia*, 443 U.S.

Second, the favorable DNA evidence was suppressed by those acting on behalf of the prosecution. The State's witnesses did not tell the jury that their testimony was false in every major respect, nor did they disclose any of the evidence that would have alerted the defense to their false testimony. *Brady's* obligations apply "irrespective of the good faith or bad faith of the prosecution." *Id. at 87.* Moreover, *Brady's* obligations apply regardless of whether the individual solicitor is aware of the evidence, as long as it is in the possession of those acting on behalf of the prosecuting entity. *Kyles*, 514 U.S. at 437; *see also, State v. Proctor*, 358 S.C. 424, 595 S.E.2d 480 (2004). The Due Process obligation extends to the prosecution as a whole, because it operates as "an entity" in serving as "the spokesman for the Government." *Giglio*, 405 U.S. at 154. This extension is "as it should be" because the prosecuting entity bears responsibility as "the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles*, 514 U.S. at 439 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Third, there can be no dispute that, had the true facts of the DNA tests results been properly disclosed to the defense, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Kyles*, 514 U.S. at 432-36. The State's case for guilt consisted solely of the DNA evidence and the inconsistent, bizarre, and heavily challenged

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307 (1979), that there was insufficient evidence to convict him of sexual assault. Moreover, the defendant's new evidence suggested that the State's DNA expert committed "the prosecutor's fallacy" at trial (which occurs when one equates the random match probability with the probability of guilt) and that she understated the probability that the DNA of one of the defendant's brothers (who was also a suspect in the case) would match the crime scene evidence. Neither issue is present in this case. Moreover, the standard for evaluating a sufficiency of the evidence claim is in no way equivalent to the analysis required for a *Brady* or *Napue* claim.

statements that Mr. Simmons gave to police after multiple, unrecorded interrogations. In the face of these facts, it is simply unreasonable to conclude that no prejudice ensued.

Finally, even if this Court does not agree that a constitutional violation occurred in this case, there nonetheless exists, "evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(a)(4) (2011). Therefore, Mr. Simmons is entitled to a new trial.

Respectfully submitted,

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Rock Hill, South Carolina 29731

BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

October 11, 2012

Exhibit A

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF Charleston)

Dr. Lewis Randolph Waid, Ph.D., who appeared personally before me, affirms and states the following:

1. I am a licensed clinical psychologist. My office address is 1459 Stuart Engals Blvd., Mt. Pleasant, South Carolina.

2. I testified as an expert witness for the defense at the trial in *State v. Kenneth Simmons* in Dorchester County in 1999.

3. I evaluated Mr. Simmons regarding his competency to stand trial; his ability to understand his *Miranda* rights; and other potential mitigating factors.

4. 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.

5. I conducted my evaluation of Mr. Simmons prior to the Supreme Court's decision in *Atkins v. Virginia*. Thus, distinguishing between mental retardation, borderline intellectual functioning or brain damage due to injury or drug use did not have the same legal significance that it has today. Given what I was asked to do – assess whether Mr. Simmons could comprehend and thus make a knowing and intelligent waiver of the *Miranda* rights – the important issue was Mr. Simmons' cognitive deficits, not determining whether he had mental retardation.

6. It was for these reasons that I did not make a formal assessment of Mr. Simmons' deficits in adaptive functioning or whether his significantly sub-average intellectual functioning manifested itself during the developmental period.

Further affiant sayeth naught.

Lewis Randolph Waid Ph.D.
DR. LEWIS RANDOLPH WAID

Sworn to and subscribed before me
This 18 day of December, 2009

Jennifer Hardy
Notary Public for the State of South Carolina
My commission expires: 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 05-CP-18-1368
COUNTY OF DORCHESTER	)	
	)	
KENNETH SIMMONS,	)	
Applicant,	)	
	)	**CERTIFICATE OF SERVICE**
v.	)	
	)	
GARY MAYNARD, COMMISSIONER,	)	
S.C. Department of Corrections	)	
Respondent.	)	
	)	

The undersigned certifies that a copy of the foregoing Applicant's Reply to Respondent's Post-Hearing Brief was served by first class United States mail, postage prepaid, this 11th day of October, 2012, upon the following:

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STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS
Kenneth Simmons, #5066, Applicant, v. State of South Carolina, Respondent.	)	C/A No.: 2005-CP-18-1368 (Capital PCR Action) RESPONDENT'S POST-HEARING REPLY BRIEF

Respondent makes the following reply to the arguments forwarded in Applicant's Post-Hearing Brief:

THE MENTAL RETARDATION ISSUE

In his post-hearing memorandum, page 2-28, Simmons relies upon the DSM IV TR definition of mental retardation and limited evidence that was presented to the Court to assert that he met his burden of proof. However, the asserts presented in the memorandum is important for what it fails to present, the contrary evidence within his presentation that supports a conclusion that Simmons is not mentally retarded as defined under South Carolina law. In reply, Respondent incorporates by reference its earlier post-hearing memorandum on this issue, particularly pages 43-54.

The Definition.

South Carolina defines mental retardation as "having significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 16-3-20(C) (b) (10); accord DSM - IV, at 41. Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003). Similarly, in Atkins, the Supreme Court

noted that an IQ score between 70 and 75 "is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Atkins, 536 U.S. at 309 n. 5, 122 S.Ct. at 2245 n. 5. The Atkins Court also stated, " '[m]ild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70." Id. at 308 n. 3, 122 S.Ct. at 2245 n. 3.[1]

Although specifically not adopted in Franklin, the American Psychiatric Association's definition was relied upon by the Applicant in his argument. "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).[2] Mental Retardation has many different

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[1]In Stripling v. State, 261 Ga. 1, 401 S.E.2d 500, 504 (1991), the Georgia Supreme Court explained that the "significantly subaverage intellectual functioning" factor of the mental retardation definition "is generally defined as an IQ of 70 or below." According to the court, however, "an IQ test score of 70 or below is not conclusive" because "an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate." Id.; accord Hill v. Humphrey, 662 F.3d 1335, at 1341, n. 6 (11th Cir. 2011).

[2] Criterion B for a diagnosis of an intellectual disability involves gauging the person's functional capacity. The clinician will look for impairments in the his adaptive functioning. The American Association on Intellectual and Developmental Disabilities notes that adaptive behavior includes three types of skills: practical skills, conceptual skills and social skills. When assessing practical skills, the clinician will looks to see if the patient can take care of herself, use money or a telephone, and other daily activities. Conceptual skills include language, number concepts and self-direction. The social skills aspect of an assessment of an intellectual disability and functional capacity involves self-esteem, following rules and interpersonal skills. To assess these adaptive functioning skills, the clinician will use a different test than the one used to evaluate the patient's intelligence level.

etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Atkins v. Virginia, 536 U.S. at 308 n. 3, 122 S.Ct. at 2245 n. 3 (citations omitted). The Applicant has used this information as a guide in his post-hearing brief, but within it fails to reveal the full story of Mr. Simmons in its assessment.

The Applicant, in his brief, assumes the applicability of the DSM criteria - criteria specifically not adopted by the Franklin court, as the test merely because footnote 3 in Atkins addressed it. In the Franklin decision, the South Carolina Supreme Court initially rejected the argument to adopt as a substantive definition of "mental retardation" different than that adopted by the legislature when Franklin was decided, particularly the AAMR or DSM-IV-TR (A.P.A.) definitions. See Franklin, In addition, he seeks to rely upon decisions by other courts in South Carolina in Atkins/Franklin related cases, *Edward Elmore v. State*, (no appeal taken), *Mercer v. State* (current on PCR appeal), and *State v. Pearson* as establishing the terms of state law. Simply put, none of these cases have been resolved by the South Carolina Supreme Court. Therefore, it cannot be said that the DSM-IV criteria have been adopted as a matter of law as the sole manner for determining the existence of mental retardation under the South Carolina definition of mental retardation.

The U.S. Supreme Court acknowledged that any disagreement concerning the execution of mentally retarded offenders related to determining who is in fact retarded. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." Id. at 317, 122 S.Ct. 2242. Accordingly, it left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." Id. (quoting Ford v. Wainwright, 477 U.S. 399, 416–17, 106 S.Ct. 2595,

91 L.Ed.2d 335 (1986)). Although the Court did refer to the clinical definitions of mental retardation promulgated by the AAMR and the American Psychiatric Association ("APA"),

> Atkins v. Virginia ... did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation "will be so impaired as to fall [within Atkins' compass]." We "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction."

Bobby v. Bies, 556 U.S. 825, 129 S.Ct. 2145, 2150, 173 L.Ed.2d 1173 (2009). Therefore it is not "clearly established Federal law as determined by the Supreme Court of the United States" that the analysis by the state court must precisely track the clinical definitions referenced in Atkins. See 28 U.S.C. § 2254(d)(1); Clark v. Quarterman, 457 F.3d 441, 445 (5th Cir.2006)(It is not clearly established federal law that the state court analysis of subaverage intellectual functioning must precisely track the AAMR's recommended approach).

Recently, there is pending before the United States Supreme Court a challenge to the approach in Texas addressing Texas assessment of the adaptive functioning prong. Chester v. Thaler, No. 11-1391 (cert pending). However, although not binding on this State, the Texas standard does provide an alternative view for assessment of these statutory factors. In the absence of action by the Texas legislature setting a definition of mental retardation for this purpose, the Texas Court of Criminal Appeals adopted the definitions set by the American Association on Mental Retardation (AAMR) or section 591.003(13) of the TEX. HEALTH & SAFETY CODE, which are substantially similar. Ex parte Briseno, 135 S.W.3d 1, 7 (Tex.Crim.App.2004).

Under the AAMR definition, mental retardation is a disability characterized by: (1) "significantly subaverage" general intellectual functioning; (2) accompanied by "related" limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.... [T]he definition under

the Texas Health and Safety Code is similar: " 'mental retardation' means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." Id. at 6. The AAMR definition was specifically cited by the Supreme Court in Atkins as one of the definitions used in that case. 536 U.S. at 308, n. 3, 122 S.Ct. 2242.

Because the second element, which looks to adaptive deficits, is subjective and an area on which experts could be found to opine on both sides of the issue in many cases, the Texas decision in Briseno also lists several evidentiary factors which factfinders might also consider when weighing evidence to determine whether it indicates mental retardation versus a personality disorder.

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8–9 (the Briseno factors).

Although the Court in Atkins held that the Eighth Amendment prohibits the execution of mentally retarded offenders, 536 U.S. at 321, it stopped short of clearly establishing which offenders

are "mentally retarded." Instead, the Court recognized that there was "serious disagreement" when it came to "determining which offenders are in fact retarded." Id. at 317 ("Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus."). The Court, therefore, "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction." Id. (citation and internal quotation marks omitted). This is consistent

with the Court's prior precedent that it has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance. Kansas v. Hendricks, 521 U.S. 346, 359 (1997) (concerning when someone may be civilly committed due to mental illness).

The Applicant may suggest that the Atkins Court delegated to the State only procedural matters regarding mental retardation. But the Court rejected that construction of Atkins in Bobby v. Bies, 556 U.S. 825, 831 (2009). There, the Court stated that "[o]ur opinion [in Atkins] did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within Atkins' compass].'" Id.

Out of the eighteen states that formed the national consensus, only two of them specifically included the AAMR's clinical test for deficits in adaptive functioning, requiring proof of

deficits in two of ten areas.[3] Five used a more general standard from the narrative section of the DSM-IV-TR, looking at "the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group."[4]

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[3] MO. REV. STAT. §565.030; N.C. GEN. STAT. §15A-2005.

[4] ARIZ. REV. STAT. ANN. §13–703.02 (now located at ARIZ. REV. STAT. ANN. §13-753); CONN. GEN. STAT. §53a–46a (death penalty abolished in 2012); FLA. STAT. §921.137; KAN. STAT. ANN. §21-4623 (now located at KAN. STAT. ANN. §§21-6622,

The rest of the state provided no guidance. But court cases using the clinical standards issued years after Atkins was decided do not establish a national consensus in Atkins. In fact, at the time of Atkins, at least two courts had rejected strict adherence to the clinical standards. The Tennessee Supreme Court held that the statutory phrase "deficits in adaptive behavior" should be given its ordinary, non-technical meaning. State v. Smith, 893 S.W.2d 908, 917 (Tenn. 1994). And the Indiana Supreme Court refused to adopt the DSM-IV's definition of adaptive functioning. Rondon v. State, 711 N.E.2d 506, 516 n.14 (Ind. 1999). There was, therefore, no national consensus in Atkins regarding how to measure deficits in adaptive functioning.

Underlying his petition is Applicant's belief that the legal definition of mental retardation for Eighth Amendment purposes should match the clinical definition. But that assertion is undermined by Court precedent explicitly recognizing that legal and clinical standards are not always the same. See,e.g., Hendricks, 521 U.S. at 359 (noting that legal definitions of "insanity" and "competency" "vary substantially from their psychiatric counterparts"). "Legal definitions . . . which must 'take into account such issues as individual responsibility . . . and competency,' need not mirror those advanced by the medical profession." Id. (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxiii, xxvii (4th ed. 1994)).

The Court has held that the "ever-advancing science" of psychiatry "informs but does not control ultimate legal determinations" and that psychiatry's "distinctions do not seek precisely to mirror those of the law." Kansas v. Crane, 534 U.S. 407, 413 (2002). The Court has also noted the reality that "psychiatrists disagree widely and frequently on what constitutes mental illness, on the

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76-12b01); WASH. REV. CODE §10.95.030.

appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." Ake v. Oklahoma, 470 U.S. 68, 81 (1985) (noting that psychiatry is "not . . . an exact science"). For this reason, it is left to judges and juries to decide mental retardation based on the facts presented by the parties. Id. They are not bound by a clinical diagnosis from an expert. See Parker v. Matthews, 132 S. Ct. 2148, 2153 (2012) (per curiam) ("But expert testimony does not trigger a conclusive presumption of correctness, and it was not unreasonable to conclude that the jurors were entitled to consider the tension between Dr. Chutkow's testimony and their own common-sense understanding of emotional disturbance.").

The two footnotes in the Atkins decision on which Applicant relies do not demonstrate that the Court, contrary to its usual practice, adopted the clinical standards as the constitutional test for mental retardation. Rather, the Court explicitly left that task to the States.

When the Court held in Atkins that the mentally retarded may not be given the death penalty, it identified several characteristics of the mentally retarded that make them less culpable than other individuals convicted of capital crimes: "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." 536 U.S. at 318; see also id. (noting that, in groups, they are followers, not leaders). He may suggests that those characteristics taken into account in the Briseno factors, are not actually indicative of mental retardation—or at least occur so rarely that the Court's consideration of them arguments now suggest that those characteristics, taken into account in the Briseno factors, are not actually indicative of mental retardation—or at least occur so rarely that the Court's consideration of them will inevitably lead to the execution of the mentally

retarded.

What we do know is that when the issue concerning the adoption of the APA and AAMR factors were squarely presented to the state supreme court to adopt in Franklin, it refused to do so, leaving it to the legislature to change and revise the definition. Not surprisingly, the question of mental retardation would soon become a battle of experts, especially with respect to the adaptive-functioning element. See, e.g., Ortiz v. United States, 664 F.3d 1151, 1158-60 (8th Cir. 2011); Walker v. Kelly, 593 F.3d 319, 324-29 (4th Cir. 2010); Larry v. Branker, 552 F.3d 356, 370 (4th Cir. 2009); Ybarra v. State, 247 P.3d 269, 277-81 (Nev. 2011).

To assist the fact-finder in considering divergent expert opinions on adaptive functioning, the Texas Court of Criminal Appeals provided seven factors to apply. These factors focus on the characteristics of the mentally retarded that convinced the Atkins Court to categorically ban their execution. Thus, if Briseno is inconsistent with the DSM and the AAMR, so is Atkins.

The first factor—whether those who knew the defendant at a young age believed he was mentally retarded and acted accordingly—actually reflects the AAMR definition, which requires the presence of adaptive-functioning deficits before age eighteen. Atkins, 536 U.S. at 308 n.3; Briseno, 135 S.W.3d at 7-8. While Applicant may argue that lay persons do not know how to diagnose mental retardation, they can certainly testify to behaviors and abilities that they witnessed when the defendant was young. And whether those individuals acted in accordance with their belief in the defendant's limitations simply adds or detracts from their credibility.

The next three factors—impulsiveness, leadership, and rational responses to external stimuli—all come from Atkins. Briseno, 135 S.W.3d at 8. The diminished capacity to control impulses is mentioned repeatedly by the Court as reducing the culpability of the mentally

retarded. Atkins, 536 U.S. at 306, 318, 320. The Court also stated that, in group settings, the mentally retarded are typically followers, not leaders. Id. at 318. And the question whether an individual has rational responses to external stimuli can be seen in the Court's focus on the mentally retarded's capacity to understand the reactions of others, to engage in logical reasoning, and to process information, all of which are referenced throughout the Court's opinion. Id. at 306, 318, 320. Indeed, Applicant's own expert suggested decisionmaking and impulse control as areas in which the mentally retarded struggle.

The fifth factor of communication is especially relevant, as it is part of the AAMR and APA definitions of adaptive functioning. Atkins, 536 U.S. at 308 n.3; Briseno, 135 S.W.3d at 8. The diminished capacity to communicate was relied on in Atkins to justify a categorical ban, as the Court noted that mentally retarded defendants are "less able to give meaningful assistance to their counsel and are typically poor witnesses." Id. at 318, 320-21.

The final two factors -the ability to lie and whether the capital offense required forethought and complex execution - reflect the Court's desire to draw a line between the "cold calculus" of premeditated murder and the more impulsive nature of the mentally retarded. Atkins, 536 U.S. at 319; Briseno, 135 S.W.3d at 8-9. As in Applicant's case, the first diagnosis of mental retardation may come after an offender has been charged with or convicted of capital murder, in other words, when he has an incentive to demonstrate a diminished capacity. Examining specific events in his life, while not necessarily determinative, will provide the judge and/or jury with a basis on which to judge the offender's current claim of retardation.

Other states recognize that Atkins did not define mental retardation. He may suggest that Texas is out of step with other States when it comes to determining who is mentally retarded and

consideration the Briseno factor is out of line. But the case law and statutes from other States do not support his assertion. Other States, like Texas, recognize that Atkins provides flexibility in defining mental retardation. And other States, like Texas, consider evidence that does not strictly align with the clinical standards for testing deficits in adaptive functioning. Texas is not an outlier, but part of the majority in considering all of the evidence and leaving the fact-finding to the judge and jury. Even before the Court made clear in Bobby v. Bies that it had not provided a substantive definition of mental retardation, States across the country recognized that they were not bound by the AAMR definition quoted in footnote three of Atkins. Franqui v. State, 59 So. 3d 82, 94 (Fla. 2011) (noting the "the broad authority given in Atkins to the states to enact their own laws to determine who is mentally retarded, without any requirement that the states adhere to one definition over another"); Gray v. State, 887 So. 2d 158, 168 (Miss. 2004) ("Determining who is mentally retarded for purposes of this prohibition has been left to the individual States."); Johnson v. State, 102 S.W.3d 535, 540 (Mo. 2003) (stating that "Atkins did not define the perimeters of mental retardation, but left 'to the States the task of'" enforcing the restriction); Winston v. Commonwealth, 604 S.E.2d 21, 50 (Va. 2004) ("The Supreme Court in Atkins did not define mental retardation, nor did it prescribe procedures for determining it.").

As a result, some States have adopted definitions of mental retardation that do not follow the AAMR's definition. For example, Utah limits the deficits in adaptive functioning to "primarily . . . the areas of reasoning or impulse control, or in both of these areas." State v. Maestas, No. 20080508, 2012 WL 3176383, at *39 (Utah July 27, 2012) (quoting UTAH CODE §77-15a-102). Mississippi's test includes a fourth prong which requires a defendant to prove that he is not malingering. Thorson v. State, 76 So. 3d 667, 670 (Miss. 2011). And Kansas, which was part

of the national consensus identified in Atkins, requires the defendant to prove that he has significantly subaverage general intellectual functioning "to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." KAN. STAT. ANN. §21-6622(h); see also Atkins, 536 U.S. at 342-43 & n.2 (Scalia, J., dissenting) (noting that Kansas would exempt only the severely mentally retarded from execution).

The Arizona Supreme Court has specifically held that the DSM-IV definition of mental retardation "is not the same as the statutory definition." State v. Grell, 135 P.3d 696, 709 (Ariz. 2006). The court drew the distinction between the clinical definition, which permitted a finding of deficits in adaptive functioning "based solely on proof of specific deficits or deficits in only two areas," and the statutory definition, which required an "overall assessment of the defendant's ability to meet society's expectations of him." Id. Thus, many States have recognized that the definition of mental retardation need not exactly match the AAMR's clinical standards or those used by other medical professionals. Even though Texas uses the three-part definition, Texas is not alone in holding that it is not bound by clinical definitions.

Many States do not strictly adhere to the clinical standards when considering deficits in adaptive functioning. Review of other States' adaptive-functioning decisions makes clear that the characteristics in Atkins are key - not the AAMR's test.

The Louisiana Supreme Court has recognized the "factors" used by the Court in Atkins. State v. Williams, 22 So. 3d 867, 881 (La. 2009) (quoting Atkins' reference to "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"). In Williams, the court considered the defendant's ability to communicate, to recall past events, to understand and anticipate the reactions of others, and his ability to learn from experience to determine that he had not proven his mental retardation. Id. at 886. Likewise, the Oklahoma Court of Criminal Appeals also listed the defendant's ability to communicate, socialize, understand others, and plan as facts indicating he was not mentally retarded. Myers v. State, 130 P.3d 262, 268 (Okla. Crim. App. 2005).

Other States have also relied on the defendant's criminal conduct and ability to lie as evidence that he fails to meet the adaptive-functioning prong. The Florida Supreme Court has noted that "[t]he experts also agreed that the planning of the murder and cover-up in this case are inconsistent with a finding that [the defendant] suffers from mental retardation." Phillips v. State, 984 So. 2d 503, 512 (Fla. 2008) (per curiam). The Oklahoma Court of Criminal Appeals in Myers relied on a defendant's ability "to mislead people and, when confronted with inconsistencies in his stories, he could conform his story to fit the facts." 130 P.3d at 268. Alabama has also found a defendant's complex criminal activity to be "insightful." See Smith v. State, No. 1060427, 2007 WL 1519869, at *9 (Ala. May 25, 2007) ("More insightful into Smith's adaptive behavior is the fact that Smith was involved in an interstate illegal-drug enterprise."); see also Morris v. State, 60 So. 3d 326, 347 (Ala. Crim. App. 2010) (relying on evidence that Morris had "engaged in drug dealing and gambling").[5]

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[5]The Alabama Court of Criminal Appeals' findings in Lee v. State 898 So. 2d 790 (2001) on direct appeal are telling as to the infirmities in Simmons' present Atkins argument: "The majority of the evidence presented in this case does not indicate that the appellant has significantly subaverage intellectual functioning. In fact, it appears that any such deficits may be due to his voluntary use of drugs and/or alcohol and/or malingering. Also, the record does not indicate that the appellant has significant or substantial deficits in adaptive behavior. Finally, the record does not indicate that any such problems manifested themselves before the appellant

The Fourth Circuit, applying the AAMR's clinical definition, held that the defendant's "conceal[ment] [of] much of his criminal activity from his family" was evidence that he did not have deficits in the conceptual area of adaptive functioning, and his distribution of drugs and manipulation were evidence that he did not have deficits in the social area. Green v. Johnson, 515 F.3d 290, 302 (4th Cir. 2008).

As noted by the Mississippi Supreme Court, "there is considerable, sincere disagreement among professionals and scholars in the field as to the best method for measuring adaptive functioning. The concept and measurement of adaptive functioning is an unsettled area without consensus among experts." Doss v. State, 19 So. 3d 690, 714 (Miss. 2009); see also *Symposium, Conceptual Hurdles to the Application of Atkins v. Virginia*, 59 HASTINGS L. J. 1203, 1209-12, 1218-22 (2008) (discussing the evolution of the AAMR's definition of mental retardation and the variety of ways to measure adaptive functioning); Note, *Implementing Atkins*, 116 HARV. L. REV. 2565, 2575-76 (2003) (describing difficulty in assessing adaptive functioning).

At bottom, Applicant's argument would take the decision of whether a defendant is mentally retarded out of the hands of the fact-finder and place it into the sole hands of medical professionals. The Court has not required this result and, for the reasons noted above,

such a ruling would be at odds with how the Court has treated other areas where mental health and the law intersect.

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reached the age of 18. The Appellant does not satisfy even the broadest definition of mental retardation." Lee, 898 So.2d at 859–60. What's more, petitioner concedes that his "impairment has eased over the years" (doc. 25, at 118), suggesting that he cannot show that the IQ and deficits in adaptive behavior exist currently, as required for him to be classified as mentally retarded for purposes of his Atkins claim. See Lee v. Thomas, 2012 WL 1965608, 60 (S.D.Ala.) (S.D.Ala.,2012).

In other areas of law, the Court has recognized the role of the fact-finder. For example, given that there "often is no single, accurate psychiatric conclusion on legal insanity in a given case," fact-finders must "resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." Ake, 470 U.S. at 81. And just this past term, the Court held that a jury was allowed to use its own common sense understanding of "extreme emotional disturbance" to reject the expert opinion proffered by the defendant. Parker, 132 S. Ct. at 2153.

The California Supreme Court followed Georgia's practice—that the jury is not "bound by the opinion testimony of expert witnesses or by test results, but may weigh and consider all evidence bearing on the issue of mental retardation." In re Hawthorne, 105 P.3d 552, 559 (Cal. 2005) (citation and internal quotation marks omitted). The California court further stated that "mental retardation is a question of fact. It is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." Id. at 558 (citations omitted).

Arkansas has permitted a jury use lay testimony to reject that of an expert. Morris, 60 So. 3d at 346-47. Similarly, Pennsylvania has permitted the lay opinions of the defendant's family and friends to contradict the conclusions of an expert witness. Commonwealth v. Keaton, 45 A.3d 1050, 1082 (Pa. 2012). And Louisiana has warned that "the trial court must not rely so extensively upon this expert testimony as to commit the ultimate decision of mental retardation to the experts." State v. Williams, 831 So. 2d 835, 859 (La. 2002).[6]

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[6] See Powell v. Allen, 602 F.3d 1263, 1272 (11th Cir.2010). "In Alabama, to establish mental retardation a defendant must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior.... *[I]t is implicit in*

Expert opinions on mental health issues are undoubtedly helpful, but they are not dispositive. The fact-finder is still free to consider all of the evidence and reach his own conclusion. Simply put, the assessment is not as cut and dried as Applicant makes it to be. Although Dr. Tasse may have used the DDSN criteria in his assessment, the criteria does not bind the court in making its conclusion - it is a guide, but not a legal standard.

SUB -AVERAGE INTELLECTUAL FUNCTIONING.

In his argument, the Petitioner asserts that sub-average intellectual functioning means an IQ of 75 or less. Memorandum, p. 3. However, state law uses the term ""having significantly subaverage general intellectual functioning . . ." S.C. Code Ann. § 16-3-20(C) (b) (10). There is no "75 or less" is the statutory definition. In fact. DSM-IV-TR states mild mental retardation is an IQ level 50-55 to approximately 70. DSM IV-TR, p. 42. It further stated that Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean. IS, p. 41. Although it notes that there is a measurement error of approximately 5 points in assessing IQ, "although this may vary from instrument to instrument (e.g. a Wechsler IQ of 70 is considered to represent a range of 65-75." Id. Similarly, a Wechsler IQ of 75 would be considered to represent a range of 70-80. As the DSM stated, mental retardation would not be diagnosed in an individual with an IQ lower that 70 if there are no significant deficits or impairments in adaptive function. Id. P. 42. The Applicant has urged that it is estimated that between 1 and 3 per cent of the population has an IQ between 70 and 75.

The Applicant suggests that he falls within the 1 and 3% of the population possessing

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that definition that the IQ and deficits in adaptive behavior exist not only prior to the age of eighteen but also both at the time of the crime and currently." Id. (citations and internal quotation marks omitted).

"significantly subaverage general intellectual functioning" relying upon a limited view of his testing. Memorandum p. 7. However, the school records reveal other testing that plainly places Simmons above the bottom 1-3% of the population. Affidavit Shwec, p. 5, School records. His elementary records contain IQ's in the first grade of 94, third grade of 104 and 4th Grade of 69. While these may not be individualized testing, they still reflect an assessment of his abilities at that time period. Further, in Shwec's affidavit she acknowledges that Simmons was not identified for the resource class until the 11th Grade, which she found to be unusual. That the fact that he was not placed there until the 11th Grade cannot be ignored, particularly when other environmental factors were coming into play - the death of his mother, and the increase in alcohol and drug use. PCR Tr.p. 52-53, Yungman Report, p. 3. State Exhibit 13, ROA 2237-38. . The speculation that as to why other teachers set forth in her affidavit, paragraph 16, because they may have felt he was to get along with, or ignored him or did not want to work with handicapped students is pure speculation. The simple fact is that until he began a downward course of alcohol intoxication and drug use, he was not identified as for the resource program or for "main-streaming." See PCR TR.p. 54-56. Although Ms. Hammock speculated that there were around 30 students in the resource program, his class rank in graduating was 531 out of 615, meaning he ranked above 84 other students, certainly not in the bottom 1% or 3% of the graduating class. The social historian also acknowledged that Simmons was never designated to go into the most remedial program that Summerville High School had concerning the most serious needs. PCR Tr.p. 87.

Dr. Tasse conceded that Simmons was not diagnosed by any school as being mentally retarded. PCR 169 - 170. Importantly, Dr. Tasse never tested the Applicant. PCR Tr.p. 173, l. 10-12.

Furthermore, a review of the school transcripts reveal variance in the grades the Applicant received throughout. As Dr. Sandler and McAfee noted, he was capable of receiving A's and B's in courses, throughout. Although, Ms. Shwec may denigrate and speculate in her affidavit, the motivation of other teachers, there was no showing made that nay particular teacher failed to give Simmons the grade he earned. PCR 50-51. In addition, the basis for the placement in the Resource program and testing were not available at the time of the hearing. Shwec Affidavit at paragraph 9; Polk Affidavit at paragraph 5.

Further, the Applicant is forced to acknowledge that the Applicant received a Full Scale IQ on the WAIS-R test. The test was relied upon by the SC DDSN examiners, who acknowledged that there may be some practice effect issues when they did their assessment in 1999. However, that does not remove the 75 IQ test to be considered, nor does it require that IQ to be decreased by any identified amount. Although it was "within the range," it is still a factor for this Court to consider and supports it not being mental retardation where the actual effect is unknown. See Richardson v. Branker, 668 F.3d 128 (4th Cir. 2012) (no requirement for downward adjustment of IQ score of 72 and 74 score due to "practice effect" and conclusion that MR not found supported). Psychology apparently acknowledges that the "practice effect" -improvement from recent familiarity with a testing instrument—may artificially inflate test scores. See Hall v. State, 160 S.W.3d 24, 30 (Tex.Crim.App.2004) ("The 'practice effect' occurs where a subject's knowledge of a previous IQ test affects the results of a test administered shortly thereafter."). The practice effect only applies when there is a short interval between tests. Here, the WAIS-R was given on May 15, 1998 (69) and February 9, 1999 (75). The nine-month period here should have dispelled any lingering effect from

the first test. [7] However, though it may have an effect, it does not mean that it actually had an effect. Further, it certainly does not explain the decrease between the WAIS-R (69) on May 15, 1998 and January 8, 1999 WAIS - III (66) testing. Simply put it is unclear was the specific IQ score the Applicant received during the 1978 test that was done prior to his 11th grade placement in the Resource class.

ADAPTIVE FUNCTIONING

In their memorandum, the Applicant completely relies upon the DSM and AAMR standards to assess the adaptive functioning. However, as pointed out in the earlier Respondent's post-hearing brief, there is another side of his functioning that the Court should consider. He claims that there us evidence of deficits in functional academics, home living, work, self-direction, and communication. However, there are certain factors in each area which also should weigh into consideration by the Court in whether weigh considering whether " deficits in adaptive behavior" exist.

First, Dr. Tasse relied upon a Vineland that was used to assess the adaptive functioning in

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[7]Due to the "practice effect," theoretically one could not give the either a particular WAIS-III or WAIS II or WAIS IV multiple times in a short period. The practice effect, at least according to one source, affects the performance portion of the test more than the verbal. Commentators have stated Verbal IQ scores gain 2 to 3 points while performance scores jump 3 to 8 points. See George C. Baroff, *Establishing Mental Retardation in Capital Cases: An Update*, 41 Ment. Retard.. 198, 199 (2003). Such an increase could raise a full scale score by as much as 2 to 3 points. Thus, the first administration, which one presumes will normally be given by a psychologist hired by the convicted individual, precludes further meaningful examination by the State. Given the subjective nature of these tests, there is much latitude for disagreement over how certain answers are scored. Rather than being able to retest the individual, the party who "goes second" is somewhat bound by the results of the first test. Commonly accepted scientific principles preclude later testing either by the second party or, as in this case, by the court. See also Middleton v. Evatt ,855 F.Supp. 837, 847 (D.S.C.,1994).

1999. However, one of the Respondent's had no contact with Simmons since 1982. PCR 166.[8] However, he admitted that he did not re-score the testing. PCR 165. He was not aware whether when the older sister had lived with Applicant and when the ex-wife had lived with him. PCR 107. In fact, he stated that he was not sure if they had lived together. PCR 167. Further, as to "money concepts', Dr. Tasse conceded that he did not know if Simmons knew the value of a dolla. He claimed that the money concepts were adequately examined by Dr. Keyes however on the Vineland given to a former wife who had virtually no contact with Applicant since 1988 (Yungman, p. 5) and the older sister. Questioning concerning the particular Vineland test about the concepts revealed that the questions of them was to address such items a his knowledge of the value of pennies, etc. PCR 182. Although Simmons was in a prison setting, he stated that adaptive behavior concerns how one acts in the community. PCR 182. Dr. Tasse felt that there were some deficits, and claimed contrary to testimony at trial that Simmons was unable to cook for himself (PCR 184-185), when family members indicted that Simmons did not the cooking when his father was ill and fed his mother. He suggested that there was a sister at home at the time, yet had to concede that she was the sister who had been determined to suffer under mild mental retardation. PCR 185. However, at trial Annette Geddis testified that Simmons cooked. ROA 2243 ("He would be the only one working or cook."). He conceded that Petitioner was able to follow directions closely. PCR 185. He further conceded that he did not see and physical developmental failings as a child. PCR 186-187. Dr. Tasse refused to

[8]Dr. Tasse in admitting that he did not re-score the Vineland and took Dr. Keyes scoring at face value. He admitted that the first page of the Vineland was virtually blank and the items were not given a response for the first half of the page. PCR 206. However, Dr. Tasse stated that sometimes he would go in and place two in the spaces but it was not done on Mr. Simmons Vineland. PCR 207. He also noted that there were a significant number of responses where the responder did not know the answer He admitted that there were 33 blank items on one page with only 9 having a response. PCR 208.

acknowledge that he saw any account that Simmons had any self-esteem when there was information in the record and reports he reviewed that Simmons had esteem over his football accomplishments. PCR 188, S.C. DDSN Report, State Exhibit 5. ROA 2204, 2217, 2220 ("leader on the defense on the football field"). Yungman , p. 3.

As to "functional academics," it was only during his second attempt at 11th Grade that he was placed in the Resource program. PCR Tr.p. 31-32, 52. At that time, his mother had died and his drug and alcohol involvement had increased. PCR 15-16, 52-53, Yungman, p. 3-4. Further, placement into similar programs was not identified throughout grade school and middle school. PCR TR.p. 32.[9] The recorded IQ's within the school records at elementary school varied from 69 at the 19th percentile, 94 at the 11th percentile, 104 at the percentile and included grades which were low to average and his achievement level in the Sixth grade was tested at a fourth grade level. PCR 42-46. It was noted that his grades continued in the low range. His grades as recognized by the SC DDSN team included a series of grades which included 9th grade grades of yearly avenge of B in Basic English, B in General Math, in tenth grade a C in Basic English, C in Math (although he had received an A and B in the first semester); a C in Art; in first 11th Grade a B in Remedial English. As noted in contrasting the reference to grades being given to Applicant, there was no evidence from any teacher that Simmons did not receive the grade he earned in the class. PCR 50-51.

As to Home living, there was a claim that Applicant was never able to live independently. Applicant's memo, p. 19. However, in contrast, the record revealed Simmons had moved out of the parent's home after his mother died and got married. He had moved back before his father dies and

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[9]The record reveals that his sister had been identified for such programs at an early stage. PCR 32, 37.

takes care of him. PCR Tr.p. 19. In addition, the record revealed that while his mother was still alive, the Applicant was a caretaker for his mother who was suffering from diabetes. PCR Tr.p. 52-53. The record supports that he helped feed his mother, helped clean her, took care of her daily needs and tried to cheer her up and make her feel better. PCR Tr.p. 53. Her also took care of his younger sister Annette at the time who was also living at home who had been determined to be mentally retarded. PCR Tr.p. 53-54. Annette Geddis had testified at the trial that the Applicant had taken care of her and that Kenneth would be the cook. Tr.p. 2243. She described that when Applicant was taking care of her father he would bathe him because he was bed-ridden , feed him and took care of everything for him (for about year before he died in 1982). Tr.p. 2248.

As to his home living, in his youth he had shared a room and it was reported to be very neat. PCR 75. He understood and was trained on self-care and personal cleanliness. PCR TR.p. 75-76.

The Applicant focuses on assertions that after he got married, his wife undertook most of the roles for home living, thus asserting that it was a deficit. However, it ignores that his life had begun to revolve around drugs and alcohol after the marriage in 1982. Although it was reported he was a good worker, his social history suggested that the move to marijuana and crack cocaine caused him to only work enough to get enough money to purchase the drugs. Yungman, p. 4. His inability to further involvement in "home living" was more likely not due to "intellectual deficits", but to his drug involvement. As noted in 1988, due to his drug involvement and refusal to seek substance abuse counseling or marriage counseling, the marriage ended with minimal contact thereafter. Thus, the deficiencies in home home living was not shown to be due to intelligence, but to drug addiction. The Applicant neither addresses this nor acknowledged it in their memorandum.

Similarly, as to "work", the social history suggests that the problems with work were due to

his drug and alcohol use and limited desire to earn enough to purchase the drugs. Yungman, p. 4. After the 1988 separation from his wife, his employment and housing arrangements were a product of his drug problems and failure to seek treatment. He was arrested in 1993 for receiving a stolen TV and placed on probation. At the same time, he began seeking shelter at the Palmetto House and participated in the program until the instant crime. It was noted that he was a regular participant. He began spending nights there in 1994. Yungman, p. 5. He began doing tasks that he was trusted in doing for the staff, including painting and yard work. PCR 73-74. See also Testimony of Doris Russell (ROA 2279-2285)(description of Simmons doing various chores at Palmetto House and for her family). Testimony of Robin Schmiedling (Tr.p. 2264-2275) (testimony concerning Applicant doing work for her in 1993 and at the shelter).

Concerning self-direction, the Applicant ignores the fact that he went to the Palmetto House to secure food and accomplish work. Although the tasks were common labor tasks, he was frequently left on his own to accomplish the tasks at either the shelter or the homes of either Russell or Schmeidling.

His communication skill was again inconsistent represented in the Applicant's memorandum. Although quiet, it was reported that Simmons was well like and could communicate with others. At trial, he was described as a person who would laugh and cut up with others (Tr.p. 2262), a person with common sense (Tr.p. 2263), Had friends on the football team (Trey Banks). Tr.p. 2266. In high school, Kenneth was nice and accepted by the "good guy crowd." Tr.p. 2268. He was further described a "a very quiet person; loves to joke; loves to play around." Tr.p. 2279. However, Hammock asserted that no one had a problem understanding his oral communications, but his writing was poor. Contrary to the trial testimony about him having friends in school, she maintained

that her information was that he did not have friends that he conversed with. PCR Tr.p. 74.

As to community resources before the age of 18, the record supports that he regularly attended school. PCR 76. There was evidence that he attended church. Ms. Hammock initially admitted that while in jail, Simmons led bible studies and that he was trained to lead bible studies. PCR Tr.p. 77-78, 85-87. However, she then asserted that he only attended bible study and did not lead the group. PCR Tr.p. 98-99.

A consideration of the Briseno standards may suggest further that Applicant has not met his burden of proving mental retardation.

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and, if so, act in accordance with that determination?

A noted above, he was not placed in a resource class until he was in the 11th grade. There is no assessment in any document that concluded Simmons was mentally retarded until after the crime in 1997. Robin Schmeidling, a high school friend, considered him, in hindsight to be "simple" or :lacks intellectually" (Tr.p. 2267-2268). Family member considered him to be a "super star' in football where he played 3 years in high school and then played some semi-pro ball. Tr.p. 2204. Although he was consider by his cousin Calvin Linning to be quiet and reserve, he was not a discipline problem. TR.p. 2205. Simmons was described as by trade he was an good carpenter and helped build a new addition on their church. Tr.p. 2214, 2219, 2225. A brother Gene Simmons recognized that Applicant was not the smartest in the school. Tr.p. 2234. He admitted that Kenneth and his sister took care of his father's needs when he got sick. Tr.p. 2235 - 36. Sandra Franklin as being not intelligent in the book sense, but in common sense. PCR Tr.p. 2261.

- Has the person formulated plans and carried them through or is his conduct

impulsive?

In this setting, it is evident that Simmons was able to formulate plans and carry them through in a series of attempts to purchase drugs. It was reported that while Kenneth was a good worker when he worked, " he would often only work to get enough money to buy alcohol and/or drugs or miss work due to being intoxicated the night before." Yungman, p. 4. The record shows that his criminal activity in 1993 involved attempting to acquire a stolen TV to get money for drugs or pay back his wife. PCR 79. He also created a false identity to rent videos to acquire the items with an intent to sell them. PCR 79-80. This revealed his plane to rent them a lesser price, using a false identity with an intent to sell them at a greater price than he rented them. PCR 80. His further crimes involved a burglary of jewels, tools , clothes and electronics. Further there was a shoplifting incident involving the theft of steaks, although the motivation was not presented at the hearing. PCR 81-82.

- Does his conduct show leadership or does it show that he is led around by others?

His conduct, as reported showed neither leadership or that he was being lead around by others. The evidence in the record suggested that Simmons was not a leader in school, but there is no evidence that he was merely a follower of anyone in his criminal pursuits or life-style habits. To the contrary it appears that the decisions he made in life were his decisions and his decisions alone, be it marriage, involvement in crime, purchase of drugs, etc.

- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

The reporters all claimed that Applicant was a caring , loving and good person in their interaction with them and others. Other than the 1997 assault on his girlfriend, Barbara Jones, it was not reported (Yungman p. 5), all the family member reports do not suggest that there was any deficit

in this area. To the contrary, they suggest that the crime was out of his character.

- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

A review of his various statements to law enforcement suggest that he plainly possesses the ability to respond coherently and rationally to questions and not wander from the subject of the question. ROA 3170-3197(first taped statement 12/5/1997); ROA 3198-99 (handwritten statement 12/5/1997 - 3:05 PM); ROA 3200-3210 (second taped interview); ROA 3211- 3220) (Dec. 9, 1997 (third) taped interview). As noted above, information received by the social worker and the trial testimony does not indicate any inability to respond proper in the oral communications.

- Can the person hide facts or lie effectively in his own or others' interests?

It is clear that Simmons has attempted since he began his criminal activities to lie in his own interest. Although he was able to secure tapes by a false identity, he was eventually caught. Similarly, he attempted in the series of statements to lie and hide facts in hi interest. The fact that it unraveled resulting in admissions is a matter of record, as set forth above.

- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

The murder of Ms. Boyd was the result of Simmons actions which began with an evening of smoking crack. Needing money, Simmons , while riding his bike in the morning came across Ms. Boyd. He entered that back porch, claimed that he found a stick on the porch and beat her. ROA 3202. He ultimately claimed no one was with him. His goal was to get more money for drugs, He claimed that he's plan was to ask her first for money and if she did not give it to him to rob her. ROA

3204Claiming to be under the influence of alcohol and drugs, when she pulled back, he claimed he then beat her, raped her and then tied her hands. ROA 3204-3205.

Simmons claimed that the victim did not know him. He stated that he waited for her outside feeding the chickens and taking in eggs. ROA 3206. He stated that he had known that she had locked her house, because they used to smoke dope near there and they would see her when she came outside. ROA 3207. He was not clear when she would come outside, but took a chance. ROA 3207. He stated that he initially went to the front door that was locked and when he went around the back, he caught her coming outside. ROA 3212-13, 15.

The crime reveals a plan put into action from the evening of drugs to get more money. Aware by seeing her previously while they were smoking in the area, Simmons planned to seek money and rob the victim if necessary. Although the scheme was not complex, there was some degree of forethought and planning for the initial purpose.

CONCLUSION

There is evidence to support a conclusion that the Applicant has failed in his burden of proof in establishing that Kenneth Simmons suffered from mental retardation with an onset prior to age 18. In addition to the initial assessment by the Department of Disabilities and Special Needs, evidence exists that mental retardation, as defined by South Carolina law has not been shown by a preponderance of the evidence.

DNA EVIDENCE ISSUE

Applicant's Challenges to the DNA Evidence

Applicant alleges the following errors in regard to the DNA evidence admitted at trial:

- Applicant was denied the right to effective assistance of counsel ...

> when trial counsel ... failed to make appropriate objections challenging the relevance and significance of the State's DNA evidence and failed to effectively cross-examine the State's DNA witnesses or otherwise expose flaws in the DNA testimony; ....
>
> - Applicant was denied due process of law and a fundamentally fair trial ... when ... the State presented false, misleading, inaccurate and unreliable DNA evidence and failed to disclose relevant impeachment and other favorable and material evidence; ....

(December 21, 2009 First Amended Application for Post-Conviction Relief, pp. 2-3).

Applicant has failed in his burden of proof.

Applicant has shown that the solicitor's chart was incorrect, not that the testing and results of the testing upon which the DNA testimony was based was incorrect. Critically, in discussing the trial testimony, Applicant consistently confuses questions with answers. Questions, of course, are not evidence. *See generally State v. Kelsey*, 331 S.C. 50, 75, 502 S.E.2d 63, 76 (1998) (citing with favor the trial judge's charge, "that an attorney's question is not evidence"). When read as a whole, the testimony from both Ms. Crane and Dr. Baird as to "matches" is very general, relying essentially on the broad conclusion that Applicant is not excluded which is consistent with the evidence at trial and in these proceedings.

Further, Applicant has shown significant disagreement with the statistics presented. The Supreme Court of the United States reasoned in *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665 (2010), however, that even significant disagreement with statistics presented does not equate with prejudice sufficient to overturn a conviction. *See* 130 S.Ct. at 675 ("The State acknowledges that Romero committed the prosecutor's fallacy, Brief for Petitioners 54, and the Mueller Report suggests that Romero's testimony may have been inaccurate regarding the likelihood of a match with one of respondent's brothers. Regardless, ample DNA and non-DNA evidence in the record adduced at trial

supported the jury's guilty verdict").

Yet, Applicant has not shown that defense counsel was ineffective as defense counsel, with the assistance of a DNA expert, chose the only identified defense that would neutralize both matching points in the test and statistical probabilities – the possibility of exclusion based on the 1.2 allele not being present. No expert has testified that this was an unreasonable or factually unsupported strategy.

Even so, Applicant makes several assertions in his post-hearing brief that Respondent would specifically address in this reply: 1) that challenges to statistical calculations equate with a conclusion that testimony is false and/or otherwise inadmissible; 2) that the gender-typing test results in this case may indicate that there is no male DNA in the sample; and, 3) Applicant's suggestion that if he is otherwise unable to carry his burden of proof on this record, Applicant would ask the Court to consider granting a new trial under S.C. Code § 17-27-20 (a)(4), in that the evidence adduced at the PCR hearing regarding DNA would constitute "evidence of material facts, not previously presented and heard...." Respondent otherwise relies upon the arguments previously presented in Respondent's opening post-hearing brief in addressing all remaining arguments on the DNA issue presented in Applicant's brief.

Allegation of Statistical Flaws Renders Evidence False and/or Otherwise Inadmissible

Applicant's note 27 indicates that the statistics were flawed in part because there was an "assumption that there were only two contributors to the evidentiary sample." (Applicant's Post-Hearing Brief, p. 43). However, Applicant produced no evidence to show there were more than two contributors. Applicant's DNA expert in PCR, Mr. Lambert, testified that there was no indication the assumption was wrong, but if tests (which he did not consider were sufficient to call) were

interpreted, Applicant would still not be excluded:

> If you look at those light alleles that match Mister Simmons, you've got to also include the alleles that don't match Mister Simmons and then at that point he wouldn't necessarily be eliminated, but he would be included as a mixture of two perpetrators which we don't really have any evidence of and I don't think it is strong enough evidence on this to conclude that there would be two perpetrators.

(February 2010 PCR Evidentiary Hearing, p. 306, lines 11-17). (See also February 2010 PCR Evidentiary Hearing, p. 307, line 23 - p. 308, line 11, "... They excluded several individuals who could have been included if you don't assume that there was a single perpetrator. And they should have reflected that in their reports. They could have said something to the effect that it's inconclusive as to whether or not whoever the suspect was is included in this data or not. That's the way we do it at SLED. So, they excluded several people who definitely could have contributed to that vaginal swab from Ms. Boyd. If you assume two contributors, you can add some of those two individuals together and actually generate the DNA type that was found on the vaginal swab. *I don't see any result that there were two perpetrators* but there could have been and they neglected to take that into account.") (emphasis added). In fact, Applicant neglected to establish any connection with another suspect, or even the actual number of suspects necessary to combine DNA for a similar result as show here. (See February 2010 PCR Evidentiary Hearing, p. 309, Mr. Lambert indicating it was a correct statement that "some of these 26 other suspects, *in either combination with each other and/or Mister Simmons* could account for all the DNA results seen in the case."). Simply, Applicant failed to show any indication of multiple perpetrators to make the offered scenario factually sustainable.

Additionally, though Dr. Word disagrees with the value of the statistics, (Word/Cotton Affidavit at pp. 13-15, para. 35-37), much like Mr. Lambert, she concedes in her affidavit that the

reported results would be correct where there is not more than one perpetrator:

> The Lifecodes report dated November 18, 1996, correctly states that a mixture is indicated in the male (or sperm) fractions from the two vaginal samples and that L. Boyd is not excluded as a possible contributor. Many other individuals were tested and their test results were reported in a number of other reports. We have not reviewed those reports other than to confirm that all of the individuals except Kenneth Simmons were excluded by Lifecodes as possible contributors. These conclusions are correct under the Assumption Set 2 but incorrect for some of the individuals if the sample contains DNA from more than one individual....

(Word/Cotton Affidavit, p. 13, para. 34).

In sum, if the facts otherwise show a single perpetrator, the experts agree these conclusions are not incorrect. Given that Applicant has failed to show any indication of multiple perpetrators, the speculation of combining DNA falls short of proof of significant error. Even so, Respondent does not submit the questions could not have been asked on cross-examination in explanation or exploration of the statistics, but mere questions on the two sets of assumptions do not automatically render testimony on either somehow inadmissible. In short, Applicant has simply shown a line of cross-examination not inadmissible testimony.

As to the statistics in general, Respondent readily admits there has been great debate over the role of statistics since the early 1990's – from calculation to sufficiency of the data based used in the calculations. Scientists, including Dr. Baird and Dr. Word, have been criticized in their calculations and use of certain databases. *See, for example, People v. Castro*, 545 N.Y.S.2d 985 (N.Y.Supreme Ct. 1989) (LifeCodes/Baird and others); *Johnson v. State*, 934 S.W.2d 179, 486-87 (Ark. 1996) (Cellmark/Word) (experts for both Johnson and the State agreed that Cellmark provided 'falsely conservative' statistical probabilities, a factor that his court has afforded some weight in assessing whether databases were in Hardy-Weinberg Equilibrium."). The statistical debate, as evidenced most

recently in the *Brown* case noted above, apparently still continues. It is of no insignificance to note that the experts in this case disagree with each other on the exact statistics that should be presented. (See February 2010 PCR Evidentiary Hearing, p. 305, lines 17-25, Mr. Lambert describing his calculations and results and calculations and results by another DNA expert in PCR for the Applicant using the same information: "I used the product manual that was provided by Lifecodes which I would assume that they would have used to calculate those frequencies. I'm not sure if he would have used another data base, but our numbers differed just a little bit. His is .135. Mine is .139. His was .125 for the Blacks and Mine is .151."). Applicant is constrained to admit that Dr. Baird has not changed his opinion in regard to the specific calculations offered. (Applicant's Post-Hearing Brief, p. 44). (See also Baird Deposition, p 12, lines 2-6, "The statistics that were given were from a single source individual. Again, consistent with the results obtained, it appeared to be a mixture of two individuals that included both the victim and the suspect."). Thus, once again, the issue falls to one of cross-examination. *See also generally Johnson v. State*, 934 S.W.2d at 447 ("Johnson all be concedes that the battle of the experts over statistical probabilities is a matter for litigation and cross-examination."). However, in further argument that Dr. Baird is incorrect – apparently with an eye toward a finding that the testimony should be inadmissible, not simply challenged on cross-examination – Applicant asserts that "Dr. Baird and his lab have a long and documented history of attempting to stretch the bounds of science in court." (Applicant's Post-Hearing Brief, p. 46). The cases relied upon, however, do not support his assertion. For instance, Applicant's reliance on *People v. Castro*, 545 N.Y.S.2d 985 (N.Y.Supreme Ct. 1989) to attack both Dr. Baird specifically and LifeCodes in general is misplaced. First, Applicant overstates the significance of the case. Second, a review of the holding, and subsequent New York cases, cannot support the presence of

necessary facts for the assertion of a "long document history of attempting to stretch the bounds of science in court" by Dr. Baird and LifeCodes. (Applicant's Post-Hearing Brief, p. 46).

In *Castro*, the court (which review testimony from *three* scientist involved, Dr. Baird included), simply found a third prong to the admissibility test set out in *Frye v. United States*, 293 F.1013 (D.C. Cr. 1923) was necessary and was not met, *i.e.*, evidence that particular tests were performed according to standards. *See also State v. Ford*, 301 S.C. 485, 491-92, 392 S.E.2d 781, 784 -85 (1990) ("The *Castro* court specifically found that reliable results may be produced by DNA forensic testing and that such techniques are generally accepted in the scientific community. Some of the DNA evidence was excluded because of the unreliability of the particular tests performed in that specific case."). At any rate, Dr. Baird was on of three scientist to testify about declaring a match in testing – he was not the sole focus of the opinion. 545 N.Y.S.2d at 977. Several years later, in *People v. Wesley*, 633 N.E.2d 451, 430 (N.Y. 1994), the Court of Appeals of New York rejected a defendant's reliance on *Castro* to show error in the LifeCodes testing and results finding that "the evidence at both the *Frye* hearing and at trial was that the procedures used by Lifecodes met standards of scientific acceptance and reliability"). *See also People v. Wesley*, 589 N.Y.S.2d 197, 201 (N.Y.A.D. 3 Dept. 1992) ("the protocol used by Lifecodes in interpreting the DNA fingerprint once it is produced, that is, in determining the existence of a match with other DNA fingerprints and in calculating the probability that the match was coincidental, also was sufficiently established to be accepted and reliable. Detailed testimony was presented regarding the technology and procedure used by Lifecodes in declaring a DNA match, and blind proficiency test data was introduced confirming its reliability. Regarding probability calculations, because it is impossible to map an entire DNA molecule, certain statistical assumptions derived from the area of population genetics regarding the

frequency with which certain base sequences within a DNA strand will occur in a population (e.g., the Hardy–Weinberg principle), as supplemented and confirmed by the results of a two-year study completed by Lifecodes, are employed in order to arrive at an estimate of the probability that the match found could have occurred fortuitously. While certain scientists still debate the validity of these assumptions, as well as the stricter criteria used by Lifecodes for determining band frequencies, in our view the expert testimony presented at the hearing satisfied the requisite standard of general acceptance and reliability."). At any rate, the *Castro* case rests on heightened New York state law, and is not applicable to determining admissibility in other jurisdictions, including, specifically, here. *Compare State v. Ford*, 301 S.C. at 489-90, 392 S.E.2d at 783-84, *citing Castro* (noting South Carolina has not accepted the *Frye* test but finding that "expert testimony may be presented to *impeach* the particular procedures used in a specific test or the reliability of the results obtained.") (emphasis added). *See also Spencer v. Murray*, 5 F.3d 758, 763 (4th Cir. 1993) ("the New York trial court case of *People v. Castro,* 144 Misc.2d 956, 545 N.Y.S.2d 985 (N.Y.Sup.Ct. Bronx County 1989), on which Spencer relies for its argument that DNA tests performed by Lifecodes are inherently suspect does not support that proposition and also is decided under New York law. The errors in *Castro*-contaminated DNA probes, bacterially contaminated samples, and procedures *used in that particular test*-do not appear in the record of Spencer's case); *People v. Lamming*, 833 N.E.2d 925, 928 (Ill.App. 5 Dist. 2005) ("Defendant's reliance on *People v. Castro,* 144 Misc.2d 956, 545 N.Y.S.2d 985 (N.Y.Sup.Ct.1989), and *People v. Lipscomb,* 215 Ill.App.3d 413, 158 Ill.Dec. 952, 574 N.E.2d 1345 (1991), to declare that the DNA testing performed by Lifecodes was unreliable is misplaced. In *Castro,* a New York trial court held that DNA evidence was inadmissible unless a heightened *Frye* standard of admissibility (*Frye v. United States,* 293 F. 1013 (D.C.Cir.1923)) was

satisfied. *Castro's* heightened *Frye* standard does not govern the admissibility of DNA evidence in Illinois. See *People v. Miller,* 173 Ill.2d 167, 219 Ill.Dec. 43, 670 N.E.2d 721 (1996). And, with respect to *Lipscomb,* while the testifying expert had concerns over procedures used by Lifecodes in a particular case, he further opined that Lifecodes' reputation in the scientific community, in general, was good."). Indeed, our Supreme Court referenced with approval in *Ford* the "testimony" in the case "that a quality control program is utilized by Lifecodes to ensure the reliability of the procedures and that the tests conducted in this case were done in a manner that is consistent with the laws of genetics and the procedures and protocol established at Lifecodes." *Ford*, 301 S.C. at 489, 392 S.E.2d at 783. Applicant's other cases similarly fail to show this asserted "long and documented history."

In *Harvey v. State*, 2004 WL 60771 (Alaska App. 2004), the court considered Dr. Baird's use of a "paternity index," his "probability of paternity" percentage, and a "*non*-genetic probability of paternity" calculation. The court termed another expert's challenges to this factors "critiques," and concluded counsel failed to present the information on cross-examination. However, the court upheld the finding that counsel, nonetheless, handled the defense competently based on a different approach than a direct challenge to the calculations. The court noted that counsel "consulted a friend of his, Attorney Barry Scheck" and "Scheck told Karnavas that the State's DNA figures were meaningless (because, even under the State's view of the evidence, the probability of paternity was only 87%). Scheck advised Karnavas to avoid launching a full-scale scientific or mathematical attack on the State's evidence; instead, Scheck advised Karnavas to pursue a strategy of keeping the issue simple for the jury." Thus, the court agreed that while critiques of the statistics could be made, it was not necessary to present a defense. *See also Strickland v. Washington*, 466 U.S. at 689 ("There

are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

Reliance on *O'Dell v. Netherland*, 95 F.3d 1214, 1248 (4th Cir. 1996) is very much misplaced where there is no clear issue with LifeCodes and, in fact, "O'Dell presented expert testimony embracing the first LifeCodes conclusion and attacking the second."

Finally, reliance on *Caldwell v. State*, 393 S.E.2d 436, 444 (Ga.1990) is also misplaced where the error in this 1990 case was not clear but appeared to center only on the databases used - "Although in a future case the state may establish scientifically that the populations represented in Lifecodes' (or some other laboratory's) databases are in Hardy-Weinberg equilibrium, we conclude the state has not done so in this case." Applicant has failed to show a "long documented history" of issues with Dr. Baird's work or LifeCodes.

Even so, the issue here should focus on the evidence of this case, the testing done on in this case, and the results in this case. Again, Respondent submits that Applicant has failed to show any exculpatory DNA evidence, and has failed to should defense counsel was unreasonable in his strategy. Applicant is not entitled to any relief.

Allegation Gender-Typing Test Results May Indicate No Male DNA in Sample

Applicant's allegation is without merit. Applicant's DNA expert at the PCR hearing, Mr. Lambert, testified that SLED initially identified semen in the sample before ever sending the sample to Lifecodes:

> The samples that were tested at Lifecodes were the sexual assault evidence that was collected from Ms. Boyd's body at the autopsy. They identified semen at the SLED laboratory. However, there wasn't enough to perform the testing that we were

preforming at the time. ...

(February 2010 PCR Evidentiary Hearing, p. 262, lines 3-7).

Further, it is uncontested that Ms. Crane's notes from LifeCodes reflect that sperm was "visualized." (July 2012 PCR Hearing, Testimony Dr. Word). Though Dr. Word testified she did not understand the "visualized" description, and also testified there was no picture available to check, she did not contest the presence of the note. Dr. Word also noted that gender testing showed no "y" chromosome, though she candidly admitted that lack of "y" chromosome could simply be attributed to the sample being at a level below that which the test could detect. (July 2012 PCR Hearing, Testimony Dr. Word). It is also undisputed that the sample was small – that is exactly why SLED sent the sample to LifeCodes for more sophisticated testing. (See also February 2010 PCR Hearing, p. 278, Mr. Lambert's testimony confirming lab notes indicated sample consumed with attempted CTT testing). Applicant has not carried his burden of proof. Again, nothing in the DNA evidence – at trial or in the PCR – is exculpatory.

Allegation Court May Consider Granting a New Trial Under S.C. Code § 17-27-20 (a)(4)

S.C. Code § 17-27-20 (a)(4) sets out that a claim may be brought in PCR on an allegation "[t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." See also S.C. Code § 17-27-45 © ("If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the

date when the facts could have been ascertained by the exercise of reasonable diligence."). "A party requesting a new trial based on after-discovered evidence must show that the evidence: (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial;(3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching." *Hayden v. State*, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). *See also Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (applying *Hayden* factors).

As a procedural matter, Applicant would need to move to amend the allegation to allow this separate issue to be litigated. To the extent that Applicant's argument in his opening brief may be construed as a separate request to amend, Respondent would object as the amendment is futile for several reasons. First, the amendment is futile because this Court in addressing the ineffective assistance of counsel claim will pass on whether the evidence shows "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1985). *See also Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). If relief is granted under *Strickland*, there is no need to address the same factual basis under a separate portion of the statute. If relief is not granted under *Strickland*, Applicant also fails to meet the initial test here that the evidence would "probably change the result" of the proceedings. Second, Applicant would not be able to factually show the "evidence" could not have been discovered by due diligence as the "evidence" (which is actually more argument and/or cross-examination challenge material as demonstrated above and in the opening brief than proof of guilt or innocence), was available and could have been obtained in challenge to the

DNA evidence at trial.[10] Third, the DNA evidence presented both at trial and during the PCR remains consistent with guilt. Fourth, at most, Applicant has shown various methods of impeachment (or attempted impeachment), not substantive evidence affecting the determination of guilt. Nothing in the record supports that Applicant could meet the above standard.

To the extent that Applicant is otherwise seeking relief simply because evidence not presented at trial was presented during the PCR proceedings, he suggests an unprecedented extension of the meaning of the Section (a)(4) – an extension that would allow an application to avoid *Strickland* prejudice requirements and/or allow a second review of the material simply because the evidence was not presented. The *Strickland* test, however, requires courts to routinely consider the "new evidence" presented in the collateral proceedings that counsel allegedly could have discovered. *See Sears v. Upton*, ___ U.S. ___, ___, 130 S.Ct. 3259, 3267 (2010) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there

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[10] To the extent Applicant claims the State improperly withheld evidence, as noted in Respondent's opening brief, Applicant failed to show any document save one page presumed to be from a lab notebook from Lifecodes was not turned over, and Applicant failed to establish that one page ("page 15") was, indeed, from the lab notes at issue or that the notes were relevance to guilt or innocence since the page appeared to reflect a run that Mr. Lambert considered not reliable. (Respondent's Post-Hearing Brief, p. 25 n. 4). Therefore, resolution of the allegation by a finding the State did not withhold evidence would also undercut proof for the instant separate claim as, again, Applicant would fail to show a reasonable probability the result would have been different. *See generally State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996) ("*Brady* requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment" and the disclosure "rule applies to impeachment evidence as well as exculpatory evidence" however, "[i]mpeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation."). The evidence is considered but under the existing *Strickland* framework which includes consideration of prejudice. To support an ineffective assistance of counsel claim, an applicant must show there was evidence that could have been discovered and utilized at the time trial. Simply, if the evidence was available and could have discovered for use at trial, the issue is one of ineffective assistance of counsel. If the evidence was not available, the issue may fall under this alternate ground for relief. Both require finding a probability the result of the proceeding would be different, but the issues will be separate and distinct and an applicant is not allowed a "second bite at the apple" on the same facts. Here, it is clear the evidence (and argument) was available at the time of trial, and should not be considered "newly discovered." Thus, the issue is properly analyzed under *Strickland* if at all.

Applicant's request to amend, to the extent this Court would consider the argument in his opening brief a motion to amend, should be denied on the basis of futility. Alternatively, relief should be denied as the record fails to support a new trial is warranted on "after discovered evidence" when the *Hayden* factors are applied to the facts of this case.

Again, Respondent submits for all the reasons in the opening brief, and this reply, Applicant has failed to show he is entitled to relief on his DNA issues

CONCLUSION

WHEREFORE, Respondent submits, for all the foregoing reasons, and for all the reasons previously submitted in Respondent's opening brief, that Applicant has failed to carry his burden

of proof and is not entitled to any relief.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

By: _____
DONALD J. ZELENKA

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina.
October 12, 2012.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
Kenneth Simmons, #5066,	)	
	)	C/A No.: 2005-CP-18-1368
Applicant,	)	(Capital PCR Action)
v.	)	
	)	CERTIFICATE OF SERVICE
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

I, Donald J. Zelenka, Senior Assistant Deputy Attorney General, certify that I have served *Respondent's Post-Hearing Reply Brief* on counsel for Applicant by depositing one copy of same in the United States mail, postage prepaid, addressed as follows:

James Morton, Esquire
Morton & Gettys, LLP
P.O. Box 707
Rock Hill, SC 29731

Emily C. Paavola, Esquire
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201

This 12th day of October, 2012.

DONALD J. ZELENKA

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(803) 734-6305

ATTORNEY FOR RESPONDENT

5293

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2005CP1801368

PLAINTIFF(S)		DEFENDANT(S)
Kenneth Simmons	2013 OCT 21 PM 4:18	Department of corrections South carolina state of
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Doyet A. Early,III — **Circuit Court Judge**
2136 — **Judge Code**
10-15-13 — **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

5294

For Clerk of Court Office Use Only

This judgment was entered on **10-21-2013**, and a copy mailed first class or placed in the appropriate attorney's box on **10-21-2013**, to attorneys of record or to parties (when appearing pro se) as follows:

James M. Morton PO Box 707 Rock Hill, SC 29731
Emily C Paavola Attorney At Law Ctr. Capital Litigation, 900 Elmwood Ave. Suite 101 Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Don Zelenka PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Cheryl Graham

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

State of South Carolina
The Circuit Court of the Second Judicial Circuit

Doyet A. Early, III
Judge

Post Office Box 90
Bamberg, SC 29003
Phone: (803) 245-4004
Fax: (803) 245-2983
dearlyj@sccourts.org

October 16, 2013

Cheryl L. Graham
Clerk of Court, Dorchester County
5200 E Jim Bilton Blvd.
St. George, SC 29477-8020

FILED-RECEIVED
2013 OCT 21 PM 12:08
CHERYL L. GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

Re: Kenneth Simmons v. State of South Carolina; 05-CP-18-1368

Dear Ms. Graham:

Please find enclosed for filing Order Granting Post-Conviction Relief.

Sincerely,

D. A. Early, III

DAE/cmw
Enclosures

cc: Emily Paavola
James Morton
Don Zelenka

CERTIFIED COPY
2013 OCT 21 PM 4:18

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER KENNETH SIMMONS *Applicant,* v. STATE OF SOUTH CAROLINA *Respondent.*	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

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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.

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

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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.

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).

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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 13, 2013
Bamberg, SC

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS
Kenneth Simmons, #5066, Applicant, v. State of South Carolina, Respondent.	)	C/A No.: 2005-CP-18-1368 (Capital PCR Action) RESPONDENT'S MOTION TO ALTER OR OR AMEND PURSUANT TO RULE 59

The Respondent State of South Carolina hereby makes a Motion to Alter and Amend the Order Granting Post-Conviction Relief Pursuant to Atkins v. Virginia, 536 U.S. 304 (2002) filed October 21, 2013 and received by below-signed counsel on October 24, 2013. The Respondent would show this Honorable Court the following:

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CLERK OF COURT
DORCHESTER COUNTY

I.

In its Order, the Court found that the Applicant, Kenneth Simmons was mentally retarded and therefore ineligible for the death penalty. Within the Order, the Court concluded that "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." Order, p. 12. This is not supported by the record or post-hearing briefs and demonstrates an inherent misapprehension of the extent of the entire record, including the original competency hearing and trial record before this Court.

[1] Rule 59 (e), SCRCP provides: " [A] motion to alter or amend shall be served not later than 10 days after receipt of written notice of the entry of the order." The clerk entered the order on October 21st and mailed written notice to the undersigned. The undersigned received written notice of the entry of the order on October 24, 2013. This document is served eight (8) days later, on November 1, 2013, and is timely.

Respondent requests this Court to alter and amend those findings and conclusions.

Within its order, the Court opined that:

1. "there is no persuasive evidence of malingering in this case." Order, p. 12. This is incorrect. The S.C. D.D.S.N. report explains why they had an opinion concerning malingering during their evaluation based upon their testing and interviews based upon testing and their observations. In the S.C. DDSN report, they indicated that "malingering was observed more or less in each session ... some of his responses seemed exaggerated or distorted in a self-protective or self-serving fashion, as is sometimes encountered during competency to stand trial evaluations.[2] His 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

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[2] In the DDSN report, evidence of malingering from the actual test report was discussed:

> In the administration of the Wechsler Adult Intelligence Scale - Revised [WAIS-R] on 9 February 1999 he obtained the following IQ scores: Verbal 70; Performance 82; and Full Scale 75. A Full-Scale IQ of 75 is in the mid-range of the Borderline Intelligence Classification (IQ scores of 70-79). The fact that his Performance IQ score was12 points higher than his verbal IQ score is significant. **One interpretation of this 12 point spread which the examiners believe may be likely is that his true IQ is in the low average intelligence classification (IQ scores of 80 to 89) as revealed in the performance IQ, and intentionally suppressed by Mr. Simmon's tendency to malinger**. His sub-tests raw scores can be converted into scaled scores along a continuum of 1 (the 0.1 percentile rank) to 19 (the 99.9 percentile rank). His highest sub-test scores were in the Object Assembly test (scaled score of 10: the 50th percentile); Picture Arrangement and Block Design tests (scaled scores of 8; the 25th percentile). His lowest sub-test scores were in the Information and Digit Symbol tests (scaled scores of 2; the 0.4 percentile rank. ...

This test assessment by DDSN was not challenged by the Applicant's current experts. See DSM - V (2013), p. 37 ('highly discrepant individual subtest scores may make an overall IQ score invalid").

lower than his vocabulary and other skills as revealed in his 1997 oral and written statements to the police.[3] Furthermore, he sometimes gave inconsistent answers across our four evaluations or gave incorrect answers that closely approximate the correct answers, which is commonly seen during malingering." S.C. DDSN Report, p. 4-5. **Dr. Thomas McAbee** testified at the competency hearing that Simmons was not mentally retarded. ROA 2702. Specifically, Dr. McAbee noted that he found Simmons mental functioning above the range of mental retardation and suspected that Simmons was not trying his best during the testing. ROA 2702. He stated that he was assessing him that the February test scores were above the range of mental retardation. ROA 2699-70. He stated that there were some functional deficits in reading abilities, but they certainly would not be in the level of mental retardation. ROA 2700. The Court did not address these persuasive evidence independent of Dr. Sandler.

Therefore, this finding and conclusion is incorrect inasmuch as evidence of malingering did exist during the 1999 testing.

2. The Court while acknowledging testimony from two qualified experts at trial who opined that Applicant did not meet the criteria for a diagnosis of mental retardation also found, "[T]he State's argument regarding the trial testimony of Dr. Randy Waid was not persuasive, given Dr. Waid's affidavit." Order, p. 13, n. 8. However, the Applicant failed to present Dr. Waid before this Court. At most, Dr. Waid's affidavit

[3] The oral statements are set forth in ROA p. 3170-3220. They are supportive of the SC DDSN evaluators assessment.

creates a question of fact - it does not address the direct contradiction in his sworn testimony, it does not retract the opinion Dr. Waid rendered at trial based upon specific developments or additional facts, or otherwise clearly show error in any of the testing or results. Dr. Waid testified as an expert in clinical and forensic psychology, and neuropsychology, to an absence of mental retardation. (ROA. pp. 1882, 1897). In particular, Dr. Waid opined that because Simmons suffers from neuro-cognitive impairments he has diminished mental capacity, but not from mental retardation. ROA 1778. As stated above, Dr. Waid opined that his life-style of poly-substance abuse hurt his brain. He opined that Simmons was not always at that level and " do not believe he suffered from mental retardation but believe his intellect is in the borderline to intellectually deficient range ..." ROA 1778.

3. The Court found that "[I]t is significant that, unlike applicant's experts, Dr. Sandler did not conduct any standardized measure of applicant's adaptive behavior." Order, p. 14. However, Dr. Tasse, the defense's expert in the PCR action failed to personally interview or test the Applicant in any manner. PCR Tr.p. 175, l. 12. Unlike Dr. Tasse, Dr. Sandler and Dr. McAbee did interview and test Applicant and attempted to use the Vineland Adaptive Behavior Scale Interview Edition with Applicant. They noted the partial results in their written report. SC DDSN Report, p. 4.

4. The Court found that "Dr. Sandler relied, in part, on some misconceptions about what people with mild mental retardation can achieve." Order, p. 14. There are no citations to the record for this conclusion and it does not appear to be supported by

any evidence in the record from either the S.C. D.D.S.N. report or testimony.[4] In the S.C. DDSN report, factors supporting their conclusion was their information that he had graduated from high school, played varsity football, passed the driver's license test, and drove a car by himself. Report, p. 5. These factors, as noted by Dr. Tasse, may not exclude mental retardation, but Dr. Tasse clearly stated that many with mental retardation could not accomplish these tasks. The Order suggests that mere reference to these factors suggests error by the evaluators. This is an incorrect reading of what the examiners at the Department of Disabilities and Special Needs found.

5. The Court found "[T]he evidence overwhelmingly shows that applicant meets all three prongs of South Carolina's definition of mental retardation by a preponderance of the evidence." Order, p. 15. However, as noted above, the Court sets forth a flawed base of reasoning. Further still, the Court failed to consider or address the facet of the DDSN opinion that substantial drug and alcohol use could account for present deficits in intellectual functioning, a factor noted in Dr. Waid's earlier rejection of mental retardation. In referencing the fact that educational achievement must be discounted, this Court merely faults the school system *in toto*. The Court appears to

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[4] During the testimony of Dr. Tasse, he testified about some common misconceptions regarding mental retardation. PCR 129-136. However, in his explanation he stated that less than 5% go on to college with some supports (PCR Tr.p. 131), 27% had employment that was sustained over a year, some were married with 15% being a parent, 40% had a savings account open, 70% had friends outside of school. PCR Tr.p. 131-134. Dr. Tasse stated that a person with mental retardation could conceivably pass a drivers test - "not all, some can." PCR Tr.p. 134. Dr. Tasse opined that people with mental retardation can learn to play simple games with clear rules. PCR TR.p. 134.

reason that the school records were wrong, the school achievements were not really achievements, the sports achievements were not really achievements, and he could not be "faking" mental retardation all along. (Order, p. 13). But that fails to account for family issues, drug issues, or merely not attempting to do one's best. It is not necessarily either 1) mental retardation or 2) feigning to attain a mental retardation opinion to avoid a death sentence.

These multiple flaws in reasoning and review of the evidence merit altering and amending the Court's order.

Respondent request this Court to alter and amend these findings and conclusions.

A.

The preponderance of evidence standard was not met. In Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the U.S. Supreme Court held that executing mentally retarded individuals constitutes cruel and unusual punishment under the Eighth Amendment "in the light of ... evolving standards of decency." But the Court recognized that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus ." In 2003, the South Carolina Supreme Court addressed the mental retardation issue and allowed for the claims for prior capital cases to be raised in a post-conviction relief setting. *Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003)

In pressing a claim of mental retardation, "the applicant must show he or she is mentally retarded by a **preponderance of the evidence**." *Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003). "Mental retardation" is defined by statute as "'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 605-06, *quoting* S.C. Code § 16-3-20(C)(b)(10). In the Franklin decision, the South Carolina Supreme Court initially rejected the argument to adopt as a substantive definition of "mental retardation" different than that adopted by the legislature when Franklin was decided.[5]

This was a contested issue from the trial to the presentation at the state PCR hearing. Respectfully, Respondent submits that the Applicant did not meet his burden of proof and the PCR Court erred in concluding that the evidence was "overwhelmingly" shown. Order, p. 15. There is evidence in the record from the report and testimony from Dr. Leslie Sandler, Dr. Thomas McAbee and Dr. Randy Waid which defeats the Applicant's burden of proof. This was admittedly a close issue, but the mere fact that an issue is close does not satisfy the burden of proof, particularly when the 199 assessment was made by neutral examiners without a stake in the result - particularly as it

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[5]Atkins left it to each state to set standards and procedures for adjudicating the mental retardation of a defendant in a capital case; however, at the time Franklin was decided, bills had been introduced in South Carolina concerning the definitions of mental retardation and procedures, but no legislation had been passed. See Franklin, supra. 356 S.C. at 605, n. 1.

The American Association of Mental Retardation (AAMR) defines mental retardation as a "disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in the conceptual, social, and practical adaptive skills." Mental Retardation[: Definition, Classifications, and Systems of Supports 1 (10th ed.2002),] at 1. As of January 1, 2007, the AAMR has been known as the American Association on Intellectual and Developmental Disabilities.

The American Psychiatric Association defines mental retardation as "significantly subaverage intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive functioning." [Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1992) (DSM–IV),] at 37. Thus, ... both definitions of mental retardation incorporate three concepts: 1) limited intellectual functioning; 2) significant adaptive limitations; and 3) age of onset.

The primary distinction between these two classification systems is that the DSM–IV specifies severity levels of mental retardation, whereas the AAMR classification system no longer specifies levels of severity, but instead, recognizes that a diagnosis of mental retardation relies on both limitations in IQ and adaptive skills and focuses on the levels of support needed following an individual diagnosis. See DSM–IV [,] at 45; AAMR[,] at 26.

related to a death sentence. This lack of bias in the 1999 evaluation should carry significant weight. In addition the mere fact that a retained defense expert has opined that Applicant suffers from mental retardation does not address the issue or necessarily satisfy the burden of proof.

In short, the factual findings and conclusions show the PCR Court failed to consider that the record of the trial proceedings which is a part of the PCR proceeding by statute, S.C. Code Ann. § 17-27-70 and, also, fails to consider that Respondent in a civil proceeding does not have access to the Applicant. Additionally, the findings and conclusion reflect the Court failed to consider that post-death sentence evidence is inherently suspect where such information is gathered specifically to undo the jury verdict and has not been tested at trial. See, for example, Broadnax v. State 2013 WL 598056, 9 (Ala.Crim.App.,2013) (nothing prevented the Applicant from calling family members to testify subject to cross-examination concerning the adaptive functioning in the post-death penalty verdict proceeding). The reliance upon the social worker as a conduit of the information before this Court is also ripe with a potential for bias where similar findings not otherwise factually supported in record where trial judge found social worker's testimony not particularly credible where based on hearsay and social worker "assigned mental operations to witnesses" who did not testify . See Davis v. State 9 So.3d 539, 558 -559 (Ala.Crim.App.,2008) ("this Court finds the use of a social worker to be less than an ideal procedure. Vogelsang came into Court and testified on behalf of several family members in Davis's family who did not appear before this Court. During her testimony, Vogelsang continually assigned mental operations to witnesses who were never brought into Court to be subjected to cross-examination" . . . this type of testimony is certainly of the sort that pushes the envelope of permissible evidence. While arguably probative and relevant to sentence, such testimony does not seem particularly suited to have great weight

placed upon it. This Court, or a jury during an actual penalty phase hearing, is being asked to accept the facts as interpreted and sifted by a third-party in reaching a conclusion"). As the Alabama court held in a similar situation: "Vogelsang [the social worker] is a professional witness, in the sense that she goes out and interviews many different people, decides what is relevant or not, and then comes into Court and places that information before the fact-finder while insulating the actual witnesses from cross-examination". Davis v. State, 9 So.3d 539, 559 (Ala.Crim.App.,2008). Cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias). Here, the Applicant's showing limited the ability to further present this inherent bias which should limit its weight. See State v. Starnes, 340 S.C. 312, 325-326, 531 S.E.2d 907, 914 - 915 (S.C.,2000).[6] "A witness will naturally favor a party who is a family member. This favoritism may erode the credibility of the witness." The New Wigmore, Impeachment and Rehabilitation, Section 6.3 (2014 Supplement).

Contrary to the position presented to this Court "psychology informs, but does not determinatively decide, whether an inmate is exempt from execution." Ortiz v. United States, 664

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[6] In Starnes, the Court held:

> SCRE, also permits a party to impeach a witness by establishing bias or prejudice either through examination or otherwise. " 'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." **915 *State v. Brewington,* 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) *quoting* 98 C.J.S. *Witnesses* § 560a (1957). A witness' romantic relationship with a party is a source of potential bias of which the jury should be aware in order to fully evaluate the witness' testimony. *McIntyre v. State,* 934 P.2d 770 (Alaska App.1997); *Orkin Exterminating Co., Inc. v. McIntosh,* 215 Ga.App. 587, 452 S.E.2d 159 (1994); *State v. Erby,* 56 N.C.App. 358, 289 S.E.2d 86 (1982).

F.3d 1151, 1168 (8th Cir.2011). Atkins "did not delegate to psychologists the determination of whether an inmate should not face execution." United States v. Bourgeois, No. 02–CR–216, 2011 WL 1930684, at *24 (S.D.Tex. May 19, 2011); see also Hooks v. Workman, 689 F.3d 1148, 1172 (10th Cir.2012) (" Atkins could have adopted the clinical standard, but explicitly declined to do so."); Clark v. Quarterman, 457 F.3d 441, 445 (5th Cir.2006) (Atkins "did not dictate that the approach" to defining mental retardation "must track the approach of the [AAIDD] or the APA exactly"); United States v. Candelario–Santana, No. 09–CV–427 (JAF), 916 F.Supp.2d 191, 194, 2013 WL 101615, at *2 (D.P.R. Jan. 8, 2013) ("Though the clinical standards have informed our analysis, we emphasize that a clinical standard is not a constitutional command." (internal quotation marks omitted)). Instead, while noting the leading clinical definitions of mental retardation, Atkins expressly permitted state legislatures and courts to exercise their own judgments as to the definition of mental retardation, even if those judgments diverged from those of leading psychologists. See Atkins, 536 U.S. at 317, 122 S.Ct. 2242 ("[W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." (alterations omitted)); see also id. at 317 n. 22, 122 S.Ct. 2242 ("The statutory definitions of mental retardation ... generally conform to the clinical definitions ...." (emphasis added)).

Applicant and the Court apparently adopted a concept that it is bedrock science that if the subject has adaptive deficits that satisfy the diagnostic criteria, then the diagnosis should be made even if the subject also has strengths. Respondent submits that this is in error. While "[t]he mental health community [may] ignore[ ] an individual's strengths when looking at adaptive functioning [,] ... presumably as a function of its role in providing support and services to impaired individuals[,] ... [t]he law makes a holistic view of an individual, recognizing that a few reported problems may

not negate an inmate's ability" to function in other ways. U.S. v. Ortiz, citing Williams v. Quarterman, 293 Fed.Appx. 298, 313–14 (5th Cir.2008) (unpublished per curiam); Clark v. Quarterman, 457 F.3d 441, 447 (5th Cir.2006); United States v. Webster, 421 F.3d 308, 313 (5th Cir.2005)). Consideration of an individual's strengths may often prove necessary to provide context and definition for consideration of reported deficits.

When viewing this record as a whole, his claimed adaptive deficits placed in context remove the aura of mental retardation.

As noted in the post-hearing memorandum of Respondents, the State's presentation primarily focused on two witnesses, Dr. Leslie Sandler of S.C. DDSN and Dr. Randy Waid, but not solely upon them. On February 10, 1999, Dr. Leslie Sandler, Ed. D., as lead psychologist and Dr. Thomas McAbee, as secondary psychologist of the Department of Disabilities and Special Needs issued a report pursuant to an Order of the Honorable Rodney Peeples concerning his competency to stand trial and criminal responsibility. The matter had been referred to S.C. D.D.S.N. due to indication of mental retardation. The report was introduced at trial as State Exhibit 8. In the report, Dr. Sandler and Dr. McAbee both opined that Simmons was not mentally retarded with a reasonable degree of scientific certainty. In their conclusion, the S.C. D.D.S.N. reported in its written conclusions to the trial court:

> The American Psychiatric Association 's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition , [APA DSM-IV] specifies the following three criteria for a diagnosis of mental retardation: significantly subaverage intellectual functioning with concurrent deficits or impairments in present adaptive functioning with onset before age 18 years. The available records do not report a history of significant developmental delays or of him ever receiving services for mental retardation or a related disability. While Mr. Simmons did repeat the eleventh grade and take remedial; courses for high school credit, his 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. . . .

Report, p. 5.

Unlike Dr. Tasse's non-interview of Simmons, the February 1999 report further indicates that in addition to police records, the examiners had interviewed Simmons on four occasions for approximately two hours each meeting for around 8 hours. The examiners considered his high school transcript noting that he had completed 18 hours of credit and graduated from Summerville High School in 1980 earning two letters in football playing defensive end. In grades, the examiners pointed out that he had received a B in ninth grade Basic English, a C in tenth grade Basic English, B in 11th Grade Basic English and an A in remedial English in the 12th grade. They noted he had received grade equivalent scores in achievement tests in the 11th grade of fifth grade in reading and fourth grade seven months in math. He had passed the state driver's license test in October 1979. They also noted that he was married and had reported having three children. Simmons had self-reported a long-term use of alcohol, marijuana and cocaine.

The S.C. D.D.S.N. examiners noted that in forensic evaluations since his arrest that he had received a provisional diagnosis of mental retardation with testing in May 1998 of a Wechsler Adult Intelligence Scale - Revised [WAIS-R} of Verbal IQ 66 , Performance IQ of 75 and Full Scale IQ of 69. A December 1998 WAIS - III test reported a Verbal IQ of 65, Performance IQ of 74 and Fill Scale IQ of 66. Concerning their own testing of the Applicant, the DDSN examiners also reported:

> In the administration of the Wechsler Adult Intelligence Scale - Revised [WAIS-R] on 9 February 1999 he obtained the following IQ scores: Verbal 70; Performance 82; and Full Scale 75. A Full-Scale IQ of 75 is in the mid-range of the Borderline Intelligence

> Classification (IQ scores of 70-79). The fact that his Performance IQ score was12 points higher than his verbal IQ score is significant. **One interpretation of this 12 point spread which the examiners believe may be likely is that his true IQ is in the low average intelligence classification (IQ scores of 80 to 89) as revealed in the performance IQ, and intentionally suppressed by Mr. Simmons tendency to malinger.** His sub-tests raw scores can be converted into scaled scores along a continuum of 1 (the 0.1 percentile rank) to 19 (the 99.9 percentile rank). His highest sub-test scores were in the Object Assembly test (scaled score of 10: the 50th percentile); Picture Arrangement and Block Design tests (scaled scores of 8; the 25th percentile). His lowest sub-test scores were in the Information and Digit Symbol tests (scaled scores of 2; the 0.4 percentile rank. ... [7]

Report, p. 3.

The examiners also noted that in the Trail-making tests his scores were elevated, yet showed no errors reflecting the impression that he was "intentionally producing exaggerated slow responses" as he did on the WAIS-R test. The Vineland Adaptive Behavior test was also attempted, but unsuccessful due to the incarceration which precluded performance of many of the adaptive skills in community living reflected in the test. A correctional officer was interviewed about Simmons current adaptive behavior which suggested that he took care of his personal hygiene and grooming without assistance from others, got along well with others and had leisure skills on playing cards and reading magazines and discussed content of those materials after reading them. It was reported that he leads a Bible discussion with other inmates and followed the rules of chess while playing other inmates. Report, p. 3-4.

The examiners also reported their own observations of Simmons which defeat the presence of mental retardation. Report, p. 4. Although the examiners reported observing malingering during each session, his clinical presentation appeared to be substantially lower than what would be expected of a high school graduate and substantially lower than his vocabulary and other skills

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[7]This was also reported at the competency hearing by Dr. Sandler. ROA 2614-15. Dr. McAbee testified that Applicant was not mentally retarded at the hearing. ROA 2699-2702.

revealed in his 1997 oral and written statements to the police. See ROA 3170 -3220 (oral statements of Simmons). They noted that he gave incorrect answers during each evaluation that closely approximated the correct answer which they saw a sign of malingering. Report, p. 5.

During the 1999 trial Dr. Sandler testified at competency hearing. ROA 2593-2671.[8] In particular, Dr. Sandler opined that he was not mentally retarded. ROA 2623- 2625. In particular, Dr. Sandler summarized the information reported above. ROA 2614-2616. As for adaptive behavior, Dr. Sandler noted that in their interviews and the report from correctional officers that there was an absence of a problem in his self-care. ROA 2623. However, Dr. Sandler opined that Simmons was a malingerer, but noted that his memory was remarkable when he wanted it to be. ROA 2625. Dr. Sandler found no indication of any adaptive problems before age 22, but testified that Dr. McAbee was the primary examiner in that area. ROA 2626. Dr. Sandler noted on cross-examination that they took into consideration his elementary grade school scores into account. ROA 2658-59.

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[8]An issue was raised concerning a disciplinary sanction against Dr. Sandler in 1989 in Pennsylvania. Neither counsel Theos or Solicitor Bailey were aware of the sanction at the time of the 1999 trial. PCR 245-248 (Bailey); p. 352 (Theos). Solicitor Bailey stated that he did not do background checks of expert witnesses and was not aware of its existence. There has been no showing that this information was in the possession of any law enforcement file. The defense counsel had equal access to information with S.C. DDSN as the prosecution. However. Solicitor Bailey stated that if he had that information about Dr. Sandler in 1999, he would have disclosed it because it could have potentially been used to impeach , although he would have resisted its use in court based upon remoteness since it was over 10 years. PCR 248. Solicitor Bailey noted that Sandler had never lost his license. Respondent submits that the evidence concerning Dr. Sandler does not reflect the he lost his license, but that he was subject to supervision. Contrary to a claim in the application it does not reflect either false or perjured testimony was given in the 1999 trial. While counsel, if they discovered it would have sought to impeach Dr. Sandler, Respondent submits that the prejudice prong of Strickland or the materiality prong of Brady had not been shown. Dr. Sandler was a court witness independently employed by the SC. D.D.S.N. He was adequately licensed to render an opinion. Further, it was not merely his opinion, but co-authored by Dr. McAbee. Importantly, there is no claim that the testing was not completed as reported in the examiners report. There is no reasonable probability the result of the 1999 trial would have been different, had the information been known and disclosed.

Dr. Thomas McAbee also testified at the competency hearing that Simmons was not mentally retarded. ROA 2702. Specifically, he noted that he found Simmons mental functioning above the range of mental retardation and suspected that Simmons was not trying his best during the testing. ROA 2702. He stated that he was assessing him that the February test scores were above the range of mental retardation. ROA 2699-70. He stated that there were some functional deficits in reading abilities, but they certainly would not be in the level of mental retardation. ROA 2700. Concerning his ability to take care of his own needs, Dr. McAbee testified that he did not see any evidence that would suggest at age 18 or 22 that he did not have the ability to do that . ROA 2701.

During the trial, Dr. John Michael Foxworth, an expert in general and forensic psychiatry, testified Applicant suffered from "an alcohol related persisting dementia," but did not testify Applicant suffered from mental retardation. (ROA. p. 1526-30). Dr. Charles Barton Saylor, a forensic psychologist, testified Applicant functioned in a "mentally deficient range," but also testified that he was not asked to look for a diagnosis of mental retardation. (ROA. pp. 1606; 1620-21). Dr. Thomas William Behrmann, a forensic psychiatrist with William S. Hall, testified that he did not diagnose him with any "mental illness or defect that would have prevented him ... from waiving his rights," in regard to the voluntary nature of Applicant's statements. (ROA. p. 1652). Dr. Behrmann also noted in his report, based solely on IQ scores, that mental retardation could be suspected. (ROA. p. 1675). Jeffrey Vidic, a clinical psychologist with William S. Hall, testified that Applicant tested in "the intellectually deficient range" and such deficiency was part of "the three diagnostic criteria" required for a diagnosis of mental retardation. (ROA. p. 1690). Dr. Sandler, again testified that he concluded, from his testing and evaluation, that Applicant was not mentally retarded. (ROA. p. 1740).

Lastly, Dr. L. Randolph Waid, an expert in clinical and forensic psychology, and neuropsychology, testified, definitively, to an absence of mental retardation. (ROA. pp. 1882, 1897). In particular, Dr. Waid opined that because he suffers from neuro-cognitive impairments he has diminished mental capacity, but not from mental retardation. ROA 1778. As stated above, Dr. Waid opined that his life-style of poly-substance abuse hurt his brain. He opined that Simmons was not always at that level and " do not believe he suffered from mental retardation but believe his intellect is in the borderline to intellectually deficient range ..." ROA 1778. He stated that he was in the lower two percentile and stated that he was not an intellectual giant. He noted that Simmons academic achievement was the first grade on was that he was falling behind. ROA 1781. "He was able to get through because he was not of the intellectual deficiency as he is now. He has diminished since high school and that's an acquired neuro-cognitive impairment . . . related to his life-style that has involved poly-substance abuse and dependance. ROA 1781-82. He was low average, not mentally retarded. Dr, Waid noted that his years associated with his abuse as well as the potential blows to his head from his life style, including his high level of drinking would contribute to the diminished functioning. ROA 1782. The evidence of Simmons overdose he considered an incident with a high potential to affect his brain. ROA 1783. He opined that Simmons had a diagnosis of polysubstance abuse by history, dementia (loss of intellectual abilities) and history of alcohol abuse. In addition to concluding that mental retardation was not an appropriate diagnosis, Dr. Waid attributed the decline in Simmons mental capacity to chronic substance abuse including alcohol and crack cocaine. ROA 1881-1882. As Dr. Waid testified: " well, he's definitely not meeting the diagnostic criteria for mental retardation." ROA 1897, l. 5-6.

During the PCR hearing, the primary witness on Applicant's behalf was Dr. Marc Tasse, a

clinical psychologist and psychology professor from the Ohio State University. PCR 100. He was qualified as an expert in mental retardation. PCR 106. Dr. Tasse stated that he reviewed records of the Applicant and opined that he had mental retardation based upon the records he reviewed as well as his consultation with social worker Dr. Marjorie Hammock. PCR 137. He opined that all of the Applicant's test scores on IQ tests were below the cut-off for mental retardation. ROA 145. In addition, he opined that the adaptive function prong was satisfied by Dr. Keyes 1999 testing of Simmons , his ex-wife and older sister. On the Vineland Adaptive Scale which scored significantly below average. PCR 145-146. Dr. Tasse found that "onset before 18" prong was more challenging to satisfy and he had to get more information from her in addition to his knowledge that Applicant was struggling in school which was a deficit in functional academics. ROA 146. He discounted the effect of drugs and alcohol. ROA 147-148.

Dr. Tasse conceded that Dr. Sandler and McAbee in February 1999 had a Full Scale IQ score of 75 which could be considered to fit within the range of metal retardation although it fit within the range of 70 +/- 5. PCR 162-163. **He admitted that based upon that score an examiner could conclude that a person was not mentally retarded** but would need to look at prong two and three. PCR 163. Dr. Tasse also relied upon the Vineland scales from an ex-wife and sister, although he could not recall the length of time the Applicant had ever lived with them. PCR 167. Dr. Tasse conceded that Applicant was not diagnosed for mentally retardation at any time in elementary school or high school. PCR 169-170. Dr. Tasse noted that the 2008 IQ testing done by Dr. Susan Knight at his request was the lowest test score on verbal comprehension , but discounted that score because he was solely concerned with the Full Scale IQ score. PCR 176.

Unlike Dr. Sandler and Dr. McAbee, Dr. Tasse stated that he never interviewed Simmons.

PCR Tr.p. 175, l. 12. For the purpose of doing any adaptive behavioral evaluation, Dr. Tasse only based his conclusion on the records made by others (frequently with a bias as a retained expert or family member of a person who had already received a death sentence). He admitted that there was information that he had a joint checking account with his wife and was not aware whether he understood the value of money. He stated that this concern about money concepts was based upon a Vineland test done by individuals who had little contact with Simmons for 17 years. PCR 182. He stated that he did not do another Vineland because Simmons had been incarcerated for a number of years and they would be unable to assess his adaptive behavior in the community because of his incarceration. PCR 182-183.

Dr. Tasse conceded that while he had opined there were some deficits in daily living, he had to admit that there was evidence that when Simmons was living at home he was the family caretraker and was caring for his mother, providing her medication and taking care of his younger sister who was identified as having mild mental retardation. PCR 185. He stated that he was also unaware any developmental delays by Applicant. PCR 187. He noted that Applicant played football but rejected that he had shown self-esteem for the record when he announced his pride in the team's record. PCR 188. Dr. Tasse further discounted that Applicant had gotten his driver's license, emphasizing that he lost his license when he was driving an uninsured vehicle. PCR 189. Dr. Tasse conceded that Applicant did not use only simple words, but multi-syllable words, that he had good hygiene, that he can read, that he had a bank account with his wife, that he got an A in drivers education and got a driver's license, and that he was able to attract girlfriends. PCR 197-199. Although these are not assessment specifically, Dr. Tasse admitted that each of these factors would be looked at to assess adaptive functioning.

Social Worker Marjorie Hammock testified about her social history report. However, when challenged the persuasive power of her testimony and its attempts to suggest deficits was severely limited in the cross-examination. It was pointed out that Simmons did participate in extra curricular activities in school, including football. She noted that he was able to receive varsity letters for playing and was able to make grades to be able to play. She stated that it was only speculation that some teachers had given him a preference, She admitted on cross-examination that there was no evidence that this happened to Simmons and they was no evidence that the grades were not an accurate reflection of what he earned. PCR 50. Ms. Hammock had noted that his academic performance declined in 1978 in the 11th grade, but then admitted that was when Simmons mother died from diabetes. PCR 52. She admitted that Simmons caretaker role in the family up to then was that he would feed her, help her clean up and took care of her daily needs. PCR 53-54. She also noted that in 1978 he also began using marijuana and drinking, although she denied knowing about the frequency of his usage. PCR 55 - 56. She noted also that his class rank was 531 out of 615. PCR 56-57. She noted that Simmons net his future wife Valerie in 1977 and they got married in 1982. PCR 59-62. She stated that his drinking and drug use began when he was 17 and became noticeable to others particularly after Mr. Simmons died. The use of cocaine began then according to her notes. PCR 63. She described his work history with a tree cutting firm, then a pest control company , a fiberglass company , a brick mason and then a tree service. PCR 60-64. She stated his marriage was from 1982 through 1988, with separations within the period. PCR 64. She state that she understood that his drug and alcohol problems caused the separation and his attendance problems at work. PCR 65-68. Concerning his driving, she noted that he only had one accident that was reported to her four years after he had received his license. PCR 69-71.

Ms. Hammock confirmed that at the Palmetto House, he would do chores, followed the rules and was well-liked. She confirmed that he care for himself, would go to school regularly, would go to church regularly upon his father's instructions and was trained in Bible studies that he held at the jail. PCR 77-78.

The evidence before this court reflects a mixed picture of the Applicant, but Respondent submits that the mixed picture was only treated one-sided in the Order. As the SC DDSN examiners concluded there is evidence in the record to suggest that he does not satisfy the elements of mental retardation. His scale score in the 1999 testing of 75 could support a conclusion that his IQ was not 70 or below. His intense drug and alcohol use since the age of 17 could impact on his intellectual functioning unrelated to mental retardation as Dr. Waid concluded.

His adaptive functioning, when pierced below the biased surface evident in the social history during cross-examination destroyed the existence of the claimed deficits. The fuller and corrected social history reflects a person who was able to care for his mother and sister, continued to have good hygiene for himself and others. Simmons possessed an ability to follow rules, gained employment when he wanted to do and participated in activities, including success at football while receiving adequate grades to maintain his presence on the team. It was reflected that the downward spin in his life not the product of mental retardation, but a combination of life style changes after the death of his mother and pursuit of drugs and alcohol. Yet even with the downward spin, his class rank was not in the bottom 10% of the high school graduates (531 out of 615).[9] His lack of motivation in

[9] Those individuals with mental retardation are considered in the bottom 2 to 3% of the population. The Prevalence of Mental Retardation, Association of Retarded Citizens (1982). See also DSM -IV-TR (2000), p. 46 ("the prevalence rate of Mental Retardation has been estimated at approximately 1%").

school was explained by drugs and family concerns and in testing was evident in the neutral examination. This presentation does not require this Court to find the existence of mental retardation where other expert witnesses, not motivated by by the potential of a death sentence or life sentence resting on their testimony - court witnesses Dr. Sandler, Dr. McAbee and Dr. Waid (a defense witness), concluded that it was not present.

The Applicant did not meet the burden of proof by a preponderance of the evidence. The Court conclusions should be altered and amended.

WHEREFORE, Respondent submits, for all the foregoing reasons, Respondent submits that the Motion to Alter or Amend should be granted. Petitioner has failed to carry his burden of proof and is not entitled to any relief.

Respectfully submitted,

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November 1, 2013 ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
Kenneth Simmons, #5066,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

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

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, Senior Assistant Deputy Attorney General, certify that I have served *Respondent's Motion to Alter or Amend* on counsel for Applicant by depositing one copy of same in the United States mail, postage prepaid, addressed as follows:

James Morton, Esquire
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Emily C. Paavola, Esquire
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This 1st day of November, 2013.

CERTIFIED COPY
2013 NOV -5 PM 3:19
CLERK OF COURT
DORCHESTER COUNTY

DONALD J. ZELENKA

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ATTORNEY FOR RESPONDENT

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

Applicant, Kenneth Simmons, by and through undersigned counsel, hereby files this response in opposition to Respondent's Motion to Alter or Amend this Court's judgment.

The purpose of a motion filed pursuant to Rule 59(e), SCRCP is to correct factual or legal errors, or to draw the court's attention to an issue that was raised but not ruled upon by the trial court. *See, e.g., Talley v. S.C. Higher Educ. Tuition Grants Committee*, 289 S.C. 483, 347 S.E.2d 99 (1986); *Doe v. Doe*, 324 S.C. 492, 478 S.E.2d 854 (1996). Respondent's motion does none of these things, and, instead, simply rehashes the numerous arguments in its post-hearing brief that this Court has already considered and rejected. Applicant responds only briefly to correct several of Respondent's most egregious factual inaccuracies.

- Respondent claims that this Court failed to consider the entire PCR record, including the entire trial transcript. Respondent is obviously mistaken since this Court's Order clearly indicates that the Court carefully reviewed the entire record in this case and the Order repeatedly references information from the trial and post-conviction records.

- Respondent asserted in its post-hearing brief that, for purposes of the *Atkins* issue, the State intended to rely primarily on the pre-*Atkins* trial testimony of "Dr. Leslie Sandler and Dr. Randy Waid." *Respondent's Post-Hearing Brief at p.45.* This Court's Order specifically addressed respondent's arguments as to both of these witnesses. Respondent now complains, however, that the Court failed to address "other evidence," such as the trial testimony of Dr. Thomas McAbee and other trial experts, including Drs. Foxworth, Saylor, Behrmann and Vidic. This argument is without merit. Dr. McAbee was a secondary psychologist at DDSN and he issued a joint report with Dr. Sandler. This

Court has already addressed the DDSN opinion. There is nothing unique to Dr. McAbee's trial testimony that requires this Court's attention. Moreover, as respondent has already conceded, Drs. Foxworth and Saylor were not asked to assess whether Applicant suffers from mental retardation nor did they conduct the necessary inquiries to make such an assessment. Drs. Behrmann and Vidic determined that a provisional diagnosis of mental retardation was appropriate, based on Applicant's IQ scores, and then referred him to DDSN for further assessment. Moreover, all of this information is contained in the trial record; it was discussed by both parties at the PCR hearing and in post-hearing briefing; and, it was considered by the Court as part of the overall record in the case. That Respondent disagrees with this Court's ultimate conclusion is not an adequate basis to alter or amend the Court's judgment.

- Respondent accuses this Court of affording Dr. Waid's affidavit too much weight because Dr. Waid did not testify live at the PCR hearing. Moreover, respondent claims that Dr. Waid's affidavit "does not retract the opinion Dr. Waid rendered at trial based upon specific developments or additional facts." *Motion to Alter at p.3.* Respondent is wrong on both counts. First, respondent specifically stipulated to the introduction of Dr. Waid's affidavit in lieu of live testimony, a procedure which is authorized by the PCR statute and has been used in numerous capital PCR proceedings in this state. Respondent cannot now complain that this well accepted procedure was somehow inadequate. Further, Dr. Waid's affidavit plainly states that, at the time of trial: (1) he was not asked to determine whether Applicant meets the criteria for mental retardation; (2) he did not have all of the information available to him that would be necessary to make such a determination; and, (3) he did not make a formal assessment of whether Applicant is a person with mental retardation. *See Affidavit of Dr. Waid at ¶¶ 4-6.*

- Throughout the motion, respondent repeatedly claims that Dr. Tasse failed to interview Applicant. This assertion is false. Dr. Tasse testified at the PCR hearing that he interviewed Applicant on January 20, 2010. *See PCR Tr. pp.109-110.* Respondent also touts the fact that Drs. Sandler and McAbee "attempted" to administer a Vineland Adaptive Behavior Scale as somehow supportive of the State's position. The truth is that Sandler and McAbee failed to recruit an appropriate informant for the Vineland and, as a result, never conducted a standardized measurement of Applicant's adaptive behavior. By contrast, Dr. Dennis Keyes administered a Vineland to Applicant's oldest sister and to his ex-wife and obtained a standardized score well within the mental retardation range. Dr. Keyes diagnosed Applicant as mentally retarded prior to trial. Further, Applicant's significant deficits in adaptive functioning are supported by numerous social history records and information collected from his teachers, coaches, employers, family and friends, all of which was offered at the PCR hearing and considered by this Court.

- Respondent likewise falsely accuses the Court of failing to consider its argument that drug and alcohol use could have affected Applicant's intellectual functioning. This issue was thoroughly addressed in the parties' post-hearing briefs. Further, experts for both the State and the defense have repeatedly acknowledged that there is no evidence that

Applicant's brain has been damaged from substance abuse. *ROA p.1909 and 1911-12; ROA p.1913*; *ROA p. 2655*; *PCR Tr. p.147.*

- Similarly, respondent continues to assert that Applicant was leading Bible studies and playing chess in jail even though the State's own witness, Dr. Sandler, admitted at trial that this claim is false. *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.*

- Finally, and perhaps most remarkably, respondent heavily criticizes this Court for relying on the clinical definitions of mental retardation set forth in the DSM-IV and by the AAIDD, both which are cited by the United States Supreme Court in *Atkins* itself. First, the exact same definition is used in S.C. Code §16-3-20(C)(b)(10) ("'Mental retardation' means significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period"), and was embraced by the South Carolina Supreme Court in *Franklin v. Maynard*, 588 S.E. 2d 604 (2003). Moreover, every court in South Carolina to address a mental retardation claim since *Atkins* has employed these two clinical definitions. It is unclear what alternative definition respondent would have this Court use, particularly in light of respondent's own repeated use of both definitions. Thus, respondent's complaint that this Court has placed too much stock in "science" is perhaps its most telling argument, since it effectively acknowledges that, by any clinical definition of mental retardation, Applicant clearly satisfies all three criteria.

For all of the reasons discussed above, and for the reasons set forth in Applicant's post-hearing briefs, respondent's arguments are without merit and this Court should deny the Motion to Alter or Amend the judgment.

Respectfully submitted,

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BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

November 5, 2013.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 05-CP-18-1368
COUNTY OF DORCHESTER	)	
	)	
KENNETH SIMMONS,	)	
Applicant,	)	
	)	**CERTIFICATE OF SERVICE**
v.	)	
	)	
STATE OF SOUTH CAROLINA.	)	
	)	

The undersigned certifies that a copy of the foregoing Applicant's Response in Opposition to Respondent's Motion to Alter or Amend Pursuant to Rule 59 was served by first class United States mail, postage prepaid, this 5th day of November, 2013, upon the following:

Donald J. Zelenka
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Jill A. Rider

CERTIFIED COPY
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CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)

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CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

Kenneth Simmons, #5066,

Applicant,

v.

State of South Carolina,

Respondent.

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

RESPONDENT'S AMENDED MOTION TO ALTER OR AMEND PURSUANT TO RULE 59

The Respondent State of South Carolina hereby makes an Amended Motion to Alter and Amend the Order Granting Post-Conviction Relief Pursuant to Atkins v. Virginia, 536 U.S. 304 (2002) filed October 21, 2013 and received by below-signed counsel on October 24, 2013.[1] The Respondent made its initial motion on November 1, 2013. The Applicant made a response to the Motion dated November 15, 2013. Respondent files this Amended Motion on November 15, 2013 clarifying the original motion. The Respondent would show this Honorable Court the following:

I.

In its Order, the Court found that the Applicant, Kenneth Simmons was mentally retarded and therefore ineligible for the death penalty. Within the Order, the Court concluded that "the State offered no evidence on the mental retardation issue during the PCR hearing, and relied instead on the pre-Atkins v. Virginia opinion of Dr. Leslie Sandler, from DDSN." Order, p. 12.

[1] Rule 59 (e), SCRCP provides: " [A] motion to alter or amend shall be served not later than 10 days after receipt of written notice of the entry of the order." The clerk entered the order on October 21st and mailed written notice to the undersigned. The undersigned received written notice of the entry of the order on October 24, 2013. The original motion was served eight (8) days later, on November 1, 2013, and is timely.

This is not supported by the record or post-hearing briefs and demonstrates an inherent misapprehension of the extent of the entire record, including the original competency hearing and trial record before this Court. Respondent requests this Court alter and amend those findings and conclusions.

Within its order, the Court opined that:

1. "there is no persuasive evidence of malingering in this case." Order, p. 12. This is incorrect. The S.C. D.D.S.N. report explains why they had an opinion concerning malingering during their evaluation based upon their testing, interviews and observations. In the S.C. DDSN report, they indicated that "malingering was observed more or less in each session ... some of his responses seemed exaggerated or distorted in a self-protective or self-serving fashion, as is sometimes encountered during competency to stand trial evaluations.[2] His 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

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[2] In the DDSN report, evidence of malingering from the actual test report was discussed:

In the administration of the Wechsler Adult Intelligence Scale - Revised [WAIS-R] on 9 February 1999 he obtained the following IQ scores: Verbal 70; Performance 82; and Full Scale 75. A Full-Scale IQ of 75 is in the mid-range of the Borderline Intelligence Classification (IQ scores of 70-79). The fact that his Performance IQ score was12 points higher than his verbal IQ score is significant. **One interpretation of this 12 point spread which the examiners believe may be likely is that his true IQ is in the low average intelligence classification (IQ scores of 80 to 89) as revealed in the performance IQ, and intentionally suppressed by Mr. Simmons's tendency to malinger.** His sub-tests raw scores can be converted into scaled scores along a continuum of 1 (the 0.1 percentile rank) to 19 (the 99.9 percentile rank). His highest sub-test scores were in the Object Assembly test (scaled score of 10: the 50th percentile); Picture Arrangement and Block Design tests (scaled scores of 8; the 25th percentile). His lowest sub-test scores were in the Information and Digit Symbol tests (scaled scores of 2; the 0.4 percentile rank.
...

This test assessment by DDSN was not challenged by the Applicant's current experts. See DSM - V (2013), p. 37 ('highly discrepant individual subtest scores may make an overall IQ score invalid").

substantially lower than his vocabulary and other skills as revealed in his 1997 oral and written statements to the police.[3] Furthermore, he sometimes gave inconsistent answers across our four evaluations or gave incorrect answers that closely approximate the correct answers, which is commonly seen during malingering." S.C. DDSN Report, p. 4-5. **Dr. Thomas McAbee** testified at the competency hearing that Simmons was not mentally retarded. ROA 2702. Specifically, Dr. McAbee noted that he found Simmons mental functioning above the range of mental retardation and suspected that Simmons was not trying his best during the testing. ROA 2702. He stated that he was assessing him that the February test scores were above the range of mental retardation. ROA 2699-70. He stated that there were some functional deficits in reading abilities, but they certainly would not be in the level of mental retardation. ROA 2700. The Court did not address this persuasive evidence from Dr. McAbee independent of Dr. Sandler.

Therefore, this finding and conclusion is incorrect inasmuch as specific and well-supported evidence of malingering did exist during the 1999 testing of Simmons by SC DDSN and reported in the original trial record.

2. The Court while acknowledging testimony from two qualified experts at trial who opined that Applicant did not meet the criteria for a diagnosis of mental retardation also found, "[T]he State's argument regarding the trial testimony of Dr. Randy Waid was not persuasive, given Dr. Waid's affidavit." Order, p. 13, n.

[3] The oral statements are set forth in ROA p. 3170-3220. They are supportive of the SC DDSN evaluators assessment.

8. However, the Applicant failed to present Dr. Waid before this Court during the PCR hearing for testimony. Although Dr. Waid's affidavit creates a question of fact, the affidavit does not address the direct contradiction in his sworn testimony. Specifically, it does not retract the opinion Dr. Waid rendered at trial based upon specific developments or additional facts, or otherwise clearly show error in any of the testing or results. At trial, Dr. Waid testified as an expert in clinical and forensic psychology, and neuropsychology, to an absence of mental retardation. (ROA. pp. 1882, 1897). In particular, Dr. Waid opined that because Simmons suffers from neuro-cognitive impairments he has diminished mental capacity, but not from mental retardation. ROA 1778. As stated above, Dr. Waid opined that Simmons' life-style of poly-substance abuse hurt his brain. He opined that Simmons was not always at that level and "do not believe he suffered from mental retardation but believe his intellect is in the borderline to intellectually deficient range ..." ROA 1778, l. 8-15.

3. The Court found: "[I]t is significant that, unlike applicant's experts, Dr. Sandler did not conduct any standardized measure of applicant's adaptive behavior." Order, p. 14. However, Dr. Tasse, the defense's expert in the PCR action failed to personally test the Applicant in any manner. PCR Tr.p. 175, l. 12.[4] Unlike Dr.

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[4] In the November 5, 2013 response to the original motion to alter, the Applicant correctly points out that Dr. Tasse testified that he met briefly with Simmons on either January 20 or 21, 2010 for about an hour and one-half. PCR Tr.p. 109, l. 23-p. 110. To the extent the Respondent's initial motion suggests that the Applicant and Dr. Tasse had never met prior to PCR testimony it was incorrect. *However, it is uncontradicted that Dr. Tasse never tested Simmons in any manner during their brief meeting and made no report of the circumstances or value of what occurred in that meeting for any purpose in the mental retardation determination.* Particularly, Dr. Tasse unequivocally stated on cross-examination :

Q. And you did not give any personal testing for the defendant in this case, did you?
A. I did not test Mister Simmons, No.

Tasse, Dr. Sandler and Dr. McAbee did interview and test Applicant and attempted to use the Vineland Adaptive Behavior Scale Interview Edition with Applicant. They noted the partial results in their written report. SC DDSN Report, p. 4.

4. The Court found that "Dr. Sandler relied, in part, on some misconceptions about what people with mild mental retardation can achieve." Order, p. 14. There are no citations to the record for this conclusion and it does not appear to be supported by any evidence in the record from either the S.C. D.D.S.N. report or testimony.[5]

PCR Tr.p. 175, l. 10-11.

[5] During the testimony of Dr. Tasse, he testified about some common misconceptions regarding mental retardation. PCR 129-136. However, in his explanation he stated that less than 5% go on to college with some supports (PCR Tr.p. 131), 27% had employment that was sustained over a year, some were married with 15% being a parent, 40% had a savings account open, 70% had friends outside of school. PCR Tr.p. 131-134. Dr. Tasse stated that a person with mental retardation could conceivably pass a driver's test - "not all, some can." PCR Tr.p. 134. Dr. Tasse opined that people with mental retardation can learn to play simple games with clear rules. PCR Tr.p. 134.

However, it is clear that in making an assessment of mental retardation, an evaluator uses criteria for determining the level of adaptive functioning based upon the person's social history in various skill levels. These have included in the AARM definition:

1. Self-Care – bathing, dressing, grooming, and feeding one's self;
2. Communication Skills – understanding and using verbal and nonverbal language;
3. Self-Direction – problem solving, exercising choice, initiating and planning activities;
4. Social Skills – maintaining interpersonal relationships, understanding emotions and social cues, understanding fairness and honesty, obeying rules and laws;
5. Leisure Skills – taking responsibility for one's own activities, having the ability to participate in the community;
6. Home or School Living – housekeeping, cooking, doing laundry, maintaining living space;
7. Functional Academics – using reading, writing, and math skills in everyday life;
8. Community Use – shopping, using public transportation, using community services;

In the S.C. DDSN report, factors supporting their conclusion was their information that he had graduated from high school, played varsity football, passed the driver's license test, and drove a car by himself. Report, p. 5. These factors, as noted by Dr. Tasse, may not exclude mental retardation, but Dr. Tasse clearly stated that many with mental retardation could not accomplish these tasks. The Order suggests that mere reference to these factors suggests error by the evaluators. This is an incorrect reading of what the examiners at the Department of Disabilities and Special Needs found.

5. The Court found: "[T]he evidence overwhelmingly shows that applicant meets all three prongs of South Carolina's definition of mental retardation by a preponderance of the evidence." Order, p. 15. However, as noted above, the Court sets forth a flawed base of reasoning. Further still, the Court failed to consider or address the facet of the DDSN opinion that substantial drug and alcohol use could account for present deficits in intellectual functioning, a factor noted in Dr. Waid's earlier rejection of mental retardation. In referencing the fact that educational achievement must be discounted, this Court merely faults the school system *in toto*. The Court appears to reason that the school records were wrong, the school achievements were not really achievements, the sports achievements

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9. Work – ability to maintain part-time or full-time employment, either competitive or sheltered, ability to work under supervision, cooperate with coworkers, be reliable and punctual, and meet work standards, and;

10. Health and Safety – ability to protect one's self, responding to health problems.

In making the broad conclusion about misconceptions, the Court has failed to recognize that the historical factors expressly stated by the SC DDSN evaluators would be included as matters for consideration within areas of adaptive functioning assessment. See Also DSM –IV, p. 41.

were not really achievements, and he could not be "faking" mental retardation all along. (Order, p. 13). But that fails to account for family issues, drug issues, or merely not attempting to do one's best. It is not necessarily either 1) mental retardation or 2) feigning to attain a mental retardation opinion to avoid a death sentence.

These multiple flaws in reasoning and review of the evidence merit altering and amending the Court's order.

Respondent request this Court to alter and amend these findings and conclusions.

A.

The preponderance of evidence standard was not met. In Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the U.S. Supreme Court held that executing mentally retarded individuals constitutes cruel and unusual punishment under the Eighth Amendment "in the light of ... evolving standards of decency." But the Court recognized that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." In 2003, the South Carolina Supreme Court addressed the mental retardation issue and allowed for the claims for prior capital cases to be raised in a post-conviction relief setting. Franklin v. Maynard, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003).

In pressing a claim of mental retardation, "the applicant must show he or she is mentally retarded by a **preponderance of the evidence.**" Franklin v. Maynard, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003). "Mental retardation" is defined by statute as "'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 605-06, *quoting* S.C. Code § 16-3-20(C)(b)(10). In the Franklin decision, the South Carolina Supreme Court initially rejected the argument to adopt as a substantive definition of "mental retardation" different than that adopted by the legislature when Franklin was decided.[6]

This was a contested issue from the trial to the presentation at the state PCR hearing. Respectfully, Respondent submits that the Applicant did not meet his burden of proof and the PCR Court erred in concluding that the evidence was "overwhelmingly" shown. Order, p. 15. There is contrary evidence in the record from the report and testimonies of Dr. Leslie Sandler, Dr. Thomas McAbee and Dr. Randy Waid which defeat the Applicant's burden of proof. This was admittedly a close issue, but the mere fact that an issue was close does not satisfy the burden of proof when the 1999 assessment was made by neutral examiners without a stake in the result - particularly before it impacted on the viability of a death sentence. This lack of bias in the 1999 evaluation by neutral examiners should carry significant weight. In addition the mere fact that a retained defense expert has opined that Applicant suffers from mental retardation does not

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[6] Atkins left it to each state to set standards and procedures for adjudicating the mental retardation of a defendant in a capital case; however, at the time Franklin was decided, bills had been introduced in South Carolina concerning the definitions of mental retardation and procedures, but no legislation had been passed. See Franklin, supra. 356 S.C. at 605, n. 1.

The American Association of Mental Retardation (AAMR) defines mental retardation as a "disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in the conceptual, social, and practical adaptive skills." Mental Retardation [: Definition, Classifications, and Systems of Supports 1 (10th ed.2002),] at 1. As of January 1, 2007, the AAMR has been known as the American Association on Intellectual and Developmental Disabilities.

The American Psychiatric Association defines mental retardation as "significantly subaverage intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive functioning." [Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1992) (DSM–IV),] at 37. Thus, ... both definitions of mental retardation incorporate three concepts: 1) limited intellectual functioning; 2) significant adaptive limitations; and 3) age of onset.

The primary distinction between these two classification systems is that the DSM–IV specifies severity levels of mental retardation, whereas the AAMR classification system no longer specifies levels of severity, but instead, recognizes that a diagnosis of mental retardation relies on both limitations in IQ and adaptive skills and focuses on the levels of support needed following an individual diagnosis. See DSM–IV [,] at 45; AAMR[,] at 26.

address the issue or necessarily satisfy the burden of proof.

In short, the factual findings and conclusions show the PCR Court failed to consider that the record of the trial proceedings which is a part of the PCR proceeding by statute, S.C. Code Ann. § 17-27-70 and, also, fails to consider that Respondent in a civil proceeding does not have access to the Applicant. Additionally, the findings and conclusion reflect the Court failed to consider that post-death sentence evidence is inherently suspect where such information is gathered specifically to undo the jury verdict and has not been tested at trial. See, for example, Broadnax v. State, 2013 WL 598056, 9 (Ala.Crim.App.,2013) (nothing prevented the Applicant from calling family members to testify subject to cross-examination concerning the adaptive functioning in the post-death penalty verdict proceeding). The reliance upon the social worker as a conduit of the information before this Court is also ripe with a potential for bias where similar findings not otherwise factually supported in record where trial judge found social worker's testimony not particularly credible where based on hearsay and social worker "assigned mental operations to witnesses" who did not testify. See Davis v. State, 9 So.3d 539, 558 -559 (Ala.Crim.App.,2008) ("this Court finds the use of a social worker to be less than an ideal procedure. Vogelsang came into Court and testified on behalf of several family members in Davis's family who did not appear before this Court. During her testimony, Vogelsang continually assigned mental operations to witnesses who were never brought into Court to be subjected to cross-examination" . . . this type of testimony is certainly of the sort that pushes the envelope of permissible evidence. While arguably probative and relevant to sentence, such testimony does not seem particularly suited to have great weight placed upon it. This Court, or a jury during an actual penalty phase hearing, is being asked to accept the facts as interpreted and

sifted by a third-party in reaching a conclusion"). As the Alabama court held in a similar situation: "Vogelsang [the social worker] is a professional witness, in the sense that she goes out and interviews many different people, decides what is relevant or not, and then comes into Court and places that information before the fact-finder while insulating the actual witnesses from cross-examination". Davis v. State, 9 So.3d 539, 559 (Ala.Crim.App.,2008). Cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias). Here, the Applicant's showing limited the ability to further present this inherent bias which should limit its weight. See State v. Starnes, 340 S.C. 312, 325-326, 531 S.E.2d 907, 914 - 915 (S.C.,2000).[7] "A witness will naturally favor a party who is a family member. This favoritism may erode the credibility of the witness." The New Wigmore, Impeachment and Rehabilitation, Section 6.3 (2014 Supplement).

Contrary to the position presented to this Court "psychology informs, but does not determinatively decide, whether an inmate is exempt from execution." Ortiz v. United States, 664 F.3d 1151, 1168 (8th Cir.2011). Atkins "did not delegate to psychologists the determination of whether an inmate should not face execution." United States v. Bourgeois, No. 02–CR–216, 2011 WL 1930684, at *24 (S.D.Tex. May 19, 2011); see also Hooks v. Workman, 689 F.3d

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[7] In *Starnes*, the Court held:

> SCRE, also permits a party to impeach a witness by establishing bias or prejudice either through examination or otherwise. " 'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) *quoting* 98 C.J.S. *Witnesses* § 560a (1957). A witness' romantic relationship with a party is a source of potential bias of which the jury should be aware in order to fully evaluate the witness' testimony. McIntyre v. State, 934 P.2d 770 (Alaska App.1997); Orkin Exterminating Co., Inc. v. McIntosh, 215 Ga.App. 587, 452 S.E.2d 159 (1994); State v. Erby, 56 N.C.App. 358, 289 S.E.2d 86 (1982).

1148, 1172 (10th Cir.2012) ("Atkins could have adopted the clinical standard, but explicitly declined to do so."); Clark v. Quarterman, 457 F.3d 441, 445 (5th Cir.2006) (Atkins "did not dictate that the approach" to defining mental retardation "must track the approach of the [AAIDD] or the APA exactly"); United States v. Candelario–Santana, No. 09–CV–427 (JAF), 916 F.Supp.2d 191, 194, 2013 WL 101615, at *2 (D.P.R. Jan. 8, 2013) ("Though the clinical standards have informed our analysis, we emphasize that a clinical standard is not a constitutional command." (internal quotation marks omitted)). Instead, while noting the leading clinical definitions of mental retardation, Atkins expressly permitted state legislatures and courts to exercise their own judgments as to the definition of mental retardation, even if those judgments diverged from those of leading psychologists. See Atkins, 536 U.S. at 317, 122 S.Ct. 2242 ("[W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." (alterations omitted)); see also id. at 317 n. 22, 122 S.Ct. 2242 ("The statutory definitions of mental retardation ... generally conform to the clinical definitions ...." (emphasis added)).

Applicant and the Court apparently adopted a concept that it is bedrock science that if the subject has adaptive deficits that satisfy the diagnostic criteria, then the diagnosis should be made even if the subject also has strengths. Respondent submits that this is in error. While "[t]he mental health community [may] ignore[ ] an individual's strengths when looking at adaptive functioning [,] ... presumably as a function of its role in providing support and services to impaired individuals[,] ... [t]he law makes a holistic view of an individual, recognizing that a few reported problems may not negate an inmate's ability" to function in other ways. U.S. v. Ortiz, citing Williams v. Quarterman, 293 Fed.Appx. 298, 313–14 (5th Cir.2008) (unpublished per

curiam); Clark v. Quarterman, 457 F.3d 441, 447 (5th Cir.2006); United States v. Webster, 421 F.3d 308, 313 (5th Cir.2005)). Consideration of an individual's strengths may often prove necessary to provide context and definition for consideration of reported deficits.

When viewing this record as a whole, his claimed adaptive deficits placed in context remove the aura of mental retardation.

As noted in the post-hearing memorandum of Respondents, the State's presentation primarily focused on two witnesses, Dr. Leslie Sandler of S.C. DDSN and Dr. Randy Waid, but not solely upon them. On February 10, 1999, Dr. Leslie Sandler, Ed. D., as lead psychologist and Dr. Thomas McAbee, as secondary psychologist of the Department of Disabilities and Special Needs issued a report pursuant to an Order of the Honorable Rodney Peeples concerning his competency to stand trial and criminal responsibility. The matter had been referred to S.C. D.D.S.N. due to indication of mental retardation. The report was introduced at trial as State Exhibit 8. In the report, Dr. Sandler and Dr. McAbee both opined that Simmons was not mentally retarded with a reasonable degree of scientific certainty. In their joint conclusion, the S.C. D.D.S.N. reported in its written conclusions to the trial court:

> The American Psychiatric Association 's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition , [APA DSM-IV] specifies the following three criteria for a diagnosis of mental retardation: significantly subaverage intellectual functioning with concurrent deficits or impairments in present adaptive functioning with onset before age 18 years. The available records do not report a history of significant developmental delays or of him ever receiving services for mental retardation or a related disability. While Mr. Simmons did repeat the eleventh grade and take remedial; courses for high school credit, his 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. . . .

Report, p. 5.

Unlike Dr. Tasse's non-testing of Simmons, the February 1999 report further indicated that in addition to police records, the examiners had interviewed Simmons on four occasions for approximately two hours each meeting for around 8 hours. The examiners considered his high school transcript noting that he had completed 18 hours of credit and graduated from Summerville High School in 1980 earning two letters in football playing defensive end. In grades, the examiners pointed out that he had received a B in ninth grade Basic English, a C in tenth grade Basic English, B in 11th Grade Basic English and an A in remedial English in the 12th grade. They noted he had received grade equivalent scores in achievement tests in the 11th grade of fifth grade in reading and fourth grade seven months in math. He had passed the state driver's license test in October 1979. They also noted that he was married and had reported having three children. Simmons had self-reported a long-term use of alcohol, marijuana and cocaine.

The S.C. D.D.S.N. examiners noted that in forensic evaluations since his arrest that he had received a provisional diagnosis of mental retardation with testing in May 1998 of a Wechsler Adult Intelligence Scale - Revised [WAIS-R] of Verbal IQ 66, Performance IQ of 75 and Full Scale IQ of 69. A December 1998 WAIS-III test reported a Verbal IQ of 65, Performance IQ of 74 and Fill Scale IQ of 66. Concerning their own testing of the Applicant, the DDSN examiners also reported:

> In the administration of the Wechsler Adult Intelligence Scale - Revised [WAIS-R] on 9 February 1999 he obtained the following IQ scores: Verbal 70; Performance 82; and Full Scale 75. A Full-Scale IQ of 75 is in the mid-range of the Borderline Intelligence Classification (IQ scores of 70-79). The fact that his Performance IQ score was12 points higher than his verbal IQ score is significant. **One interpretation of this 12 point spread which the examiners believe may be likely is that his true IQ is in the low**

> **average intelligence classification (IQ scores of 80 to 89) as revealed in the performance IQ, and intentionally suppressed by Mr. Simmons tendency to malinger.** His sub-tests raw scores can be converted into scaled scores along a continuum of 1 (the 0.1 percentile rank) to 19 (the 99.9 percentile rank). His highest sub-test scores were in the Object Assembly test (scaled score of 10: the 50th percentile); Picture Arrangement and Block Design tests (scaled scores of 8; the 25th percentile). His lowest sub-test scores were in the Information and Digit Symbol tests (scaled scores of 2; the 0.4 percentile rank. ... [8]

Report, p. 3.

The examiners also noted that in the Trail-making tests his scores were elevated, yet showed no errors reflecting the impression that he was "intentionally producing exaggerated slow responses" as he did on the WAIS-R test. The Vineland Adaptive Behavior test was also attempted, but unsuccessful due to the Applicant's incarceration which precluded performance of many of the adaptive skills in community living reflected in the test. A correctional officer was interviewed about Simmons current adaptive behavior which suggested that he took care of his personal hygiene and grooming without assistance from others, got along well with others and had leisure skills on playing cards and reading magazines and discussed content of those materials after reading them. It was reported that he leads a Bible discussion with other inmates and followed the rules of chess while playing other inmates. Report, p. 3-4.[9]

The examiners also reported their own observations of Simmons which defeat the presence of mental retardation. Report, p. 4. Although the examiners reported observing

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[8] This was also reported at the competency hearing by Dr. Sandler. ROA 2614-15. Dr. McAbee testified that Applicant was not mentally retarded at the hearing. ROA 2699-2702.

[9] In the Response to the Motion to Alter, p. 3, the Applicant complains that "the state continues to assert that Applicant was leading Bible studies and playing chess in jail," even though Dr. Sandler "admitted at trial that this claim was false." Id. In the motion, the State made reference to the admitted report of SC DDSN which included that language. Dr. Sandler testified that he had received information that Applicant was seen reading magazines and that he was playing chess, but that it was later stated to him that Applicant was playing checkers rather than chess. ROA 1729. Dr. Sandler also testified that that while he had been told that Applicant was leading a Bible study group, he later learned that Applicant "was involved in a Bible discussion group on a daily basis with other inmates. ROA 1730.

malingering during each session, his clinical presentation appeared to be substantially lower than what would be expected of a high school graduate and substantially lower than his vocabulary and other skills revealed in his 1997 oral and written statements to the police. See ROA 3170 - 3220 (oral statements of Simmons). They noted that he gave incorrect answers during each evaluation that closely approximated the correct answer which they saw a sign of malingering. Report, p. 5.

During the 1999 trial Dr. Sandler initially testified at a competency hearing. ROA 2593-2671.[10] In particular, Dr. Sandler opined that he was not mentally retarded. ROA 2623- 2625. In particular, Dr. Sandler summarized the information reported above. ROA 2614-2616. As for adaptive behavior, Dr. Sandler noted that in their interviews and the report from correctional officers that there was an absence of a problem in his self-care. ROA 2623. However, Dr. Sandler opined that Simmons was a malingerer, but noted that his memory was remarkable when he wanted it to be. ROA 2625. Dr. Sandler found no indication of any adaptive problems before age 22, but testified that Dr. McAbee was the primary examiner in that area. ROA 2626. Dr. Sandler noted on cross-examination that they took into consideration his elementary grade school

[10] An issue was raised at the PCR hearing concerning a disciplinary sanction against Dr. Sandler in 1989 in Pennsylvania. Neither counsel Theos or Solicitor Bailey were aware of the sanction at the time of the 1999 trial. PCR 245-248 (Bailey); p. 352 (Theos). Solicitor Bailey stated that he did not do background checks of expert witnesses and was not aware of its existence. There has been no showing that this information was in the possession of any law enforcement file. The defense counsel had equal access to information with S.C. DDSN as the prosecution. However. Solicitor Bailey stated that if he had that information about Dr. Sandler in 1999, he would have disclosed it because it could have potentially been used to impeach, although he would have resisted its use in court based upon remoteness since it was over 10 years. PCR 248. Solicitor Bailey noted that Sandler had never lost his license. Respondent submits that the evidence concerning Dr. Sandler does not reflect the he lost his license, but that he was subject to supervision. Contrary to a claim in the application it does not reflect either false or perjured testimony was given in the 1999 trial. While counsel, if they discovered it would have sought to impeach Dr. Sandler, Respondent submits that the prejudice prong of Strickland or the materiality prong of Brady had not been shown. Dr. Sandler was a court witness independently employed by the SC. D.D.S.N. He was adequately licensed to render an opinion. Further, it was not merely his opinion, but co-authored by Dr. McAbee. Importantly, there is no claim that the testing was not completed as reported in the examiners' report. There is no reasonable probability the result of the 1999 trial would have been different, had the information been known and disclosed.

scores into account. ROA 2658-59.

Dr. Thomas McAbee also testified at the competency hearing that Simmons was not mentally retarded. ROA 2702. Specifically, he noted that he found Simmons mental functioning above the range of mental retardation and suspected that Simmons was not trying his best during the testing. ROA 2702. He stated that he was assessing him that the February test scores were above the range of mental retardation. ROA 2699-70. He stated that there were some functional deficits in reading abilities, but they certainly would not be in the level of mental retardation. ROA 2700. Concerning his ability to take care of his own needs, Dr. McAbee testified that he did not see any evidence that would suggest at age 18 or 22 that he did not have the ability to do that . ROA 2701.

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During the trial, Dr. John Michael Foxworth, an expert in general and forensic psychiatry, testified Applicant suffered from "an alcohol related persisting dementia," but did not testify Applicant suffered from mental retardation. (ROA. p. 1526-30). Dr. Charles Barton Saylor, a forensic psychologist, testified Applicant functioned in a "mentally deficient range," but also testified that he was not asked to look for a diagnosis of mental retardation. (ROA. pp. 1606; 1620-21). Dr. Thomas William Behrmann, a forensic psychiatrist with William S. Hall, testified that he did not diagnose him with any "mental illness or defect that would have prevented him ... from waiving his rights," in regard to the voluntary nature of Applicant's statements. (ROA. p. 1652). Dr. Behrmann also noted in his report, based solely on IQ scores, that mental retardation could be suspected. (ROA. p. 1675). Jeffrey Vidic, a clinical psychologist with William S. Hall, testified that Applicant tested in "the intellectually deficient range" and such deficiency was part of "the three diagnostic criteria" required for a diagnosis of mental

retardation. (ROA. p. 1690).

Dr. Sandler, again testified, **as a defense witness** and in his testimony, he reported, from his testing and evaluation, that Applicant was not mentally retarded. (ROA. p. 1724-25). Dr. Sandler testified that "there was a remarkable amount of signs that we were able to determine that indicated an absence of mental retardation, an absence of adaptive functioning, the onset before age eighteen . . .he seemed to have been doing fine." ROA 1725, l. 12-19. Dr. Sandler testified on cross-examination in going over the records of his school career, work career, marriage . . . relationship with his peers, his ability to care for himself, groom himself, and be gainfully employed" that he did not find any evidence at all of any deficits or impairments in adaptive functioning. ROA 1739, l. 15-24. Dr. Sandler testified that he found none of the three factors for mental retardation were present. ROA 1740.

Lastly, Dr. L. Randolph Waid, an expert in clinical and forensic psychology, and neuropsychology, testified, definitively, to an absence of mental retardation. (ROA. pp. 1882, 1897). In particular, Dr. Waid opined that because he suffers from neuro-cognitive impairments he has diminished mental capacity, but not from mental retardation. ROA 1778. As stated above, Dr. Waid opined that his life-style of poly-substance abuse hurt his brain.[11] He opined that Simmons was not always at that level and **"do not believe he suffered from mental retardation but believe his intellect is in the borderline to intellectually deficient range ..."** ROA 1778. He stated that he was in the lower two percentile and stated that he was not an

[11] In his November 1, 2013 Response to the original Motion to Alter, p. 2-3, the Applicant asserts that "experts for the State and the defense have repeatedly acknowledged that there is no evidence that Applicant's brain has been damaged from substance abuse, citing ROA 1909, 1911-12, 1913, 2655, PCR Tr.p. 147. Although Dr. Waid acknowledged in the testimony that an MRI test did not show structural damage to the brain (ROA 1909) and a neurological examination done at Hall Institute showed normal, Dr. Waid opined at trial that normal MRI's can still occur with brain damage. *He testified that there is medical evidence that he had a substance abuse problem and a polysubstance abuse problem,* ROA 1913, l. 10-14.

intellectual giant. He noted that Simmons academic achievement was the first grade on was that he was falling behind. ROA 1781. "He was able to get through because he was not of the intellectual deficiency as he is now. He has diminished since high school and that's an acquired neuro-cognitive impairment . . . related to his life-style that has involved poly-substance abuse and dependence. ROA 1781-82. He was **"low average, at best, not mentally retarded."** ROA 1782, l. 11-12. Dr. Waid noted that his years associated with his abuse as well as the potential blows to his head from his life style, including his high level of drinking would contribute to the diminished functioning. ROA 1782. The evidence of Simmons overdose he considered an incident with a high potential to affect his brain. ROA 1783. He opined that Simmons had a diagnosis of polysubstance abuse by history, dementia (loss of intellectual abilities) and history of alcohol abuse. In addition to concluding that mental retardation was not an appropriate diagnosis, Dr. Waid attributed the decline in Simmons mental capacity to chronic substance abuse including alcohol and crack cocaine. ROA 1881-1882. As **Dr. Waid later testified: "well, he's definitely not meeting the diagnostic criteria for mental retardation." ROA 1897, l. 5-6.** [12]

[12] In the Response in Opposition to the Motion to Alter, p. 2, the Applicant suggests that Dr. Waid retracted his opinion that Applicant was not mentally retarded. However, a close reading of Dr. Waid's affidavit gives no explanation of the fact that he actually rendered an opinion at trial that Simmons was not mentally retarded or that it was incorrect. Rather, he merely claims that his evaluation occurred before Atkins and that he did not realize the legal significance of the opinion that it had today and suggests that he was not asked by the defense to make a formal assessment, but he gave an opinion at trial that Simmons lacked the criteria for mental retardation. His affidavit contradicts his actual sworn testimony at trial and does not address its correctness. However, whether one is mentally retarded should not depend on the legal significance or impact of the determination, but whether the person is mentally retarded regardless of the legal significance, a point that Dr. Waid did not address in his affidavit.

The Applicant implies that the fact that an affidavit was admitted without objection automatically carries the weight the Applicant suggests. The Respondent did not stipulate to the weight or statement within Dr. Waid's affidavit – only its discretionary admissibility under the Uniform Post-conviction relief Act. The affidavit itself was impeached by the sworn testimony presented during the trial cited above. The fact that Dr. Waid did not address his actual prior sworn opinion to the court that Simmons was not mentally retarded was not addressed or even acknowledged within the affidavit. To suggest otherwise ignores the full record before the Court.

During the PCR hearing, the primary witness on Applicant's behalf was Dr. Marc Tasse, a clinical psychologist and psychology professor from the Ohio State University. PCR 100. He was qualified as an expert in mental retardation. PCR 106. Dr. Tasse stated that he reviewed records of the Applicant and opined that he had mental retardation based upon the records he reviewed as well as his consultation with social worker Dr. Marjorie Hammock. PCR 137. He opined that all of the Applicant's test scores on IQ tests were below the cut-off for mental retardation. ROA 145. In addition, he opined that the adaptive function prong was satisfied by Dr. Keyes 1999 testing of Simmons, his ex-wife and older sister. On the Vineland Adaptive Scale which scored significantly below average. PCR 145-146. Dr. Tasse found that "onset before 18" prong was more challenging to satisfy and he had to get more information from her in addition to his knowledge that Applicant was struggling in school which was a deficit in functional academics. ROA 146. He discounted the effect of drugs and alcohol. ROA 147-148.

Dr. Tasse conceded that Dr. Sandler and McAbee in February 1999 had a Full Scale IQ score of 75 which could be considered to fit within the range of mental retardation although it fit

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The Supreme Court of Ohio has addressed the review that should be given affidavits in a collateral case. "In determining how to assess the credibility of supporting affidavits in post-conviction relief proceedings, the Ohio Supreme Court adopted the reasoning of State v. Moore (1994), 99 Ohio App.3d 748, 651 N.E.2d 1319, which had looked to federal habeas corpus decisions for guidance. Id. at 753-754, 651 N.E.2d at 1322-1323. The Supreme Court ultimately determined that the trial court should consider all relevant factors in assessing the credibility of affidavit testimony in 'so-called paper hearings,' including the following: '(1) whether the judge viewing the post-conviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) ***whether the affidavits contradict evidence proffered by the defense at trial. Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony.***' State v Calhoun, 86 Ohio St.3d at 285, 714 N.E.2d at 911-912, citing Moore, 99 Ohio App.3d at 754-756, 651 N.E.2d at 1323-1324." State v. Kinley (1999), 136 Ohio App.3d 1, 13-14, 735 N.E.2d 921, 930-31.

As "self-serving" affidavits, the trial court could give them little or no weight. State v. Calhoun (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905; State v. Kapper (1983), 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (letter or affidavit from the court, prosecutors, or defense counsel alleging a defect in the plea process might be sufficient to warrant a hearing, although defendant's own affidavit alleging same defect would not, because the former are not self-serving declarations).

within the range of 70 +/- 5. PCR 162-163. **He admitted that based upon that score an examiner could conclude that a person was not mentally retarded** but would need to look at prong two and three. PCR 163. Dr. Tasse also relied upon the Vineland scales from an ex-wife and sister, although he could not recall the length of time the Applicant had ever lived with them. PCR 167. Dr. Tasse conceded that Applicant was not diagnosed for mental retardation at any time in elementary school or high school. PCR 169-170. Dr. Tasse noted that the 2008 IQ testing done by Dr. Susan Knight at his request was the lowest test score on verbal comprehension, but discounted that score because he was solely concerned with the Full Scale IQ score. PCR 176.

Unlike Dr. Sandler and Dr. McAbee, Dr. Tasse stated that he never tested Simmons. PCR Tr.p. 175, l. 12.[13] For the purpose of doing any adaptive behavioral evaluation, Dr. Tasse only based his conclusion on the records made by others (frequently with a bias as a retained expert or family member of a person who had already received a death sentence). He admitted that there was information that he had a joint checking account with his wife and was not aware whether he understood the value of money. He stated that this concern about money concepts was based upon a Vineland test done by individuals who had little contact with Simmons for 17 years. PCR 182. He stated that he did not do another Vineland because Simmons had been incarcerated for a number of years and they would be unable to assess his adaptive behavior in the community because of his incarceration. PCR 182-183.

Dr. Tasse conceded that while he had opined there were some deficits in daily living, he had to admit that there was evidence that when Simmons was living at home he was the family caretaker and was caring for his mother, providing her medication and taking care of his younger

[13] Respondent agrees that at some point he met with Applicant, but are not aware of the substance of the meeting since no testimony was elicited about it, no testing was done during the meeting and no written report was made concerning it.

sister who was identified as having mild mental retardation. PCR 185. He stated that he was also unaware any developmental delays by Applicant. PCR 187. He noted that Applicant played football but rejected that he had shown self-esteem for the record when he announced his pride in the team's record. PCR 188. Dr. Tasse further discounted that Applicant had gotten his driver's license, emphasizing that he lost his license when he was driving an uninsured vehicle. PCR 189. Dr. Tasse conceded that Applicant did not use only simple words, but also used multi-syllable words, that he had good hygiene, that he can read, that he had a bank account with his wife, that he got an A in driver education class and received a driver's license, and that he was socially able to attract girlfriends. PCR 197-199. Although these are not the criteria to assess mental retardation specifically, Dr. Tasse admitted that each of these factors would be looked at by a psychologist to assess adaptive functioning, including whether they could read and write, whether money concepts, including opening and using a bank account, whether a person can hold a job for "work adaptive skills" and whether a person can develop a relationship with another person for social skills and a person's hygiene. PCR Tr.p. 197-198.

Social Worker Marjorie Hammock testified about her social history report. However, when challenged the persuasive power of her testimony and its attempts to suggest deficits was severely limited in the cross-examination. It was pointed out that Simmons did participate in extracurricular activities in school, including football. She noted that he was able to receive varsity letters for playing and was able to make grades to be able to play. She stated that it was only speculation that some teachers had given him a preference as an athlete. She admitted on cross-examination that there was no evidence that this happened to Simmons and there was no evidence that the grades were not an accurate reflection of what he earned. PCR 50. Ms.

Hammock had noted that his academic performance declined in 1978 in the 11th grade, but then admitted that was when Simmons mother died from diabetes. PCR 52. She admitted that Simmons caretaker role in the family up to then was that he would feed her, help her clean up and took care of her daily needs. PCR 53-54. She also noted that in 1978 he also began using marijuana and drinking, although she denied knowing about the frequency of his usage. PCR 55 - 56. She noted also that his class rank was 531 out of 615. PCR 56-57. She noted that Simmons net his future wife Valerie in 1977 and they got married in 1982. PCR 59-62. She stated that his drinking and drug use began when he was 17 and became noticeable to others particularly after Mr. Simmons died. The use of cocaine began then according to her notes. PCR 63. She described his work history with a tree cutting firm, then a pest control company, a fiberglass company, a brick mason and then a tree service. PCR 60-64. She stated his marriage was from 1982 through 1988, with separations within the period. PCR 64. She state that she understood that his drug and alcohol problems caused the separation and his attendance problems at work. PCR 65-68. Concerning his driving, she noted that he only had one accident that was reported to her four years after he had received his license. PCR 69-71.

Ms. Hammock confirmed that at the Palmetto House, he would do chores, followed the rules and was well-liked. She confirmed that he cared for himself, would go to school regularly, would go to church regularly upon his father's instructions and was trained in Bible studies that he held at the jail. PCR 77-78.

The evidence before this court reflects a mixed picture of the Applicant, but Respondent submits that the mixed picture was only treated one-sided in the Order. As the SC DDSN examiners concluded there is evidence in the record to suggest that he does not satisfy the

elements of mental retardation. His scale score in the 1999 testing of 75 could support a conclusion that his IQ was not 70 or below. His intense drug and alcohol use since the age of 17 could impact on his intellectual functioning unrelated to mental retardation as Dr. Waid concluded.

His adaptive functioning, when pierced below the biased surface evident in the social history during cross-examination destroyed the existence of the claimed deficits. The fuller and corrected social history reflects a person who was able to care for his mother and sister, continued to have good hygiene for himself and others. Simmons possessed an ability to follow rules, gained employment when he wanted to do and participated in activities, including success at football while receiving adequate grades to maintain his presence on the team. It was reflected that the downward spin in his life not the product of mental retardation, but a combination of life style changes after the death of his mother and pursuit of drugs and alcohol. *Yet even with the downward spin, his class rank was not in the bottom 10% of the high school graduates (531 out of 615).*[14] His lack of motivation in school was explained by drugs and family concerns and in testing was evident in the neutral examination. This presentation does not require this Court to find the existence of mental retardation where other expert witnesses, not motivated by the potential of a death sentence or life sentence resting on their testimony - court witnesses Dr. Sandler, Dr. McAbee and Dr. Waid (a defense witness), concluded that it was not present.

The Applicant did not meet the burden of proof by a preponderance of the evidence. The Court conclusions should be altered and amended.

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[14] Those individuals with mental retardation are considered in the bottom 2 to 3% of the population. The Prevalence of Mental Retardation, Association of Retarded Citizens (1982). See also DSM -IV-TR (2000), p. 46 ("the prevalence rate of Mental Retardation has been estimated at approximately 1%").

WHEREFORE, Respondent submits, for all the foregoing reasons, Respondent submits that the Motion to Alter or Amend should be granted. Petitioner has failed to carry his burden of proof and is not entitled to any relief.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Attorney General

By: _____
DONALD J. ZELENKA

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina.
November 15, 2013

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2013 NOV 18 PM 12:48
CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER)

Kenneth Simmons, #5066,)
) C/A No.: 2005-CP-18-1368
Applicant,) (Capital PCR Action)
v.)
) CERTIFICATE OF SERVICE
State of South Carolina,)
)
Respondent.)

I, Donald J. Zelenka, Senior Assistant Deputy Attorney General, certify that I have served *Respondent's Amended Motion to Alter or Amend* on counsel for Applicant by depositing one copy of same in the United States mail, postage prepaid, addressed as follows:

James Morton, Esquire
Morton & Gettys, LLP
P.O. Box 707
Rock Hill, SC 29731

Emily C. Paavola, Esquire
Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201

FILED-RECORDED
2013 NOV 18 PM 12:48
CHERYL [illegible]
CLERK OF COURT
DORCHESTER COUNTY

This 15th day of November, 2013.

DONALD J. ZELENKA

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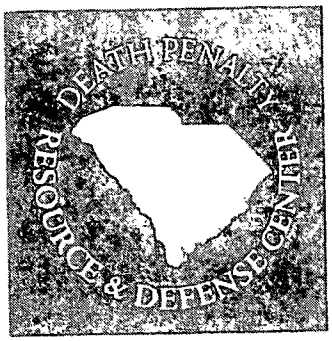
ATTORNEY FOR RESPONDENT



November 19, 2013

The Hon. D.A. Early, III
Judge of Second Judicial Circuit
Post Office Box 90
Bamberg, South Carolina 29003

Re: *Case No.: 2005CP1801368*
Kenneth Simmons v. State of South Carolina

Dear Judge Early:

As Your Honor is aware, Respondent filed a motion to alter or amend the Court's judgment in this matter. The Applicant filed a response in opposition stating that the motion was without merit and that it contained several inaccurate factual representations. Yesterday, I received Respondent's proposed "amended" motion to alter. This motion is, of course, untimely since it was filed well beyond the 10 day period provided by Rule 59(e), SCRCP. In any event, as far as I can determine, the "amended" motion is identical to the original except that it removes all references to Respondent's original inaccurate claim that Dr. Tasse never met with or interviewed Kenneth Simmons. Therefore, no additional reply is necessary, and this Court should deny Respondent's motion for the reasons Applicant has already stated.

Sincerely,

Emily C. Paavola

Emily C. Paavola

cc: Donald J. Zelenka, Esq.
James Morton, Esq.

STATE OF SOUTH CAROLINA

CIRCUIT COURT

COUNTY OF DORCHESTER

2005-CP-18-01368

KENNETH SIMMONS,
Applicant,

-vs-

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA,
Respondent.

Death Penalty Post-Conviction Relief Hearing

Heard on Wednesday, December 4, 2013

Bamberg, South Carolina

BEFORE:

THE HONORABLE DOYET A. EARLY, III

APPEARANCES:

Counsel on Behalf of the Applicant:
James Morton, Esq.
Emily C. Paavola, Esq.

Counsel on Behalf of the Respondent, State of SC:
Melody J. Brown, Esq.
Donald Zelenka, Esq.

Cheri L. Young, RPR
Circuit Court Reporter
P O Box 5232
Aiken, SC 29803-5232

EXHIBIT INDEX

(NO EXHIBITS IDENTIFIED/INTRODUCED.)

ON WEDNESDAY, DECEMBER 4, 2013 AT 9:37 A.M.:

THE COURT: The first thing I have this morning is a motion for reconsideration in the case of Kenneth Simmons versus State of South Carolina.

Members from the AG, Morton, et al., Ms. Brown, Mr. Zelenka, good morning.

MR. ZELENKA: Thank you, Your Honor. May it please the Court.

THE COURT: All right. Gentlemen -- ladies, gentlemen, 15 minutes each. 15 minutes each.

MR. ZELENKA: Okay. With respect to our amended motion to alter or amend Rule 59 -- under Rule 59 concerning the order that you issued which granted limited relief to Mr. Simmons, we appreciate the opportunity to be heard today on that issue.

In making the Rule 59 --

THE COURT: And before you start, and I won't cut your time. As I understand, I got an e-mail from --

MR. ZELENKA: Yes, sir.

THE COURT: -- Ms. Paavola or Mr. Morton or a combination thereof and Mr. Kenneth Simmons has waived his right to be here today; is that correct, ma'am?

MS. PAAVOLA: Yes, Your Honor. Mr. Simmons wishes to waive his presence here today. In addition to that, we should note for the record that death row is currently on

a tended quarantine due to a flu outbreak, so he would not be available anyway.

THE COURT: But he's waived his right to be here?

MS. PAAVOLA: He has. Yes, Your Honor.

THE COURT: Thank you.

MR. ZELENKA: Okay.

When we received the order in this particular matter we recognized that the -- you granted relief on the issue of the existence of mental retardation.

In reviewing your order, and the purpose of the motion to alter or amend is that we were of the opinion that there were some factors that you did not adequately take into account in ruling on that particular decision as reflected in the order.

In the first notation that we've -- have in our motion to alter and amend was the judge's order that the State offered no evidence on the mental retardation issue during the PCR hearing and relied instead on the pre-Atkins opinion of Dr. Wesley Sandler from DDSN. That's the order at page 12.

That was basically the foundation of your determination that they've met their burden of proof by a preponderance of the evidence and showing the existence of mental retardation as defined in South Carolina.

Within that order we found that there were some

conditioned precedents which you had ruled upon that we found were not necessarily supported by the record. The first one, the order at page 12. There's no persuasive evidence of malingering in this case.

In our motion to alter or amend we note that there was persuasive evidence of malingering in this case.

THE COURT: Well, who does it persuade, you or me?

MR. ZELENKA: Well my, my argument is that it, it was persuasive evidence that should have persuaded you. Thus the reason for the motion to alter or amend.

THE COURT: And I understand that. I was perhaps being rude to you.

MR. ZELENKA: No, that's fine. I recognize the question. And that's always problems with motions to alter or amend --

THE COURT: I understand.

MR. ZELENKA: -- and responses to motions to alter or amend because we are trying to define what went into your mental state when you issued the opinions. And what we have is the order and whether the order reflects that information.

And if you found it not to be persuasive, obviously your ruling is correct. But we would submit by not including and resolving some of those issues in the motion to alter or amend you may not have had that consideration

and may actually have misapprehended a part of the record.

In the Department of Disabilities' report which was included in the record, they made particular findings of the existence of malingering based upon their evaluations of the Defendant. Actual evaluations. Actual testing that they did of the Defendant and their interviews. Their interviews with Mr. Simmons lasted over eight hours, two hours each, four times, before they came to their conclusions. It wasn't based solely upon the testing that was done but it was on their observations that they had of Mr. Simmons, his inconsistent responses to similar questions that they had presented which is reflected in both the testimony of Dr. McAfee, the testimony of Dr. Sandler and the report that we've introduced in this matter.

They also noted that there was a discrepancy in the ways the evaluation test was done which showed a high difference between some of those scores. That difference in some of those scores, one interpretation of the 12-point spread -- this is coming from their report -- which the examiners believe may be likely, that his true IQ is in the low-average intelligence classification. IQ scores 80 to 89 is revealed in the performance IQ and the intentional suppression by Mr. Simmons' tendency to

malinger.

That just didn't come out of the blue. That came from professional analysts who recognized that -- the diagnostic and statistics manual recognizes that highly discrepant individual sub-test scores may make an overall IQ score invalid. Looking at those matters, it's something that they were taking into account and analyzed those sub-tests supportive of their determination.

They also found that the vocabulary as he was revealing to them in their conversations was substantially lower than the vocabulary in the other skills reflected in his somewhat lengthy statements that he gave to law enforcement, both the written statements and the oral statements in 1997.

The inconsistent answers on the evaluation closely approximating correct answers, but it's a factor that they commonly see in malingering. The purpose of the malingering was a factor that those evaluators at that time utilized in making their determination that he was not mentally retarded.

Dr. McAfee testified, a fact that -- it wasn't included in your assessment. It wasn't just Dr. Sandler, it was Dr. McAfee. And Dr. McAfee according to the record was the one charged with making determinations of the second prong, what I call the second prong of the mental

retardation test on adaptive functioning. And he found in his testimony at 27-02 that the mental functioning was above the range of mental retardation and suspected that he was not trying his best during the testing. And, again, he opined that he was looking at the February scores, found them to be above the range of mental retardation and the functional deficits in reading abilities existed but he didn't determine that they met that level of mental retardation in his own expertise.

So that's two evaluators that were looking at this.

Also, we pointed out in our motion that Dr. Wade's assessment could not be ignored. He opined multiple times at trial upon direct questioning that this Defendant did not satisfy the terms of mental retardation.

Now, that's at 1782, 1787, 1778. He has submitted an affidavit before this Court but I think, look at the affidavit, it's very important to see not only what he said but what he didn't say.

The one thing he didn't say was he didn't have an opinion currently. That his opinion that he gave at the time of trial as an expert in psychology was that the Defendant was mentally retarded. His opinion which he gave at trial was that he was not mentally retarded. He gave reasons for that opinion at trial.

If you closely look at the affidavit, he's saying he

wasn't asked by the defense team at the time of the preparation for trial to give a formal assessment on mental retardation. However, at trial he gave an opinion to a reasonable degree of certainty in his area of expertise that the Defendant did not meet the terms of mental retardation, that the Defendant's psychological makeup suffered from a different basis and it wasn't mental retardation as he was finding.

He hasn't come off from that opinion. He's merely said that he wasn't asked to give a formal assessment at the time. However, the information that he gave at trial was sufficient to give him an opinion and he has not changed that opinion within that affidavit.

Now, they take the position that because we allow the affidavit to be submitted, therefore we must assume, apparently, that his opinion was something different than he said at the time of trial. That affidavit didn't say that. That affidavit merely set forth what he was asked to do and whether he gave a formal assessment. A formal assessment at the time in 1997.

What is particularly interesting about Dr. Wade's affidavit is the paragraph in the affidavit where he notes that he was asked to do this initial evaluation prior to the decision coming out in the Atkins' case. And in that decision it set forth for the first time that individuals

who no long -- who meet the terms of mental retardation are no longer subject to the death penalty or no longer subject to being executed. However, what he failed to say or what he suggests is that Atkins changed what an individual who was mentally retarded actually was. It didn't.

People who were mentally retarded in 1997 who met those terms of mental retardation are the same as people who are mentally retarded today. The fact that Atkins versus Virginia occurred didn't change that. It should have changed the assessment. It shouldn't have revised what a mental health expert should be looking at or looking for in making those determinations at the time without the bias as to whether the individual -- without the bias is whether that assessment would lead to an ultimate conclusion whether an individual lived or died.

Dr. Wade gave an opinion. And that opinion was he wasn't mentally retarded. That opinion should not change merely because of the existence of Atkins, merely because of the existence of an additional condition which may arise from that termination.

His opinion should have been the same. He hasn't revised that opinion or suggested that it had changed. But I think that that suggests that there may be some inherent bias that should play out when that is at issue.

It -- within the affidavit itself, he suggests that he may now have a bias, a bias because of the result of his opinion. And I think this Court in making its assessment of that affidavit should closely look at that and consider that.

With respect to Dr. Sandler's -- your order at page 14. Dr. Sandler relied on part on some misconceptions as to what people with mental retardation can achieve. Within your order, respectfully, you did not set out what those misconceptions were. So it's difficult for me to say whether they were misconceptions or whether they weren't misconceptions.

However, what we have noted, and there are no citations in the record for that information to be either supported by the Department of Disabilities and Special Needs' report or by their testimony.

Interestingly now -- well, the defense in this case had relied upon and in the PowerPoint, had relied upon various terms, definitions that they look at in assessing adaptive functioning. And in assessing adaptive functioning, I've laid them out at page five and six of our amended motion: Self-care, bathing, dressing, grooming, feeding one's self; communication skills, understanding and using verbal and non-verbal language; self-direction, problem solving, exercising choice,

initiating and planning activities; social skills, maintaining inter-personal relationships, understanding emotions and social cues, understanding fairness and honesty, obeying rules and laws; leisure skills, taking responsibility for one's own activities, having the ability to participate in the community, home or school living; housekeeping, cooking, doing laundry, maintaining living space; functional academics, using reading, writing and math skills in everyday life; community use, shopping, using public transportation, using community services; work, ability to maintain part-time or full-time employment either competitive or showed the ability to work under supervision, cooperate with co-workers, be reliable and punctual, and meet work standards; and home and health safety, ability to protect one's self, responding to mental health problems.

The evaluators generally are supposed to look at these matters which can lead to strengths and weaknesses of any individual. Within the report, Dr. Sandler and Dr. McAfee and in their testimony pointed out to a series of factors that they found that Dr. -- excuse me, that Mr. Simmons was doing which suggested support for the fact that his adaptive functioning was not diminished, that he was acting sufficiently.

Now if those are the factors that they've pointed out,

which has been his schooling, his ability to maintain grades sufficient to stay on the football team, his ability to letter in the football team, his ability to take care of a mother who was suffering from diabetes and a sister who suffered from mental retardation, throughout that period of time, the ability to get a job, and other factors, the ability to have social relations with other individuals, those factors are factors which can lead generally to a determination that his adaptive functioning was not substantially impaired.

Those factors, I think -- three more minutes? Thank you. Time flies -- those factors, I would submit, are factors which in combination can lead to an appropriate impression that he did not suffer from mental retardation.

If you look at Dr. Tasse's testimony in the PCR transcript, 129 to 136 and 131, he notes a series where there are individuals who suffer from mental retardation who can do some of similar activities. But necessarily, Dr. Sandler, Dr. McAfee weren't saying that no mentally retarded person can do these activities. He was saying that this individual can do this combination of activities. A combination in that assessment that will lead them reasonably to believe in their expertise that this Defendant did not suffer from the adaptive functioning criteria for mental retardation.

One other factor that I would like to put out is the situation where they rely upon the social worker to wean out, I would submit, act as conduit for hearsay testimony. I think that's a matter this Court should look suspiciously at. View that testimony recognizing, as we argue, that there were two sides that was developed through Ms. Hammack's testimony.

And both of those sides are matters that should be considered. And we pointed out a lot of those deficiencies. A lot of that action that the Defendant was doing he was doing okay in school; he wasn't shown to have been given any special grades; he graduated above the lower 10 percent of his high school class. If mental retardation is supposed to be in the bottom one percent, two percent or three percent, he was clearly through his high school scores above that information also.

I would submit that basically this Court should consider revising the order, revising its determination viewing the record as a whole.

Again, there was one clarification that I made from the amended -- in the amended return from the original return. And the fact was whether Dr. Tasse had met with the Defendant. The Petitioner is correct. There is evidence in the record that he met with the Defendant, but what is particularly absent in the record is what occurred

during that meeting. We don't have a written report from Dr. Tasse admitted, and there's no evidence in the record of any information that he gained from the Defendant, unlike the State's DDSN expert in this particular case. In fact, Dr. Tasse testified unequivocally that he did no testing of the Defendant in that meeting that he had with the Defendant in this particular case.

With that -- he graduated 531st out of 615. My co-counsel notes there were 84 students in the high school that graduated at a lower rate than he did.

THE COURT: Thank you.

MS. PAAVOLA: Good morning, Your Honor.

THE COURT: Good morning.

MS. PAAVOLA: First of all, we would simply like to say it is our position that we do not believe that the Court failed to adequately take into account any information. We believe that the Court properly evaluated all of the evidence available and rendered an appropriate decision.

We further do not agree with the State's position that it is the basis of this Court's finding that the Applicant satisfied the preponderance of evidence simply because the State failed to offer live witnesses at the PCR hearing. The order does note that, but obviously the order addresses all of the available relevant evidence. And

it's our understanding that the Court considered it all in making its decision.

First I'd like to address Mr. Zelenka's arguments about this malingering issue. The order, I believe, appropriately finds that there's no persuasive evidence of malingering. Because, if you look at every expert involved in this case, both at the trial or in post conviction, all of them who gave malingering tests, these are objective tests that are administered, found that they resulted in no evidence that Mr. Simmons was malingering.

These are tests designed to determine if someone is malingering. And they're pretty simple tests that basically work like they have a series of questions that are intended to sound difficult but the answer is actually quite easy. And the results, if you just guess you'll get about half of them right.

So if somebody's attempting to malinger by guessing incorrectly, they'll get less than 50 percent right. And that's an indication that they may be attempting to sort of fake that. And every expert who gave a test like that, including Dr. Sandler and Dr. McAfee found Mr. Simmons did not show any indication of malingering.

Mr. Zelenka is correct that the doctors from DDSN, Dr. Sandler and Dr. McAfee, did testify that they believed Mr. Simmons was malingering but they simply said this is

just their opinion that, you know, when I looked at him I felt like he was faking, when I talked to him I felt like he was faking. But every objective measure of faking resulted in no evidence that he was attempting to do so.

Further, it is well established in the clinical literature that the best evidence of malingering or not in a mental retardation case is consistency in test scores over time. And Mr. Simmons clearly meets that objective. His test scores are entirely consistent over a 30-year period from his high school to current day, both in terms of his general IQ scores and the sub-test scores, and his performance over the course of his life history. And we think that is far more persuasive than one expert's opinion with no objective support that someone may be faking.

Further, Mr. Zelenka referenced, he said, written statements that Mr. Simmons gave to police during the investigation. There is one written statement that Mr. Simmons gave pretrial. It's a two-page written statement. I would -- I don't have it in front of me but I would invite Your Honor to read it if you haven't recently. It's been evaluated. It's written at approximately a third grade level. And I personally believe that no reasonable person can read that written statement and think that it could not have been written by

someone who has mild mental retardation. It's riddled with misspellings. It's senseless. It clearly looks like a third grader wrote it. I don't see how that's evidence that Mr. Simmons is somehow faking and is able to perform at some higher level.

Secondly, Dr. Wade's assessment pretrial was based on some -- what Dr. Wade was asked to do pretrial is to determine if Mr. Simmons was competent enough to waive his rights and give a voluntary statement. And Dr. Wade determined that Mr. Simmons was not able to do that.

At the time, the case was being litigated pre Atkins and therefore the reason that Mr. Simmons was unable to make that voluntary waiver was not as important. It was simply a strategy, the trial defense team strategy to show that because he was so low functioning intellectually the jury should not believe the statements that he gave.

Dr. Wade has since said, look, at the time that I was asked to do this I wasn't asked to determine if he had mental retardation. I wasn't given all the information that I would normally require if I was asked to make a determination about that. And I don't -- I no longer have an opinion about that.

It's true that he wasn't asked to reevaluate Mr. Simmons for mental retardation for the purposes of the PCR hearing but he wasn't available to do that and we had

other experts who were able to do that. And what the State is essentially asking you to do is give greater weight to Dr. Wade's trial testimony than Dr. Wade currently gives to it. And we would submit that that is not an appropriate basis for this Court to make a decision.

Next the State says that your order doesn't list any examples of the misconceptions that Dr. Sandler relied on. But if you look at the order, on page 14 the order says, 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.

And, Your Honor, it is just overwhelmingly well established that people with mild mental retardation function at about the level that we would expect an 11 or 12-year-old child, about a sixth grader. And sixth graders obviously can take care of their own personal hygiene.

The fact that Mr. Simmons had no malodorous smells emanating from him as Dr. Sandler said is not evidence that he doesn't have mental retardation. It is simply a misconception that many people have that someone with mild

mental retardation is someone like you might have seen in the movies or on TV or it might be a person that has Down's Syndrome or something of that nature. And that is simply not true.

Mild mental retardation is not the same as severe mental retardation. And many people do not understand that. And that is why Dr. Tasse explained at length what misconceptions people have about mild mental retardation.

And I believe that the State continues to operate on the basis of many of those misconceptions.

Lastly we would note there's nothing suspicious about social worker testimony in a capital case. I'm sure Your Honor knows that. It's routinely, you know, not only used but expected to be used and that social workers are trained and skilled in the area of collecting social history information. And that's exactly what Ms. Hammack did in this case.

But even if Your Honor has some suspicion about that, which I don't believe would be warranted, not only did Ms. Hammack testify at length about Mr. Simmons' social history but we also offered, I believe, up to 16 independent affidavits, many of which came directly from those witnesses that she spoke to and others, including Mr. Simmons' former football teammates, his football coaches, his, one of his special education teachers,

people who worked with him at the homeless shelter where he went for meals and assistance.

And so, you know, we don't see that there's any problem with that or that the Court should have any concern that that evidence is somehow unreliable.

And also we would note that all of those affidavits in addition to Dr. Wade's were entered with Respondent's stipulation and so we don't believe they should be able to come in now and say that somehow those affidavits should be given suspiciousness or less weight in some way when they specifically agreed that we could offer them as, in place of live testimony which is, I would note, a procedure that's both approved by PCR statute and frequently used in capital PCR cases.

Two other minor notes. Mr. Zelenka pointed out that Mr. Simmons graduated approximately ahead of about 84 students in his class. Again, that is not somehow, doesn't somehow defeat the claim of mental retardation. It is true that people with mental retardation fall within approximately the bottom -- mild mental retardation falls within approximately the bottom two percent on the bell curve of IQ scores. IQ scores are not equivalent to grades. And so this idea that we can somehow correlate them is simply false and clinically incorrect.

Furthermore, we offered evidence from his teachers

that in the resource program, which was a special education program that he was in, he was evaluated based on individual standards. So, if he was able to -- he was given specific tasks to him, and if he was able to work towards his individual goals he would get a good grade. That doesn't somehow mean that he wasn't very low functioning. And, in fact, all of his academic test scores indicate that he was and is and always has been a very low intellectually-functioning individual.

Finally, the State originally claimed that Dr. Tasse failed to speak with Mr. Simmons. They have since acknowledged that that is incorrect and that in fact he did interview Mr. Simmons.

They still, however, fault him for not individually testing Mr. Simmons. And that is true. He did not administer any IQ tests. At the time Dr. Tasse became involved in the case, Mr. Simmons had been tested six times. All of his scores found him to be in the mental retardation range.

It is not uncommon in the clinical field to not retest when you already have historical test scores that are well within the mental retardation range, as Mr. Simmons has. And, in fact, that is the current official policy of the Department of Disabilities and Special Needs. It is my understanding that they will also not retest if there are

historical test scores that give relevant information to a mental retardation claim.

And, therefore, we don't believe that that should bear any sort of negative connotation in this case.

Thank you.

THE COURT: Mr. Zelenka, five minutes. If you need it.

MR. ZELENKA: Court's indulgence for a minute.

Just to clarify. On the admission of affidavits, we did not object to the admission of the affidavits. But the fact that an affidavit is admitted doesn't mean that we are stipulating to the facts in the affidavit. We never did that. We acknowledged under 17-27-80 that affidavits, depositions are admissible in post-conviction relief hearings.

So in -- with respect to how you evaluate those matters and the same way as to how you evaluate a social worker's testimony and hearsay testimony about other matters, that again is whether you find sufficient proof to determine whether they have satisfied the burden of proof.

As we've noted in our memorandum, there are a series of cases which recognize inherent bias. Some individuals, social workers, defense experts, family members, people who have an interest in a particular defendant may have,

particularly in capital cases, in making their statements, their determinations, their testimony, they choose -- chose not to have those individuals presented. They chose not to have those individuals presented subject to potential impeachment, impeachment which the South Carolina Supreme Court said in State versus Starnes is a very important factor in those individuals. We chose to rest on the way those affidavits stood.

THE COURT: Mr. Zelenka, are you still of the opinion that this is a close case?

MR. ZELENKA: Yes. Of course. All mental retardation cases are going to be close cases.

The Defendant's IQ testing that was done by the Department of Disabilities and Special Needs, their testing placed him at a 75 IQ. That's the upper range. If you would accept that mental retardation is a 70 IQ, plus or minus five, that was at the upper range of mental retardation.

When the Department of Disabilities and Special Needs tested him, they opined that his IQ could be as high as 80.

THE COURT: Or as low as 70.

MR. ZELENKA: Or as low as 70. Under the standard error of measurement, that 75 IQ range is subject to a plus or minus five and could mean and suggest that it

would support a determination that he had an 80 IQ.

And there was not necessarily consistency in the IQs that were given. As the testimony acknowledged at the time, the most recent IQ which was done in post conviction by a defense expert appeared to have been the lowest IQ of the whole bunch. It wasn't necessarily presented. So there is a range going on with Mr. Simmons.

THE COURT: Well, not necessarily just with the IQ scores but with all the evidence that was presented by the State and by the Applicant, it presented a case to me that, as you classified it, was a close call.

And, you know, the burden of proof is by the preponderance of the evidence, greater weight of the evidence. It's not by beyond a reasonable doubt. And, quite frankly, I struggled with it.

But, my overall review of everything, I found that the evidence was -- was balanced in favor of the finding that I found, by the greater weight of the evidence, the preponderance of the evidence that he was mentally retarded.

And I respect both of you's positions. I respect all of the evidence in the case, but I sat as a fact-finder and still do, and I took your motion to reconsider or to alter to heart. And I revisited it. I looked at it. I will continue to revisit and look at it subsequent to your

arguments here today, but I didn't do this lightly.

MR. ZELENKA: Well, we understand.

THE COURT: I know that. And it's -- it was a very, very deliberate process that I went through in making my decision.

And if my order is lacking in some of my thought processes, I will certainly correct that. But what I want to do and I don't mean to cut you off right here, but what I want to do -- I'll still look at this case.

And it's, the facts surrounding the event were horrible but, you know, I am now dealing with a whole different legal issue after the Atkins case. And I have looked at it most deliberately as I can and tried to consider everything. I hope I did.

But here's what I want to do -- go ahead and finish your response.

MR. ZELENKA: Yes, sir.

THE COURT: But I'm going to ask y'all to once again give me a proposal. Well, go ahead and finish.

MR. ZELENKA: Okay. I just have, I believe, one other thing unless my co-counsel has pointed something out to me.

Again, reviewing the affidavit of Dr. Randy Wade, he is not saying in this affidavit at any time that he has no opinion and that his opinion changed from what he

testified at the trial. In fact, it doesn't say anything about his testimony at the trial where he gave an opinion that the Defendant did not suffer from mental retardation, that his problems, his mental problems were induced by his use of drugs and those factors.

Again, that factor weighing in on depreciation of any of the IQ scores and having a noticeable effect on IQ testing.

No further.

THE COURT: Thank you. Well, let me commend both sides. I mean, y'all have presented this case as thorough as it could be presented. And I appreciate all of your diligence in representing your respective sides.

As I said a while ago, it was a tremendous task. Any time you're dealing with whether somebody's going to be executed or not based on a decision coming out of the supreme court such as the one we're dealing with here, that is even a more burdensome task.

And I hope I have exercised my duties properly in this case. I think I have. As a matter of fact, I can look in the mirror and I know I have. I reviewed everything and I gave it what I thought to be the proper weight on both sides.

I'd once again reserve ruling on the motion to alter or amend. I know it's holiday season. I would ask y'all

fine. If you want to do it before Christmas, that's fine.

State, what's your --

MR. ZELENKA: Well, I can get something to you within the next two weeks.

MS. PAAVOLA: That's fine, Your Honor. I just want to make sure I understand what it is you're asking for.

THE COURT: Well, I just want you to set out your position in regard to the motion to amend --

MS. PAAVOLA: Sure.

THE COURT: -- in the way of an order.

MS. PAAVOLA: All right.

THE COURT: Have it to me by the 22nd. How about that? That's 20 days. Well, what's today? The 4th. Have it to me by Christmas -- have it to me by the first of the year. January 1. How about that? Is that sufficient time?

MR. ZELENKA: That's fine, Your Honor.

MS. PAAVOLA: Yes, Your Honor. Thank you.

THE COURT: Thank y'all very much.

END OF PROCEEDINGS: 10:19 A.M.

***

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

I, Cheri L. Young, Registered Professional Reporter and Official Court Reporter for the State of South Carolina, Second Circuit-At Large, do hereby certify that the foregoing proceedings were written stenographically by me using computer-aided translation; further, that the foregoing is a true, accurate and complete record, to the best of my skill and ability, of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Bamberg County, on the 4th day of December, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

I have hereunder set my hand this 28th day of January, 2014.

Cheri L. Young, RPR
Official Court Reporter

ATTORNEY GENERAL'S OFFICE 5395
RECEIVED 1-7-14

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
CERTIFIED COPY
COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT
2014 JAN -2 AM 11:53
) CASE NO.: 2005-CP-18-1368

Kenneth Simmons, #5066) **MOTION AND ORDER INFORMATION**
Plaintiff,) **FORM AND COVERSHEET**
vs.)
)
STATE OF SOUTH CAROLINA)
Defendant.)

Motion - file copy
& Order

Plaintiff's Attorney:	Defendant's Attorney:
Emily C. Paavola, Bar No. _____ Address: Death Penalty Resource and Defense Center 900 Elmwood Avenue, Suite 101 Columbia, South Carolina 29201 Phone: 803-765-1044Fax _____ E-mail: emily@deathpenaltyresource.orgOther:	Donald J. Zelenka, Bar No. 5758 Address: South Carolina Attorney General's Office PO Box 11549 Columbia, SC 29211 Phone: 803-734-6305 Fax_____ E-mail: dzelenka@scag.govOther: _____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

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

Signature of Attorney for ☐ Plaintiff /☒ Defendant — December 31, 2013 Date submitted

SECTION III: Motion Fee

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

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS
Kenneth Simmons, #5066, Applicant, v. State of South Carolina, Respondent.	)	C/A No.: 2005-CP-18-1368 (Capital PCR Action ORDER GRANTING RESPONDENT'S AMENDED MOTION TO ALTER OR AMEND PURSUANT TO RULE 59

CERTIFIED COPY
2014 JAN -2 AM 11:53
CLERK OF COURT
DORCHESTER COUNTY

This Court enters this Order granting the Respondent State of South Carolina's Amended Motion to Alter and Amend the Order Pursuant to Atkins v. Virginia, 536 U.S. 304 (2002). The original order granted limited post-conviction relief of a resentencing proceeding to the Applicant Kenneth Simmons on October 21, 2013. The Respondent made its initial motion on November 1, 2013. The Applicant made a response to the Motion dated November 15, 2013. Respondent made an Amended Motion on November 15, 2013 clarifying the original motion. On December 4, 2013, this Court held a motion hearing at the Bamberg County Courthouse. The Applicant waived his presence at the hearing and was represented by Emily Paavola and James Morton. The Respondent was represented by Donald Zelenka and Melody Brown of the Attorney General's Office. At the conclusion of the hearing, this Court took the matter under advisement and requested proposed orders from the parties by January 1, 2014. This Order granting Respondent's Motion and amending the judgment to deny the resentencing request follows:

I.

In its original Order, the Court found that the Applicant, Kenneth Simmons was mentally retarded and therefore ineligible for the death penalty. Within the Order, the Court concluded that "the State offered no evidence on the mental retardation issue during the PCR hearing, and relied instead on the pre-Atkins v. Virginia opinion of Dr. Leslie Sandler, from DDSN." *Order, p. 12.* Upon reconsideration, this stark conclusion is not supported by the record before this Court which includes the original competency hearing and trial record. The Court is constrained to alter and amend its original findings of fact and conclusions of law.

II.

A.

Within its original Order, the Court opined that: "there is no persuasive evidence of malingering in this case." Order, p. 12. This Court is constrained to amend and alter this finding because it is incorrect. Upon reconsideration of the record, this Court concludes that the S.C. Department of Disabilities and Special Needs ("DDSN") Report of February 10, 1999 explained in detail with supporting data why the court examiners had an opinion concerning malingering during their evaluation based upon their testing, interviews and observations. State PCR Exhibit 5 (*February 11, 1999 Hearing, State Exhibit 8).* In the DDSN report, the court's examiners concluded that "malingering was observed more or less in each session ... some of his responses seemed exaggerated or distorted in a self-protective or self-serving fashion, as is sometimes encountered during competency to stand trial evaluations.[1] His clinical presentation during the

[1] In the DDSN report. evidence of malingering from the actual test report was discussed:

In the administration of the Wechsler Adult Intelligence Scale - Revised [WAIS-R] on 9 February 1999 he obtained the following IQ scores: Verbal 70; Performance 82; and Full Scale 75. A Full-

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.[2] Furthermore, he sometimes gave inconsistent answers across our four evaluations or gave incorrect answers that closely approximate the correct answers, which is commonly seen during malingering." *S.C. DDSN Report, p. 4-5.* **Dr. Thomas McAbee** testified at the competency hearing that Simmons was not mentally retarded. ROA 2702. However, Dr. McAbee stated that that during their sessions, he suspected the factor of malingering affected his opinion. ROA 2694, 2696. Specifically, Dr. McAbee noted that he found Simmons' mental functioning above the range of mental retardation and suspected that Simmons was not trying his best during the testing. ROA 2700-2702. He stated that the February 9th test scores were above the range of mental retardation. ROA 2699-2700, 2702. He stated that there were some functional deficits in reading abilities consistent with the testimony of the teachers, but they certainly would not be in the level of mental retardation. ROA 2700, l. 18-21. The Court did not previously address this additional well-founded evidence

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> Scale IQ of 75 is in the mid-range of the Borderline Intelligence Classification (IQ scores of 70-79). The fact that his Performance IQ score was12 points higher than his verbal IQ score is significant. **One interpretation of this 12 point spread which the examiners believe may be likely is that his true IQ is in the low average intelligence classification (IQ scores of 80 to 89) as revealed in the performance IQ, and intentionally suppressed by Mr. Simmons's tendency to malinger.** His sub-tests raw scores can be converted into scaled scores along a continuum of 1 (the 0.1 percentile rank) to 19 (the 99.9 percentile rank). His highest sub-test scores were in the Object Assembly test (scaled score of 10: the 50th percentile); Picture Arrangement and Block Design tests (scaled scores of 8; the 25th percentile). His lowest sub-test scores were in the Information and Digit Symbol tests (scaled scores of 2; the 0.4 percentile rank.
> ...

DDSN Report, p. 3 (emphasis added). This test assessment by DDSN was not challenged by the Applicant's current experts. See DSM - V (2013), p. 37 ('highly discrepant individual subtest scores may make an overall IQ score invalid").

[2] The oral statements of Kenneth Simmons are set forth in ROA p. 3170-3220. They are supportive of the SC DDSN evaluators assessment.

from Dr. McAbee independent of Dr. Sandler.

Therefore, this Court's original finding and conclusion is incorrect inasmuch as specific and well-supported evidence of malingering did exist during the 1999 testing of Simmons by SC DDSN and reported in the original trial record.

B.

The Court, in its original Order, while acknowledging there was testimony from two qualified experts at trial who opined that Applicant did not meet the criteria for a diagnosis of mental retardation, also found: [T]he State's argument regarding the trial testimony of Dr. Randy Waid was not persuasive, given Dr. Waid's affidavit." Order, p. 13, n. 8. However, the Applicant failed to present Dr. Waid, a defense witness at the trial, before this Court during the PCR hearing for testimony.

Although Dr. Waid's affidavit (Applicant's Exhibit 2), creates a question of fact, the affidavit does not address the direct contradiction with his prior sworn trial testimony. Upon close scrutiny, the affidavit does not retract the sworn opinion Dr. Waid gave at trial based upon any new developments or additional facts, or otherwise clearly show error on his part in any of his earlier testing or results.

At trial, Dr. Waid testified to an absence of mental retardation as an expert in clinical and forensic psychology, and neuropsychology. (ROA. pp. 1882, 1897). Dr. Waid opined that because Simmons suffers from neuro-cognitive impairments he has diminished mental capacity, but it is not mental retardation. ROA 1778. Dr. Waid opined that Simmons' life-style of poly-substance abuse hurt his brain. Dr. Waid testified that Simmons was not always at that level and specifically that he "[did] not believe he suffered from mental retardation but believe his intellect

is in the borderline to intellectually deficient range ..." ROA 1778, l. 8-15. Nothing in his recent affidavit retracts that opinion.

Dr. Waid's affidavit states that he "did not formally assess Mr. Simmons' adaptive behavior functioning" and that the evaluation occurred before Atkins was decided. He stated that "distinguishing between mental retardation, borderline intellectual functioning or brain damage due to injury or drug use did not have the same legal significance that it has today." However, this Court notes that even at the time of the trial, "mental retardation" was a specific statutory mitigating circumstance, which had a heightened significance prior to Atkins.

C.

This Court also earlier found: "[I]t is significant that, *unlike applicant's experts*, Dr. Sandler did not conduct any standardized measure of applicant's adaptive behavior." Order, p. 14. However, this Court finds that Dr. Tasse, the defense's expert in the PCR action, failed to personally test the Applicant in any manner. PCR Tr.p. 175, l. 12.[3] Unlike Dr. Tasse, Dr. Sandler and Dr. McAbee did interview and test Applicant and attempted to use the Vineland Adaptive Behavior Scale Interview Edition with Applicant. The DDSN examiners stated the partial results in their written report. SC DDSN Report, p. 4.

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[3] In the November 5, 2013 response to the original motion to alter, the Applicant correctly points out that Dr. Tasse testified that he met briefly with Simmons on either January 20 or 21, 2010 for about an hour and one-half. PCR Tr.p. 109, l. 23-p. 110. To the extent the Respondent's initial motion suggested that the Applicant and Dr. Tasse had never met prior to PCR testimony it was incorrect and was corrected in their Amended Motion. *However, this Court must further find that it is uncontradicted that Dr. Tasse never tested Simmons in any manner during their brief meeting and made no report of the circumstances or value of what occurred in that meeting for any purpose in the mental retardation determination.* Particularly, Dr. Tasse unequivocally stated on cross-examination:

Q. And you did not give any personal testing for the defendant in this case, did you?
A. I did not test Mister Simmons. No.

PCR Tr.p. 175, l. 10-11. To the extent the Applicant or the Court's earlier Order suggested otherwise, it is altered and amended.

D.

This Court also found that "Dr. Sandler relied, in part, on some misconceptions about what people with mild mental retardation can achieve." Order, p. 14.[4] In the DDSN report,

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[4] During the testimony of Dr. Tasse, he testified about some common misconceptions regarding mental retardation. PCR 129-136. However, in his explanation he also stated that less than 5% go on to college with some supports (PCR Tr.p. 131), 27% had employment that was sustained over a year, some were married with 15% being a parent, 40% had a savings account open, 70% had friends outside of school. PCR Tr.p. 131-134. Dr. Tasse stated that a person with mental retardation could conceivably pass a driver's test - "not all, some can." PCR Tr.p. 134. Dr. Tasse opined that people with mental retardation can learn to play simple games with clear rules. PCR Tr.p. 134.

However, it is clear that in making an assessment of mental retardation, an evaluator uses criteria for determining the level of adaptive functioning based upon the person's social history in various skill levels. These have included in the AARM definition:

1. Self-Care – bathing, dressing, grooming, and feeding one's self;
2. Communication Skills – understanding and using verbal and nonverbal language;
3. Self-Direction – problem solving, exercising choice, initiating and planning activities;
4. Social Skills – maintaining interpersonal relationships, understanding emotions and social cues, understanding fairness and honesty, obeying rules and laws;
5. Leisure Skills – taking responsibility for one's own activities, having the ability to participate in the community;
6. Home or School Living – housekeeping, cooking, doing laundry, maintaining living space;
7. Functional Academics – using reading, writing, and math skills in everyday life;
8. Community Use – shopping, using public transportation, using community services;
9. Work – ability to maintain part-time or full-time employment, either competitive or sheltered, ability to work under supervision, cooperate with coworkers, be reliable and punctual, and meet work standards, and;
10. Health and Safety – ability to protect one's self, responding to health problems.

In making the broad conclusions about misconceptions, this Court failed to acknowledge that the historical factors expressly stated by the SC DDSN evaluators would also be included as matters for consideration within areas of adaptive functioning assessment and could support a conclusion that the person was not mentally retarded in combination with other factors. See Also DSM –IV. p. 41. This Court must alter and amend the Order to reflect this clarification.

factors supporting their conclusion were their information that he had graduated from high school, played varsity football, passed the driver's license test, and drove a car by himself. Report, p. 5. These factors, as noted by Dr. Tasse, may not necessarily exclude mental retardation, but Dr. Tasse clearly stated that many with mental retardation could not accomplish these same or similar tasks. The earlier Order suggested that mere reference to these individual factors suggests error by the evaluators in their rejection of the existence of mental retardation. This is an incorrect reading of what the examiners at the Department of Disabilities and Special Needs actually found. Necessarily, in any assessment for adaptive functioning a series of abilities must be considered. The DDSN examiners cannot be faulted for their reliance upon this combination of factors to support their conclusion. The earlier Order suggesting otherwise is amended to reflect this factor.

E.

This Court also found: "[T]he evidence overwhelmingly shows that applicant meets all three prongs of South Carolina's definition of mental retardation by a preponderance of the evidence." Order, p. 15. Upon reconsideration, this Court, as established above, finds that it used a flawed basis of reasoning and a restrictive evaluation of the whole of the evidence before this Court. This Court in its original order under emphasized the facets of the DDSN opinion that substantial drug and alcohol use could account for present deficits in intellectual functioning, a factor also noted in Dr. Waid's earlier rejection of mental retardation. In reconsideration, the Court must conclude that the Applicant had failed to satisfy the preponderance of the evidence standard.[5]

[5] This Court notes again, as it did at the December 4th hearing, the Court considers the evidence to present a close case, far from overwhelming. This Court has carefully considered and reconsidered the whole of the evidence.

In retrospect, the original Order can be read to suggest that educational achievement must be discounted and faulted the school system *in toto*. Contrary to the impression within the earlier Order, the Court alters and amends the Order to clarify that that the school records were not wrong, the school achievements were achievements, and the sports achievements were achievements. The Court had concluded that Simmons could not be "faking" mental retardation symptoms throughout his life from early childhood to age 51. (Order, p. 13). However, in this close case, the Order failed to account for the family issues, drug issues, or merely not attempting to do one's best that has similarly occurred throughout his life. It is not necessarily either 1) mental retardation or 2) feigning to attain a mental retardation opinion to avoid a death sentence.

Upon reconsideration, these multiple flaws in reasoning and review of the evidence merit altering and amending the Court's order to reflect that the Applicant failed to meet his burden of proof in showing the existence of mental retardation.

III

This Court must alter and amend its Order to now conclude that the preponderance of evidence standard was not met. In Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the U.S. Supreme Court held that executing mentally retarded individuals constitutes cruel and unusual punishment under the Eighth Amendment "in the light of ... evolving standards of decency." But the Court recognized that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." In 2003, the South Carolina Supreme Court addressed the mental retardation issue and allowed for the claims for prior capital cases to be raised in a post-

conviction relief setting. Franklin v. Maynard, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003).

In pressing a claim of mental retardation, "the applicant must show he or she is mentally retarded by a **preponderance of the evidence.**" Franklin v. Maynard, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003). "Mental retardation" is defined by statute as "'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 605-06, *quoting* S.C. Code § 16-3-20(C)(b)(10). In the Franklin decision, the South Carolina Supreme Court specifically rejected the argument by the named defendants, including Kenneth Simmons, to adopt as a substantive definition of "mental retardation" different than that adopted by the legislature when Franklin was decided.[6] More particularly, the Supreme Court of South Carolina specifically rejected an argument by Simmons to adopt the AARM or DSM-IV standard as the standard for the state court's consideration of mental retardation, leaving that to the legislature to revise a statutory standard. However, this Court within the original Order erroneously adopted the AARM standard as its rule rather than as a mere guidance. See Order, p. 8. The error in this

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[6] Atkins left it to each state to set standards and procedures for adjudicating the mental retardation of a defendant in a capital case; however, at the time Franklin was decided, bills had been introduced in South Carolina concerning the definitions of mental retardation and procedures, but no legislation had been passed. See Franklin, supra. 356 S.C. at 605, n. 1.

The American Association of Mental Retardation (AAMR) defines mental retardation as a "disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in the conceptual, social, and practical adaptive skills." Mental Retardation [: Definition, Classifications, and Systems of Supports 1 (10th ed.2002),] at 1. As of January 1, 2007, the AAMR has been known as the American Association on Intellectual and Developmental Disabilities.

The American Psychiatric Association defines mental retardation as "significantly subaverage intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive functioning." [Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1992) (DSM–IV),] at 37. Thus, ... both definitions of mental retardation incorporate three concepts: 1) limited intellectual functioning; 2) significant adaptive limitations; and 3) age of onset.

The primary distinction between these two classification systems is that the DSM–IV specifies severity levels of mental retardation, whereas the AAMR classification system no longer specifies levels of severity, but instead, recognizes that a diagnosis of mental retardation relies on both limitations in IQ and adaptive skills and focuses on the levels of support needed following an individual diagnosis. See DSM–IV at 45; AAMR at 26.

Court's adoption of the AARM standards as the definition of mental retardation as a matter of law is reflected in the Court's earlier findings, such as "This Court finds that the applicant exhibits deficits in at least five of the ten areas; thus the second prong is satisfied" was an error of law and needs to be corrected.

The existence of mental retardation was a contested issue from the trial to the later presentation at the state PCR hearing. Respondent submitted in the Motion to Alter that the Applicant did not meet his burden of proof and this Court erred in concluding that the evidence was "overwhelmingly" shown. Order, p. 15. There is contrary evidence in the record from the report and testimonies of Dr. Leslie Sandler, Dr. Thomas McAbee and Dr. Randy Waid which minimize the Applicant's showing and show that he failed to satisfy the preponderance of the evidence standard. This was admittedly a close issue, but the mere fact that an issue was close does not satisfy the burden of proof - especially when the 1999 assessment was made by neutral court examiners without a stake in the result - before it impacted on the viability of a death sentence. This lack of bias in the 1999 evaluation by neutral examiners carries significant weight and is bolstered by the fact that Dr. Waid, a retained *defense* expert at trial, similarly rejected the presence of mental retardation. The mere fact that Dr. Tasse, a retained defense expert has opined that Applicant suffers from mental retardation does not satisfy the burden of proof by a preponderance of the evidence, particularly when Dr. Tasse performed no testing, discounted scores, discounted deterioration due to adult drug use, minimized many factors which support the lack of mental retardation and testified in great part as to a legal result as opposed to a clinical fact.

In short, the initial factual findings and conclusions by the Court failed to adequately

measure the strength of the showing in the trial record which contradicts the existence of mental retardation. S.C. Code Ann. § 17-27-70. Additionally, the original findings and conclusions reflect the Court failed to recognize that post-death sentence evidence is inherently suspect where such information is gathered specifically to undo the jury verdict and has not been tested at trial. See, for example, Broadnax v. State, 2013 WL 598056, 9 (Ala.Crim.App.,2013) (nothing prevented the Applicant from calling family members to testify subject to cross-examination concerning the adaptive functioning in the post-death penalty verdict proceeding). The reliance upon the social worker as a conduit of the information before this Court is also ripe with a potential for bias. Other courts have questioned the probative weight of such evidence finding social worker's testimony not particularly credible where based on hearsay and that social worker "assigned mental operations to witnesses" who did not testify. See Davis v. State, 9 So.3d 539, 558 -559 (Ala.Crim.App.,2008) ("this Court finds the use of a social worker to be less than an ideal procedure. Vogelsang came into Court and testified on behalf of several family members in Davis's family who did not appear before this Court. During her testimony, Vogelsang continually assigned mental operations to witnesses who were never brought into Court to be subjected to cross-examination" . . . this type of testimony is certainly of the sort that pushes the envelope of permissible evidence. While arguably probative and relevant to sentence, such testimony does not seem particularly suited to have great weight placed upon it. This Court, or a jury during an actual penalty phase hearing, is being asked to accept the facts as interpreted and sifted by a third-party in reaching a conclusion"). As the Alabama court held in a similar situation: "Vogelsang [the social worker] is a professional witness, in the sense that she goes out and interviews many different people, decides what is relevant or not, and then comes into Court

and places that information before the fact-finder while insulating the actual witnesses from cross-examination". Davis v. State, 9 So.3d 539, 559 (Ala.Crim.App.,2008). Cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias). Here, the Applicant's showing limited the ability to further present this inherent bias which should limit its weight. See State v. Starnes, 340 S.C. 312, 325-326, 531 S.E.2d 907, 914 - 915 (S.C.,2000).[7] "A witness will naturally favor a party who is a family member. This favoritism may erode the credibility of the witness." The New Wigmore, Impeachment and Rehabilitation, Section 6.3 (2014 Supplement).

Contrary to the position presented to this Court "psychology informs, but does not determinatively decide, whether an inmate is exempt from execution." Ortiz v. United States, 664 F.3d 1151, 1168 (8th Cir.2011). Atkins "did not delegate to psychologists the determination of whether an inmate should not face execution." United States v. Bourgeois, No. 02–CR–216, 2011 WL 1930684, at *24 (S.D.Tex. May 19, 2011); see also Hooks v. Workman, 689 F.3d 1148, 1172 (10th Cir.2012) ("Atkins could have adopted the clinical standard, but explicitly declined to do so."); Clark v. Quarterman, 457 F.3d 441, 445 (5th Cir.2006) (Atkins "did not dictate that the approach" to defining mental retardation "must track the approach of the

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[7] In *Starnes*, the Court held:

> SCRE, also permits a party to impeach a witness by establishing bias or prejudice either through examination or otherwise. "'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) *quoting* 98 C.J.S. *Witnesses* § 560a (1957). A witness' romantic relationship with a party is a source of potential bias of which the jury should be aware in order to fully evaluate the witness' testimony. McIntyre v. State, 934 P.2d 770 (Alaska App.1997); Orkin Exterminating Co., Inc. v. McIntosh, 215 Ga.App. 587, 452 S.E.2d 159 (1994); State v. Erby, 56 N.C.App. 358, 289 S.E.2d 86 (1982).

[AAIDD] or the APA exactly"); United States v. Candelario–Santana, No. 09–CV–427 (JAF), 916 F.Supp.2d 191, 194, 2013 WL 101615, at *2 (D.P.R. Jan. 8, 2013) ("Though the clinical standards have informed our analysis, we emphasize that a clinical standard is not a constitutional command." (internal quotation marks omitted)). Instead, while noting the leading clinical definitions of mental retardation, Atkins expressly permitted state legislatures and courts to exercise their own judgments as to the definition of mental retardation, even if those judgments diverged from those of leading psychologists. See Atkins, 536 U.S. at 317, 122 S.Ct. 2242 ("[W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." (alterations omitted)); see also id. at 317 n. 22, 122 S.Ct. 2242 ("The statutory definitions of mental retardation ... generally conform to the clinical definitions ...." (emphasis added)).

The Respondent contended in his motion that the Applicant and this Court apparently adopted a concept that it is bedrock science that if the subject has adaptive deficits that satisfy the diagnostic criteria, then the diagnosis should be made even if the subject also has strengths. This Court concludes that the original Order should be altered because Respondent has shown the original adoption of the diagnostic criteria as a matter of law was in error. While "[t]he mental health community [may] ignore[ ] an individual's strengths when looking at adaptive functioning [,] ... presumably as a function of its role in providing support and services to impaired individuals[,] ... [t]he law makes a holistic view of an individual, recognizing that a few reported problems may not negate an inmate's ability" to function in other ways. U.S. v. Ortiz, citing Williams v. Quarterman, 293 Fed.Appx. 298, 313–14 (5th Cir.2008) (unpublished per curiam); Clark v. Quarterman, 457 F.3d 441, 447 (5th Cir.2006); United States v. Webster, 421

F.3d 308, 313 (5th Cir.2005)). Consideration of an individual's strengths may often prove necessary to provide context and definition for consideration of reported deficits.

When viewing this record as a whole, his claimed adaptive deficits placed in context remove the aura of mental retardation. The Order should be altered to reflect this correction.

As noted in the post-hearing memorandum of Respondents, the State's presentation primarily focused on two witnesses, Dr. Leslie Sandler of S.C. DDSN and Dr. Randy Waid, but not solely upon them. On February 10, 1999, Dr. Leslie Sandler, Ed. D., as lead psychologist and Dr. Thomas McAbee, as secondary psychologist of the Department of Disabilities and Special Needs issued a report pursuant to an Order of the Honorable Rodney Peeples concerning his competency to stand trial and criminal responsibility. The matter had been referred to S.C. D.D.S.N. due to indication of mental retardation. The report was introduced at trial as State Exhibit 8. In the report, Dr. Sandler and Dr. McAbee both opined that Simmons was not mentally retarded with a reasonable degree of scientific certainty. In their joint conclusion, the S.C. D.D.S.N. reported in its written conclusions to the trial court:

> The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, [APA DSM-IV] specifies the following three criteria for a diagnosis of mental retardation: significantly subaverage intellectual functioning with concurrent deficits or impairments in present adaptive functioning with onset before age 18 years. The available records do not report a history of significant developmental delays or of him ever receiving services for mental retardation or a related disability. While Mr. Simmons did repeat the eleventh grade and take remedial; courses for high school credit, his 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. . . .

Report, p. 5.

Unlike Dr. Tasse's non-testing of Simmons, the February 1999 report further indicated that in addition to police records, the examiners had interviewed Simmons on four occasions for approximately two hours each meeting for around 8 hours. The examiners considered his high school transcript noting that he had completed 18 hours of credit and graduated from Summerville High School in 1980 earning two letters in football playing defensive end. In grades, the examiners pointed out that he had received a B in ninth grade Basic English, a C in tenth grade Basic English, B in 11th Grade Basic English and an A in remedial English in the 12th grade. They noted he had received grade equivalent scores in achievement tests in the 11th grade of fifth grade in reading and fourth grade seven months in math. He had passed the state driver's license test in October 1979. They also noted that he was married and had reported having three children. Simmons had self-reported a long-term use of alcohol, marijuana and cocaine.

The S.C. D.D.S.N. court examiners noted that in forensic evaluations since his arrest that he had received a provisional diagnosis of mental retardation with testing in May 1998 of a Wechsler Adult Intelligence Scale - Revised [WAIS-R] of Verbal IQ 66, Performance IQ of 75 and Full Scale IQ of 69. A December 1998 WAIS-III test reported a Verbal IQ of 65, Performance IQ of 74 and Full Scale IQ of 66. Concerning their own testing of the Applicant, the DDSN examiners also reported:

> In the administration of the Wechsler Adult Intelligence Scale - Revised [WAIS-R] on 9 February 1999 he obtained the following IQ scores: Verbal 70; Performance 82; and Full Scale 75. A Full-Scale IQ of 75 is in the mid-range of the Borderline Intelligence Classification (IQ scores of 70-79). The fact that his Performance IQ score was12 points higher than his verbal IQ score is significant. **One interpretation of this 12 point spread which the examiners believe may be likely is that his true IQ is in the low average intelligence classification (IQ scores of 80 to 89) as revealed in the performance IQ, and intentionally suppressed by Mr. Simmons tendency to malinger.** His sub-tests raw scores can be converted into scaled scores along a continuum of 1 (the 0.1 percentile rank) to 19 (the 99.9 percentile rank). His highest sub-test scores

> were in the Object Assembly test (scaled score of 10: the 50th percentile); Picture Arrangement and Block Design tests (scaled scores of 8; the 25th percentile). His lowest sub-test scores were in the Information and Digit Symbol tests (scaled scores of 2; the 0.4 percentile rank. ... [8]

Report, p. 3 (emphasis added).

The examiners also noted that in the trail-making tests his scores were elevated, yet showed no errors reflecting the impression that he was "intentionally producing exaggerated slow responses" as he did on the WAIS-R test. The Vineland Adaptive Behavior test was also attempted, but unsuccessful due to the Applicant's incarceration which precluded performance of many of the adaptive skills in community living reflected in the test. A correctional officer was interviewed about Simmons current adaptive behavior which suggested that he took care of his personal hygiene and grooming without assistance from others, got along well with others and had leisure skills on playing cards and reading magazines and discussed content of those materials after reading them. It was reported that he leads a Bible discussion with other inmates and followed the rules of chess while playing other inmates. Report, p. 3-4.[9]

The examiners also reported their own observations of Simmons which defeat the presence of mental retardation. Report, p. 4. Although the examiners reported observing malingering during each session, his clinical presentation appeared to be substantially lower than

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[8] This was also reported at the competency hearing by Dr. Sandler. ROA 2614-15. Dr. McAbee testified that Applicant was not mentally retarded at the hearing. ROA 2699-2702.

[9] In the Response to the Motion to Alter, p. 3, the Applicant complains that "the state continues to assert that Applicant was leading Bible studies and playing chess in jail," even though Dr. Sandler "admitted at trial that this claim was false." Id. In the motion, the State made reference to the admitted report of SC DDSN which included that language. Dr. Sandler testified that he had received information that Applicant was seen reading magazines and that he was playing chess, but that it was later stated to him that Applicant was playing checkers rather than chess. ROA 1729. Dr. Sandler also testified that that while he had been told that Applicant was leading a Bible study group, he later learned that Applicant "was involved in a Bible discussion group on a daily basis with other inmates. ROA 1730. Clearly, the conflicting reports were considered and did not affect the ultimate conclusion. The Court notes that the Dr. Marjorie Hammock testified that Simmons "was trained to lead Bible studies. Yes, he was." PCR Tr.p. 77, l. 25.

what would be expected of a high school graduate and substantially lower than his vocabulary and other skills revealed in his 1997 oral and written statements to the police. See ROA 3170 - 3220 (oral statements of Simmons). They noted that he gave incorrect answers during each evaluation that closely approximated the correct answer which they saw a sign of malingering. Report, p. 5.

During the 1999 trial Dr. Sandler initially testified at a competency hearing. ROA 2593-2671.[10] In particular, Dr. Sandler opined that Simmons was not mentally retarded. ROA 2623-2625. In particular, Dr. Sandler summarized the information reported above. ROA 2614-2616. As for adaptive behavior, Dr. Sandler noted that in their interviews and the report from correctional officers that there was an absence of a problem in his self-care. ROA 2623. However, Dr. Sandler opined that Simmons was a malingerer, but noted that his memory was

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[10] An issue was raised at the PCR hearing concerning a disciplinary sanction against Dr. Sandler in 1989 in Pennsylvania. Neither counsel Theos or Solicitor Bailey were aware of the sanction at the time of the 1999 trial. PCR 245-248 (Bailey); p. 352 (Theos). Solicitor Bailey stated that he did not do background checks of expert witnesses and was not aware of its existence. There has been no showing that this information was in the possession of any law enforcement file. The defense counsel had equal access to information with S.C. DDSN as the prosecution. However, Solicitor Bailey stated that if he had that information about Dr. Sandler in 1999, he would have disclosed it because it could have potentially been used to impeach, although he would have resisted its use in court based upon remoteness since it was over 10 years. PCR 248. Solicitor Bailey noted that Sandler had never lost his license. The evidence concerning Dr. Sandler does not reflect the he lost his license, but that he was subject to supervision. Contrary to a claim in the application it does not reflect either false or perjured testimony was given in the 1999 trial. While counsel, if they discovered it would have sought to impeach Dr. Sandler, this Court finds that the prejudice prong of Strickland or the materiality prong of Brady had not been shown. Dr. Sandler was a court witness independently employed by the SC. D.D.S.N. He was adequately licensed to render an opinion. Further, it was not merely his opinion, but co-authored by Dr. McAbee. Importantly, there is no claim that the testing was not completed as reported in the examiners' report. There is no reasonable probability the result of the 1999 trial would have been different, had the information been known and disclosed.

In its original order, this Court addressed the issue concerning Dr. Sandler's Pennsylvania license at Order, pp. 13 - 14, n. 10. This Court stated there that it did not base its conclusion that Dr. Sandler's opinion was "less credible than those of applicant's experts" on his Pennsylvania sanction. This Court found that "applicant's presentation was far more thorough. detailed and accurate, and therefore entitled to greater weight." Id. On reconsideration, this broad conclusion is incorrect. This Court. within today's Order. has revised its conclusion in finding the combined opinions of Dr. Sandler, Dr. McAbee and the evidence of adaptive functioning revealed in the DDSN report and testimony, as well as testimony from Dr. Hammock, emphasized within this order carry greater weight.

remarkable when he wanted it to be. ROA 2625. Dr. Sandler found no indication of any adaptive problems before age 22, but testified that Dr. McAbee was the primary examiner in that area. ROA 2626. Dr. Sandler noted on cross-examination that they took into consideration his elementary grade school scores into account. ROA 2658-59.

Dr. Thomas McAbee also testified at the competency hearing that Simmons was not mentally retarded. ROA 2702. Specifically, he noted that he found Simmons mental functioning above the range of mental retardation and suspected that Simmons was not trying his best during the testing. ROA 2702. He stated that he was assessing him that the February test scores were above the range of mental retardation. ROA 2699-70. He stated that there were some functional deficits in reading abilities, but they certainly would not be in the level of mental retardation. ROA 2700. Concerning his ability to take care of his own needs, Dr. McAbee testified that he did not see any evidence that would suggest at age 18 or 22 that he did not have such ability. ROA 2701.

During the trial, Dr. John Michael Foxworth, a defense expert in general and forensic psychiatry, testified Applicant suffered from "an alcohol related persisting dementia," but did not testify Applicant suffered from mental retardation. (ROA. p. 1526-30). Dr. Charles Barton Saylor, a forensic psychologist, testified Applicant functioned in a "mentally deficient range," but also testified that he was not asked to look for a diagnosis of mental retardation. (ROA. pp. 1606; 1620-21). Dr. Thomas William Behrmann, a forensic psychiatrist with William S. Hall, testified that he did not diagnose him with any "mental illness or defect that would have prevented him ... from waiving his rights," in regard to the voluntary nature of Applicant's statements. (ROA. p. 1652). Dr. Behrmann also noted in his report, based solely on IQ scores,

that mental retardation could be suspected. (ROA. p. 1675). Jeffrey Vidic, a clinical psychologist with William S. Hall, testified that Applicant tested in "the intellectually deficient range" and such deficiency was part of "the three diagnostic criteria" required for a diagnosis of mental retardation. (ROA. p. 1690).

Dr. Sandler, again testified, **as a defense witness** and in his testimony, he reported, from his testing and evaluation, that Applicant was not mentally retarded. (ROA. p. 1724-25). Dr. Sandler testified that "there was a remarkable amount of signs that we were able to determine that indicated an absence of mental retardation, an absence of adaptive functioning, the onset before age eighteen . . .he seemed to have been doing fine." ROA 1725, l. 12-19. Dr. Sandler testified on cross-examination in going over the records of his school career, work career, marriage . . . relationship with his peers, his ability to care for himself, groom himself, and be gainfully employed" that he did not find any evidence at all of any deficits or impairments in adaptive functioning. ROA 1739, l. 15-24. Dr. Sandler testified that he found none of the three factors for mental retardation were present. ROA 1740.

Lastly, Dr. L. Randolph Waid, an expert in clinical and forensic psychology, and neuropsychology, testified, definitively, to an absence of mental retardation. (ROA. pp. 1882, 1897). In particular, Dr. Waid opined that because Simmons suffers from neuro-cognitive impairments he has diminished mental capacity, but not from mental retardation. ROA 1778. As stated above, Dr. Waid opined that his life-style of poly-substance abuse hurt his brain.[11] He

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[11] In his November 1, 2013 Response to the original Motion to Alter, p. 2-3, the Applicant asserts that "experts for the State and the defense have repeatedly acknowledged that there is no evidence that Applicant's brain has been damaged from substance abuse, citing ROA 1909, 1911-12, 1913, 2655. PCR Tr.p. 147. Although Dr. Waid acknowledged in the testimony that an MRI test did not show structural damage to the brain (ROA 1909) and a neurological examination done at Hall Institute showed normal. Dr. Waid opined at trial that normal MRI's can still occur with brain damage. *He testified that there is medical evidence that Simmons had a substance abuse problem and a polysubstance abuse problem,* ROA 1913, l. 10-14. See DDSN Report, p. 2 (self-report from

opined that Simmons was not always at that level and "**do not believe he suffered from mental retardation but believe his intellect is in the borderline to intellectually deficient range ...**" ROA 1778. He stated that he was in the lower two percentile and stated that he was not an intellectual giant. He noted that Simmons academic achievement was the first grade on was that he was falling behind. ROA 1781. "He was able to get through because he was not of the intellectual deficiency as he is now. He has diminished since high school and that's an acquired neuro-cognitive impairment . . . related to his life-style that has involved poly-substance abuse and dependence. ROA 1781-82. He was **"low average, at best, not mentally retarded."** ROA 1782, l. 11-12. Dr. Waid noted that his years associated with his abuse as well as the potential blows to his head from his life style, including his high level of drinking would contribute to the diminished functioning. ROA 1782. The evidence of Simmons overdose he considered an incident with a high potential to affect his brain. ROA 1783. He opined that Simmons had a diagnosis of polysubstance abuse by history, dementia (loss of intellectual abilities) and history of alcohol abuse. In addition to concluding that mental retardation was not an appropriate diagnosis, Dr. Waid attributed the decline in Simmons mental capacity to chronic substance abuse including alcohol and crack cocaine. ROA 1881-1882. As **Dr. Waid later testified: "well, he's definitely not meeting the diagnostic criteria for mental retardation." ROA 1897, l. 5-6.** [12]

Simmons of "long-term use of alcohol, marijuana, and cocaine").

[12] In the Response in Opposition to the Motion to Alter. p. 2, the Applicant suggests that Dr. Waid retracted his opinion that Applicant was not mentally retarded. However, a close reading of Dr. Waid's affidavit gives no explanation of the fact that he actually rendered an opinion at trial that Simmons was not mentally retarded or that it was incorrect. Rather, he merely claims that his evaluation occurred before Atkins and that he did not realize the legal significance of the opinion that it had today and suggests that he was not asked by the defense to make a formal assessment, but he gave an opinion at trial that Simmons lacked the criteria for mental retardation. His affidavit contradicts his actual sworn testimony at trial and does not address the correctness of his trial opinion. This Court finds whether one is mentally retarded should not depend on the legal significance or impact of the

During the PCR hearing, the primary witness on Applicant's behalf was Dr. Marc Tasse, a clinical psychologist and psychology professor from the Ohio State University. PCR 100. He was qualified as an expert in mental retardation. PCR 106. Dr. Tasse stated that he reviewed records of the Applicant and opined that he had mental retardation based upon the records he reviewed as well as his consultation with social worker Dr. Marjorie Hammock. PCR 137. He opined that all of the Applicant's test scores on IQ tests were below the cut-off for mental retardation. ROA 145. In addition, he opined that the adaptive function prong was satisfied by Dr. Keyes 1999 testing of Simmons, his ex-wife and older sister on the Vineland Adaptive Scale which scored "significantly below average." PCR 145-146. Dr. Tasse found that "onset before

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determination, but whether the person is mentally retarded - a point that Dr. Waid did not address in his affidavit.

The Applicant implies that the fact that an affidavit was admitted without objection automatically carries the weight the Applicant suggests. The Respondent did not stipulate to the weight or statement within Dr. Waid's affidavit – only its discretionary admissibility under the Uniform Post-conviction relief Act. The affidavit itself was impeached by the sworn testimony presented during the trial cited above. The fact that Dr. Waid did not address his actual prior sworn opinion to the court that Simmons was not mentally retarded was not addressed or even acknowledged within the affidavit. To suggest otherwise ignores the full record before the Court.

The Supreme Court of Ohio has addressed the review that should be given affidavits in a collateral case. "In determining how to assess the credibility of supporting affidavits in post-conviction relief proceedings, the Ohio Supreme Court adopted the reasoning of State v. Moore (1994), 99 Ohio App.3d 748, 651 N.E.2d 1319, which had looked to federal habeas corpus decisions for guidance. Id. at 753-754, 651 N.E.2d at 1322-1323. The Supreme Court ultimately determined that the trial court should consider all relevant factors in assessing the credibility of affidavit testimony in 'so-called paper hearings,' including the following: '(1) whether the judge viewing the post-conviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) ***whether the affidavits contradict evidence proffered by the defense at trial. Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony.***' State v Calhoun, 86 Ohio St.3d at 285, 714 N.E.2d at 911-912, citing Moore, 99 Ohio App.3d at 754-756, 651 N.E.2d at 1323-1324." State v. Kinley (1999), 136 Ohio App.3d 1, 13-14, 735 N.E.2d 921, 930-31.

As "self-serving" affidavits, the trial court could give them little or no weight. State v. Calhoun (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905; State v. Kapper (1983), 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (letter or affidavit from the court, prosecutors, or defense counsel alleging a defect in the plea process might be sufficient to warrant a hearing, although defendant's own affidavit alleging same defect would not, because the former are not self-serving declarations).

18" prong was more challenging to satisfy and he had to get more information from her in addition to his knowledge that Applicant was struggling in school which was a deficit in functional academics. ROA 146. He discounted the effect of drugs and alcohol. ROA 147-148.

Dr. Tasse conceded that Dr. Sandler and McAbee in February 1999 had a Full Scale IQ score of 75 which could be considered to fit within the range of mental retardation although it fit within the range of 70 +/- 5. PCR 162-163. **He admitted that based upon that score an examiner could conclude that a person was not mentally retarded** but would need to look at prong two and three. PCR 163. Dr. Tasse also relied upon the Vineland scales from an ex-wife and sister, although he could not recall the length of time the Applicant had ever lived with them. PCR 167. Dr. Tasse conceded that Applicant was not diagnosed for mental retardation at any time in elementary school or high school. PCR 169-170. Dr. Tasse noted that the 2008 IQ testing done by Dr. Susan Knight at his request was the lowest test score on verbal comprehension, but discounted that score because he was solely concerned with the Full Scale IQ score. PCR 176.

Unlike Dr. Sandler and Dr. McAbee, Dr. Tasse stated that he never tested Simmons. PCR Tr.p. 175, l. 12.[13] For the purpose of doing any adaptive behavioral evaluation, Dr. Tasse only based his conclusion on the records made by others (frequently with a bias as a retained expert or family member of a person who had already received a death sentence). He admitted that there was information that Simmons had a joint checking account with his wife and was not aware whether he understood the value of money. Dr. Tasse stated that this concern about money concepts was based upon Dr. Keyes' Vineland test done by individuals who had little contact with Simmons for 17 years. PCR 182. Dr. Tasse stated that he did not do another Vineland

[13] At some point Dr. Tasse met with Applicant. This Court cannot discern the substance of the meeting since no testimony was elicited about it, no testing was done during the meeting and no written report was made concerning it.

because Simmons had been incarcerated for a number of years and they would be unable to assess his adaptive behavior in the community because of his incarceration. PCR 182-183.

Dr. Tasse conceded that while he had opined there were some deficits in daily living, he had to admit that there was evidence that when Simmons was living at home he was the family caretaker and was caring for his mother, providing her medication and taking care of his younger sister who was identified as having mild mental retardation. PCR 185. He stated that he was also unaware any developmental delays by Applicant. PCR 187. He noted that Applicant played football but rejected that he had shown self-esteem for the record when he announced his pride in the team's record. PCR 188. Dr. Tasse further discounted that Applicant had gotten his driver's license, emphasizing that he lost his license when he was driving an uninsured vehicle. PCR 189. Dr. Tasse conceded that Applicant did not use only simple words, but also used multi-syllable words, that he had good hygiene, that he can read, that he had a bank account with his wife, that he got an A in driver education class and received a driver's license, and that he was socially able to attract girlfriends. PCR 197-199. Although these are not the criteria to assess mental retardation specifically, Dr. Tasse admitted that each of these factors would be looked at by a psychologist to assess adaptive functioning, including whether they could read and write, whether money concepts, including opening and using a bank account, whether a person can hold a job for "work adaptive skills" and whether a person can develop a relationship with another person for social skills and a person's hygiene. PCR Tr.p. 197-198.

Social Worker Marjorie Hammock testified about her social history report. However, when challenged the persuasive power of her testimony and its attempts to suggest deficits was severely limited in the cross-examination. It was pointed out that Simmons did participate in

extracurricular activities in school, including football. She noted that he was able to receive varsity letters for playing and was able to make grades to be able to play. She stated that it was only speculation that some teachers had given him a preference as an athlete. She admitted on cross-examination that there was no evidence that this happened to Simmons and there was no evidence that the grades were not an accurate reflection of what he earned. PCR 50. Ms. Hammock had noted that his academic performance declined in 1978 in the 11th grade, but then admitted that was when Simmons mother died from diabetes. PCR 52. She admitted that Simmons caretaker role in the family up to then was that he would feed her, help her clean up and took care of her daily needs. PCR 53-54. She also noted that in 1978 he also began using marijuana and drinking, although she denied knowing about the frequency of his usage. PCR 55 - 56. She noted also that his class rank was 531 out of 615. PCR 56-57. She noted that Simmons met his future wife Valerie in 1977 and they got married in 1982. PCR 59-62. She stated that his drinking and drug use began when he was 17 and became noticeable to others particularly after Mr. Simmons died. The use of cocaine began then according to her notes. PCR 63. She described his work history with a tree cutting firm, then a pest control company, a fiberglass company, a brick mason and then a tree service. PCR 60-64. She stated his marriage was from 1982 through 1988, with separations within the period. PCR 64. She state that she understood that his drug and alcohol problems caused the separation and his attendance problems at work. PCR 65-68. Concerning his driving, she noted that he only had one accident that was reported to her four years after he had received his license. PCR 69-71.

Ms. Hammock confirmed that at the Palmetto House, he would do chores, followed the rules and was well-liked. She confirmed that he cared for himself, would go to school regularly,

would go to church regularly upon his father's instructions and was trained in Bible studies that he held at the jail. PCR 77-78.

The evidence before this Court reflects a mixed picture of the Applicant, but the Court's original Order did not adequately take into account the evidence supportive of a rejection of mental retardation as a medical diagnosis and further a legal determination regarding sentencing exposure. As the SC DDSN court examiners concluded, there is evidence in the record to suggest that he does not satisfy the elements of mental retardation. It is uncontested Simmons scale score in the 1999 testing of 75 could support a conclusion that his IQ was not 70 or below. His intense drug and alcohol use since the age of 17 could impact on his intellectual functioning unrelated to mental retardation as Dr. Waid concluded. His adaptive functioning, when pierced below the biased surface evident in the social history during cross-examination destroyed the existence of the claimed deficits. The fuller and corrected social history reflects a person who was able to care for his mother and sister, continued to have good hygiene for him and others. Simmons possessed an ability to follow rules, gained employment when he wanted to do and participated in activities, including success at football while receiving adequate grades to maintain his presence on the team. It was reflected that the downward spin in his life not the product of mental retardation, but a combination of life style changes after the death of his mother and pursuit of drugs and alcohol. *Yet even with the downward spin, his class rank was not in the bottom 10% of the high school graduates (531 out of 615).*[14] His lack of motivation in school was explained by drugs and family concerns and in testing was evident in the neutral

[14] Those individuals with mental retardation are considered in the bottom 2 to 3% of the population. The Prevalence of Mental Retardation, Association of Retarded Citizens (1982). See also DSM -IV-TR (2000), p. 46 ("the prevalence rate of Mental Retardation has been estimated at approximately 1 %").

examination. This presentation does not require this Court to find the existence of mental retardation where other expert witnesses, not motivated by the potential of a death sentence or life sentence resting on their testimony - court witnesses Dr. Sandler (also a defense witness at trial), Dr. McAbee and Dr. Waid (a defense witness) - concluded that it was not present.

The Applicant did not meet the burden of proof by a preponderance of the evidence. This Court's conclusions are altered and amended.

IV.

WHEREFORE, this Court is constrained to conclude that the Motion to Alter or Amend is granted. The judgment is altered and amended to conclude that the Applicant failed to carry his burden of proof to show that he suffered under mental retardation under state and federal law and ineligible for the death penalty pursuant to Franklin v. Maynard, supra. Post-conviction relief must be denied because the Applicant is not entitled to a remand for a new sentencing proceeding.

AND IT IS SO ORDERED this _____ day of January, 2014.

By:_____

The Honorable Doyet A. Early, III
Presiding Judge

Bamberg, South Carolina.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
Kenneth Simmons, #5066,	)	
	)	C/A No.: 2005-CP-18-1368
Applicant,	)	(Capital PCR Action)
v.	)	
	)	CERTIFICATE OF SERVICE
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

I, Donald J. Zelenka, Senior Assistant Deputy Attorney General, certify that I have served *Respondent's Proposed Order Granting the Amended Motion to Alter or Amend* on counsel for Applicant by depositing one copy of same in the United States mail, postage prepaid, addressed as follows:

James Morton, Esquire
Morton & Gettys, LLP
P.O. Box 707
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Death Penalty Resource & Defense Center
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Columbia, SC 29201

Honorable Doyet A. Early, III
Circuit Court of South Carolina
PO Box 90
Bamberg, SC 29003

This 31st day of December, 2013.

DONALD J. ZELENKA

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ATTORNEY FOR RESPONDENT

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

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 ____, 2014
Bamberg, SC

5436

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2005CP1801368

CERTIFIED COPY
2014 JAN 30 PM 2:25
CLERK OF COURT
DORCHESTER COUNTY

PLAINTIFF(S)	DEFENDANT(S)
Kenneth Simmons	Department of corrections; South carolina state of
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Doyet A. Early, III — **Circuit Court Judge**

2136 — **Judge Code**

1-22-2014 — **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **1-30-2014**, and a copy mailed first class or placed in the appropriate attorney's box on **1-30-2014**, to attorneys of record or to parties (when appearing pro se) as follows:

James M. Morton PO Box 707 Rock Hill, SC 29731
Emily C Paavola Attorney At Law Ctr. Capital Litigation, 900 Elmwood Ave. Suite 101 Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Donald J. Zelenka PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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.	)	

CERTIFIED COPY
2014 JAN 30 PM 2:25
CLERK OF COURT
DORCHESTER COUNTY, SC

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.

MTE

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

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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

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	Case No.: 05-CP-18-1368
COUNTY OF DORCHESTER)	
)	
KENNETH SIMMONS,)	
Applicant,)	
)	**CERTIFICATE OF SERVICE**
v.)	
)	
STATE OF SOUTH CAROLINA,)	
Respondent.)	
)	

The undersigned certifies that a copy of the Order Denying Respondent's Motion to Alter or Amend Pursuant to Rule 59 was served by first class United States mail, postage prepaid, this 27th day of January, 2013, upon the following:

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

Jill A. Rider

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF GENERAL SESSIONS**
COUNTY OF DORCHESTER	)	
THE STATE,	)	**SENTENCE**
	)	
-VS-	)	**Indictment No. 98-GS-18-75**
	)	
KENNETH SIMMONS	)	
	)	
DEFENDANT	)	

The Defendant, Kenneth Simmons, has been found by the jury to be guilty of the offense of murder. The jury has recommended that the Defendant should be sentenced to death.

It is, therefore, the judgment of the law and the Sentence of the Court that the Defendant, Kenneth Simmons, be transported to the County Jail of Dorchester County, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 10th day of May, 1999, upon which day between the hours of six o'clock P.M. and six o'clock A.M., the Defendant, Kenneth Simmons, shall suffer death by electrocution or lethal injection in the manner provided by law.

Rodney A. Peeples
Presiding Judge
First Judicial Circuit

March 5, 1999
St. George, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF GENERAL SESSIONS**
COUNTY OF DORCHESTER	)	
THE STATE,	)	
	)	
-VS-	)	**AFFIRMATION OF DEATH SENTENCE**
	)	
KENNETH SIMMONS	)	**Indictment No. 98-GS-18-75**
	)	
DEFENDANT	)	

As the Trial Judge in the above captioned action, and prior to the imposition of the death sentence upon the Defendant, Kenneth Simmons, I find as an affirmative fact that the evidence of the case warrants the imposition of the death penalty and its imposition is not a result of prejudice, passion, or any other arbitrary factor.

Rodney A. Peeples
Presiding Judge
First Judicial Circuit

March 1, 1999
St. George, South Carolina

5454

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF GENERAL SESSIONS

THE STATE,)
)
-VS-)
)
KENNETH SIMMONS)
)
DEFENDANT)

RECOMMENDATION OF SENTENCE
DEATH PENALTY

Indictment No. 98-GS-18-75

WE, THE JURY, IN THE ABOVE CAPTIONED CASE, HAVE FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE(S): Criminal Sexual Conduct Kidnapping - Armed Robbery - Physical Torture and Burglary

_____ NOW RECOMMEND TO THE COURT THAT THE DEFENDANT, KENNETH SIMMONS, BE SENTENCED TO DEATH.

Foreman

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

Juror

March 2, 1999
St. George, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF GENERAL SESSIONS

THE STATE,)
)
-VS-)
)
)
KENNETH SIMMONS)
)
DEFENDANT)

JURY'S FINDING AS TO AGGRAVATING CIRCUMSTANCE

Indictment No. 98-GS-18-75

Complete either A or B, as appropriate:

(A) WE THE JURY IN THE ABOVE - ENTITLED CASE, DO NOT UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF ANY STATUTORY AGGRAVATING CIRCUMSTANCE(S).

DATE: 3/2/99 SIGNED: _____
FORELADY

(B) WE THE JURY IN THE ABOVE-ENTITLED CASE DO UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE(S):

(1) CRIMINAL SEXUAL CONDUCT - (NO) ____ (YES) X

(2) KIDNAPPING - (NO) ____ (YES) X

(3) ARMED ROBBERY - (NO) ____ (YES) X

(4) PHYSICAL TORTURE - (NO) ____ (YES) X

(5) BURGLARY - (NO) ____ (YES) X

SIGNED:

Jan W Moore
Forelady

Robert L Hughes
Juror

Mark Will
Juror

Robert K. Shuford
Juror

[illegible]
Juror

Rebe Dell D. [illegible]
Juror

Bryan Sullivan
Juror

Paul Randle Lee
Juror

Milton J. Hamlin Jr.
Juror

Allen Powell
Juror

Herbert Simmons Jr.
Juror

Donald F. Street Jr.
Juror

March 1, 1999
St. George, South Carolina

WITNESSES

Det. Thomason

DOCKET #: 98GS18-2078

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS
Term: January, 1998

THE STATE

vs.

Kenneth Simmons

ARREST WARRANT #:

F719270

Arrested on December 09, 1997

INDICTMENT FOR

211A

MURDER

(COMMON LAW)

ACTION OF GRAND JURY

TRUE BILL

Foreman: [signature]
Grand Jury

VERDICT

Guilty or Not Guilty

Foreman: Jan Whaley
Petit Jury

Date: 2-28-99

Circle Unanimous Verdict

State of South Carolina)
) INDICTMENT #98GS18-00775
County of Dorchester)

At a Court of General Sessions, convened on January 19, 1998, the Grand Jurors of Dorchester County present upon their oath:

COUNT: MURDER
(COMMON LAW)

That Kenneth Simmons did in Dorchester County on or about September 1, 1996, feloniously, wilfully and with malice aforethought, kill one Lilly Bell Boyd by means of by beating her about the head and strangling her and that the said Lilly Bell Boyd did die as a proximate result thereof on or about the 1st day of September, 1956.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR Will Bay

STATE OF SOUTH CAROLINA
IN THE COURT OF GENERAL SESSIONS
#2 Sentence
5459

COUNTY OF Dorchester)
STATE VS.)
Kenneth Simmons)
AKA:)
Race: B Sex: M)
DOB: [redacted] Age:)
SSN: [redacted])
DL#:)
SID#:)

INDICTMENT/CASE#: 98-GS-18-0076
A/W#: F719273
Date of Offense: Sept. 1, 1996
S.C. Code § : 16-11-311
CDR Code #: 010719

SENTENCE

☐ PLEA ☑ TRIAL

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS TO: Burglary in the First Degree (Dwelling)
in violation of § 16-11-311 of the S.C. Code of Laws, bearing CDR Code # 010719

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Kenneth Simmons
Defendant

Jerry N. Theos
James A. Bell
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☑ **State Department of Corrections,** ☐ **County Detention Center,** for a determinate term of Life imprisonment days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for _____ days/months jail time.
☐ CONCURRENT or ☑ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
_____
Recipient: _____
_____
*Fine: .....$_____
§ 14-1-206 - Assessments 100%.....$_____
§ 14-1-211 - Surcharge.....$_____
(Exceptions: See § 14-1-211)
§ 56-5-2995 (DUI).....$_____
County (3%).....$_____
TOTAL.....$_____

PTUP _____
_____days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund.
Other: _____
_____
_____

Clerk of Court/Deputy Clerk Cheryl Graham
Court Reporter: Addison

PRESIDING JUDGE Rodney A. Peeples
Judge Code: 101110
Sentence Date: 3/2/98

White - Clerk *Green* - Corrections *Canary* - Probation *Pink* - Defendant

SCCA/217 (1/99)

WITNESSES

R. Thomason

DOCKET #: 98GS18-0076

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: January, 1998

THE STATE

vs.

Kenneth Simmons

ARREST WARRANT #:

F719273

Arrested on December 09, 1997

INDICTMENT FOR

0079

BURGLARY IN THE FIRST DEGREE

(DWELLING) 16-11-311

ACTION OF GRAND JURY

TRUE BILL

By: _____

Date: _____

Foreman: _____
Grand Jury

VERDICT

Guilty or Not Guilty

Foreman: Jan Whitmore
Petit Jury

Date: 2-28-99

Circle Unanimous Verdict

STATE OF SOUTH CAROLINA)
) INDICTMENT #96GS18-0076
County of Dorchester)

At a Court of General Sessions, convened on January 13, 1998, the Grand Jurors of Dorchester County present upon their oath:

COUNT: BURGLARY IN THE FIRST DEGREE
(DWELLING) 16-11-311

That Kenneth Simmons did in Dorchester County on or about September 1, 1996, willfully and unlawfully enter the dwelling of Lilly Bell Boyd without consent and with the intent to commit a crime therein, to wit: Armed Robbery, Criminal Sexual Conduct and Kidnapping and the defendant while in effecting entry or while in the dwelling or in immediate flight therefrom was armed with a deadly weapon, caused physical injury to Lilly Bell Boyd, who was not a participant in the crime, used or threatened to use a dangerous instrument, and/or entered said dwelling in the nighttime.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR Will Rogers

STATE OF SOUTH CAROLINA
COUNTY OF Dorchester #3 Sept Term
STATE VS. Kenneth Simmons
AKA:
Race: B Sex: M
DOB: [redacted] Age:
SSN: [redacted]
DL#:
SID#:

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#: 5462
98 -GS- 18 - 0077
A/W#: F719272
Date of Offense: Sept. 1, 1996
S.C. Code § : 16-11-330
CDR Code #: 011319

SENTENCE
☐ PLEA ☑ TRIAL

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS TO: Armed Robbery
in violation of § 16-11-330 of the S.C. Code of Laws, bearing CDR Code # 011319

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor | Defendant | Jerry N. Theos, James A. Bell — Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☑ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of 30 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for _____ days/months jail time.
☐ CONCURRENT or ☑ CONSECUTIVE to sentence on: 98-DA-18-75 Murder

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
_____
Recipient: _____
_____
*Fine: .....$_____
§ 14-1-206 - Assessments 100%.....$_____
§ 14-1-211 - Surcharge.....$_____
(Exceptions: See § 14-1-211)
§ 56-5-2995 (DUI).....$_____
County (3%).....$_____
TOTAL.....$_____

PTUP _____
_____days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund.
Other: _____
_____
_____

Clerk of Court/Deputy Clerk Cheryl Graham
Court Reporter: Addison
PRESIDING JUDGE Rodney A. Peeples
Judge Code: 101110
Sentence Date: 3/3/99

White - Clerk *Green* - Corrections *Canary* - Probation *Pink* - Defendant

SCCA/217 (1/99)

WITNESSES

Det. R. Thomason

ARREST WARRANT #:

F719272

Arrested on December 09, 1997

ACTION OF GRAND JURY

TRUE BILL

By:

Date

Foreman: Willie Geegees
Grand Jury

VERDICT

Guilty or Not Guilty

~~Foreperson~~ Foreman: Jan Johnson
Petit Jury

Date: 2-28-99

Circle Unanimous Verdict

DOCKET #: 98GS18-0077

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: January, 1998

THE STATE

vs.

Kenneth Simmons

INDICTMENT FOR

0139

ARMED ROBBERY

(16-11-330)

STATE OF SOUTH CAROLINA)
) INDICTMENT #98GS18-0077
County of Dorchester)

At a Court of General Sessions, convened on January 19, 1998, the Grand Jurors of Dorchester County present upon their oath:

COUNT: ARMED ROBBERY
(16-11-330)

That Kenneth Simmons did in Dorchester County on or about September 1, 1996, while armed with a deadly weapon, take from the person or presence of the victim, Lilly Bell Boyd, by means of force or intimidation, goods or monies of said Victim.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR _____

STATE OF SOUTH CAROLINA
COUNTY OF Dorchester
STATE VS.
Kenneth Simmons
AKA:
Race: B Sex: M
DOB: [redacted] Age:
SSN: [redacted]
DL#:
SID#:

#4 Settle

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#: 5465
98 -GS- 18 - 0078
A/W#: F 719271
Date of Offense: Sept. 1, 1996
S.C. Code § : 16-3-652
CDR Code #: 01 1610

SENTENCE
☐ PLEA ☑ TRIAL

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS TO: Criminal Sexual Conduct - First Degree
in violation of § 16-3-652 of the S.C. Code of Laws, bearing CDR Code # 01 1610

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor — Defendant: Kenneth Simmons — Attorney for Defendant: Jerry N. Theos, James A. Bell

WHEREFORE, the Defendant is committed to the ☑ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of 30 ~~days/months~~ years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for _____ days/months jail time.
☐ CONCURRENT or ☑ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
_____
Recipient: _____
_____
*Fine: .....$_____
§ 14-1-206 - Assessments 100%.....$_____
§ 14-1-211 - Surcharge.....$_____
(Exceptions: See § 14-1-211)
§ 56-5-2995 (DUI).....$_____
County (3%).....$_____
TOTAL.....$_____

PTUP _____
_____days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund.
Other: _____
_____
_____

Clerk of Court/Deputy Clerk Cheryl Graham
Court Reporter: Addison

PRESIDING JUDGE Rodney A. Peeples
Judge Code: 1 1 1 0
Sentence Date: 3-2-99

White - Clerk *Green* - Corrections *Canary* - Probation *Pink* - Defendant
SCCA/217 (1/99)

WITNESSES

Det. R. Thomason

DOCKET #: 98GS18-0078

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: January, 1998

THE STATE

vs.

Kenneth Simmons

ARREST WARRANT #:

F719271

Arrested on December 09, 1997

INDICTMENT FOR

2150

CRIMINAL SEXUAL CONDUCT - FIRST DEGREE

(16-3-652)

ACTION OF GRAND JURY

TRUE BILL

By: _____

Date _____

Foreman: Ellen Degree
Grand Jury

VERDICT

Guilty or Not Guilty

Foreperson Jan Johnson
Petit Jury

Date: 2-28-99

Circle Unanimous Verdict

STATE OF SOUTH CAROLINA)
) INDICTMENT #98GS18-0078
County of Dorchester)

At a Court of General Sessions, convened on January 19, 1998, the Grand Jurors of Dorchester County present upon their oath:

COUNT: CRIMINAL SEXUAL CONDUCT - FIRST DEGREE
(16-3-652)

That Kenneth Simmons did in Dorchester County on or about September 1, 1996, wilfully and unlawfully engage in criminal sexual conduct in the first degree in that Kenneth Simmons, engaged in sexual battery with Lilly Bell Boyd, the victim, and did use aggravated force to accomplish such sexual battery and/or that the said Lilly Bell Boyd submitted to sexual battery by the said Kenneth Simmons under circumstances where Lilly Bell Boyd was also the victim of forcible confinement, Robbery, Extortion and/or Burglary.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR Walt Bag

STATE OF SOUTH CAROLINA)
COUNTY OF Dorchester)
STATE VS.)
Kenneth Simmons)
AKA:)
Race: B Sex: M)
DOB: [redacted] Age:)
SSN: [redacted])
DL#:)
SID#:)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE# 5468
98 -GS- 18 - 0079
A/W#: F719274
Date of Offense: Sept. 1, 1996
S.C. Code § : 16-3-910
CDR Code #: 019418

SENTENCE

☐ PLEA ☑ TRIAL

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS TO: Kidnapping in violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 019418

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

William Hall
Solicitor

Kenneth Simmons
Defendant

Not applicable See 16-3-20
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of _____ days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ The Defendant is to be given credit for _____ days/months jail time.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

16-3-910
J.C. Cole

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee $ _____
Payment Terms: _____
☐ set by SCDPPPS _____
_____
Recipient: _____
_____
*Fine: .....$_____
§ 14-1-206 - Assessments 100%.....$_____
§ 14-1-211 - Surcharge.....$_____
(Exceptions: See § 14-1-211)
§ 56-5-2995 (DUI).....$_____
County (3%).....$_____
TOTAL.....$_____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund.
Other: _____
_____
_____

Clerk of Court/Deputy Clerk Cheryl Graham
Court Reporter: Addison

PRESIDING JUDGE Rodney A Peeples
Judge Code: 121110
Sentence Date: 3/2/99

White - Clerk *Green* - Corrections *Canary* - Probation *Pink* - Defendant

SCCA/217 (1/99)

WITNESSES

Det. R. Thomason

DOCKET #: 98GS18-0079

THE STATE OF SOUTH CAROLINA
County of Dorchester

COURT OF GENERAL SESSIONS

Term: January, 1998

THE STATE

vs.

Kenneth Simmons

ARREST WARRANT #:

F719274

Arrested on December 09, 1997

INDICTMENT FOR

0095

KIDNAPPING

(16-3-910)

ACTION OF GRAND JURY

TRUE BILL

By

Date

Foreman: [signature]
Grand Jury

VERDICT

Guilty or Not Guilty

Foreman: [signature]
Petit Jury

Date: 2-28-99

Circle Unanimous Verdict

STATE OF SOUTH CAROLINA)
) INDICTMENT #98GS18-0079
County of Dorchester)

At a Court of General Sessions, convened on January 19, 1998, the Grand Jurors of Dorchester County present upon their oath:

COUNT: KIDNAPPING
(16-3-910)

That Kenneth Simmons a/a in Dorchester County on or about September 1, 1996, wilfully and unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or, carry away Lilly Bell Boyd, without authority of law.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR Wade Ray