

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Court Judge

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CA No. 05-CP-18-1368  
Appellate Case No. 2014-000387

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**RECEIVED**

JUN 26 2014

**S.C. Supreme Court**

KENNETH SIMMONS, SK5066. .... *Respondent/Petitioner,*

v.

STATE OF SOUTH CAROLINA ..... *Petitioner/Respondent.*

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

### I.

Whether the PCR Court erred in failing to grant Simmons a new trial under circumstances where: (1) the State presented false, misleading, and unreliable DNA evidence; (2) the State failed to disclose material and favorable evidence regarding its DNA testing; and, (3) “there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction . . . in the interest of justice.” S.C. Code Ann. § 17-27-20(a)(4); *Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667 (1985).

### II.

Whether the PCR Court erred in failing to find that Simmons’ trial counsel was ineffective for not retaining a false confession expert. *Strickland v. Washington*, 466 U.S. 668 (1994).

## STATEMENT OF THE CASE

Kenneth Simmons is intellectually disabled.<sup>1</sup> In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court observed that “[intellectually disabled] defendants in the aggregate face a special risk of wrongful execution” as well as wrongful conviction. *Id.* at 321. The Court noted that, among other things, people with intellectual disability face an increased risk of false confession, they are less able to give meaningful assistance to their counsel, and they are typically poor witnesses. *Id.* at 320-21. The Court ultimately concluded that people who are intellectually disabled should be ineligible for the death penalty because, by definition, the “characteristics of [intellectual disability] undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.” *Id.* at 317; *see also Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014) (reaffirming that people with intellectual disability face a special risk of wrongful conviction). This case epitomizes that rationale. Simmons’ conviction rests exclusively on false DNA testimony and an incriminating statement obtained under circumstances known to produce false confessions.

Lilly Bell Boyd was an elderly, African-American woman who lived alone in Summerville, South Carolina. She was last seen alive in her yard on Saturday, August 31, 1996, and she was found murdered in her home the following day. She had been beaten, strangled, and sexually assaulted. The Summerville Police Department actively investigated the case for a year without success, prompting the State Law Enforcement Division (“SLED”) to form a task

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<sup>1</sup> The term “intellectual disability” replaces and has the same meaning as what was previously referred to as “mental retardation.” *See Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (citing Rosa’s Law, 124 Stat. 2643).

force to solve the case. The task force requested a suspect profile and then rounded up and interrogated nearly thirty men from the area who generally fit that profile.<sup>2</sup>

In October of 1997, a task force member suggested Simmons, a black man from Boyd's neighborhood, as a potential suspect.<sup>3</sup> Shortly thereafter, Simmons was arrested for placing two family packs of steaks down his pants at the Food Lion, and held until he could be questioned by task force members. From December 2-9, 1997, Summerville police detectives and/or SLED agents interrogated Simmons six times. He gave multiple incriminating statements and ultimately confessed to the Boyd murder. Simmons' statements are inconsistent, contradictory, do not correspond to any actual evidence, are highly implausible.<sup>4</sup> App. 4231. Moreover, there are several situational reasons to doubt the reliability of Simmons' incriminating statements, and his intellectual disability is foremost among numerous risk factors associated with false confessions. *See Atkins*, 536 U.S. at 320 n.25.

In addition to 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:

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<sup>2</sup> 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.

<sup>3</sup> As the solicitor later explained at trial, "[i]t didn't take a whole lot to get to be a suspect in this case, your honor." App. 1252.

<sup>4</sup> For example, Simmons was first interrogated by Detective Everett Howard. At that time, Simmons 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 Simmons a second time. At the conclusion of this interrogation, Simmons confessed to killing the person named Shorty. During a third interrogation, Simmons confessed to a murder in Traveler's Rest, South Carolina. All of these stories were later determined to be fictional. App. 4231.

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.

App. 1042.

The State's DNA testimony came from two expert witnesses employed by Lifecodes Corporation – Lauren Crane and her supervisor, Michael Baird.<sup>5</sup> They provided the only proof of the two factual propositions at the center of the purported DNA “match” around which Simmons' prosecution was built: (a) that vaginal swabs taken from the victim's body contained a mixture of the perpetrator's and victim's DNA; and, (b) that laboratory testing had shown a match between Simmons' DNA and the mixture from the victim at all nine of the genetic locations that had been examined. App. 1470-71. Based on this purported match, Baird further claimed that the statistical likelihood that someone other than Simmons contributed to the mixture was roughly 1 in a billion in the Caucasian population and 1 in 8 million in the African-American population. App. 1479-82.

*None of this testimony was true.* As discussed in greater detail below, the State's witnesses presented the jury with fabricated data to support their “match” conclusion, and the State failed to disclose evidence that would have revealed their expert testimony as false, as well as evidence strongly suggesting that *all nine* of Lifecodes' purported test results are unreliable.

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<sup>5</sup> Lifecodes was a private, for-profit biotechnology company located in Stamford, Connecticut. Ira Jeffcoat testified at trial that the evidentiary samples in this case were originally analyzed by SLED, but because the samples were too small and “very degraded,” SLED was forced to “farm them to a private laboratory” for a different type of DNA testing called PCR testing. App. 1431-33.

After this Court affirmed his convictions and sentence on direct appeal, *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004), Simmons sought post-conviction relief. The PCR Court conducted an evidentiary hearing and issued an Order Granting Post-Conviction Relief Pursuant to *Atkins*. App. 5296-5311. Apart from the *Atkins* claim, the PCR Court denied relief on the merits on all other grounds without discussion. App. 5311. The State filed a notice of appeal, and Simmons cross-appealed. This Court should deny the State's petition for a writ of *certiorari*, grant Simmons' petition, and award him a new trial.

### **REASONS THE WRIT SHOULD BE GRANTED**

#### **I. THE STATE PRESENTED FALSE DNA TESTIMONY AT TRIAL AND WITHHELD FAVORABLE, MATERIAL EVIDENCE.**

In support of his post-conviction claims, Simmons offered testimony from three DNA experts: Dr. Steven Lambert, a former DNA analyst and forensic department supervisor for SLED; Dr. Charlotte Word, formerly the Senior Manager, Forensic and Laboratory Director at Orchid Cellmark; and, Dr. Robin Cotton, a professor and program director in Biomedical Forensic Sciences at Boston University School of Medicine.<sup>6</sup> The parties also offered numerous exhibits and the deposition testimony of Lauren Crane and Michael Baird, the Lifecodes employees who provided the State's trial testimony. The post-conviction record establishes beyond any reasonable dispute that the State's DNA evidence at trial was false, misleading,

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<sup>6</sup> All three experts testified that the vast majority of their previous testifying experience was on behalf of the prosecution for various state and federal agencies. App. 4074, 4927, 5003-04. Moreover, Dr. Word provided a substantial portion of her work *pro bono*, App. 4975, and Dr. Cotton volunteered all of her time on this matter. App. 5006. Dr. Word explained that even though she had known Dr. Baird for over twenty years and considers him a personal friend, she felt compelled by "a huge scientific and moral obligation" to testify at Simmons' PCR hearing because she was "just overwhelmed at what was presented in this case at trial." App. 4976. All three experts reviewed a copy of the Lifecodes laboratory file and testing films. In addition, Dr. Word traveled to the Orchid Cellmark Laboratory in Dallas, Texas, where the original films are currently located and reviewed them in person. App. 4931.

unreliable and fraught with error. It also shows that the State failed to disclose favorable and material evidence in violation of due process.

**A. THE STATE’S WITNESSES TESTIFIED TO FABRICATED CTT RESULTS.**

During Lauren Crane’s testimony at trial, the State introduced a chart, labeled State’s Exhibit Number 24, which she described in detail. App. 1464-71. The chart depicts the nine genetic locations to which Crane testified. The first six locations were tested in early January of 1998 with 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 were tested approximately two weeks later by a single test known as CTT (to represent the three genetic locations it identifies: CSF1PO, TPOX and THO1). The chart, as it appeared before the jury, looked like this:

<u>ITEM</u>	<u>LDLR</u>	<u>GYPA</u>	<u>HBBG</u>	<u>D7S8</u>	<u>GC</u>	<u>HLAD0A1</u>	<u>CSE1PO</u>	<u>TPOX</u>	<u>TH01</u>
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

The first two rows of this chart depict the genetic results obtained from Lilly Bell Boyd's and Kenneth Simmons' *known* samples, respectively. The last four rows purport to show the results obtained from the evidentiary samples – *i.e.*, vaginal swabs taken from the victim's body (sample number F156384 and sample number F156386). Crane and Baird both testified that Simmons' DNA was consistent with the evidentiary samples at nine out of nine tested genetic locations. App. 1470-71, 1481-82. Exhibit Number 24 likewise represented to the jury that CTT results from Simmons' known sample were exactly the same as the CTT results obtained from the vaginal swabs. This testimony was false.

First, with regard to sample number F156384, Crane and Baird both admitted during their post-conviction depositions that a CTT test was *never* conducted on this sample because the sample was consumed before any CTT testing could be performed. App. 4723-24, 4733-34, 4798, 4807-08. Lifecodes' lab notes also indicate that sample number F156384 was completely exhausted before the CTT testing ever began. App. 4444 (lab record dated 1/15/1998, stating: "Note: No Sample 56384 left"); *see also* App. 4946-47 (Dr. Word testifying that a CTT test was never performed on this sample because "there was no DNA left for further testing").

Second, Lifecodes *did* complete a CTT test on sample number F156386, but the results reported at trial on State's Exhibit Number 24 are completely false. Crane testified that the CTT results for sample number F156386 were the same as those obtained from Simmons' known blood sample. In fact, the results that Lifecodes obtained from sample number F156386 *do not match Simmons' DNA*. App. 4805-4810, 4812-16, 4951. Instead, the CTT results from this sample were consistent with the victim's DNA alone, and they indicate only a single DNA profile – not a mixture of DNA from more than one person. App. 4951, 5048, 5054.

Thus, Exhibit Number 24 (and Crane's trial testimony regarding its contents) represented data that are completely unsupported by the laboratory's notes or test results. App. 5048. There are no records in this case that would support including Simmons as a potential contributor to the CTT results from the evidentiary samples taken from the victim's body. That is, the data presented to the jury at trial regarding the CTT tests were simply fabricated. *Id.* The exhibit, when corrected,<sup>7</sup> looks like this:

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<sup>7</sup> See App. 4944-52 for additional information regarding the bases for these corrections.

<u>ITEM</u>	<u>LDLR</u>	<u>GYPA</u>	<u>HBGG</u>	<u>D7S8</u>	<u>GC</u>	<u>HLADQA1</u>	<u>CSF1PO</u>	<u>TPOX</u>	<u>THO1</u>
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	<del>10, 11</del> 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	<del>10, 11</del> Not done	<del>10, 11</del> Not done	<del>7, 8</del> 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	<del>10, 11</del> 10, 12	<del>10, 11</del> 9	<del>7, 8</del> 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

Lifecodes never disclosed that it had conducted a CTT test on the evidentiary samples, nor did it ever report what those test results purported to show. In her deposition, Crane explained that Lifecodes never issued such a 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 do 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.

App. 4830-31.

The jury that found Simmons guilty never learned that the CTT results were inconclusive and lacked any evidentiary value relevant to Simmons' case. On the contrary, both experts falsely claimed that 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.<sup>8</sup>

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<sup>8</sup> The solicitor emphasized this false evidence in his opening and closing statements. In his opening statement, the solicitor told the jury:

In post-conviction, the State's witnesses could offer no coherent explanation for how this fabricated evidence ended up before the jury. Dr. Baird was deposed on September 24, 2010. He testified that some things on the trial exhibit appeared to be incorrect, that he hoped Lauren Crane would have a better recollection about those matters, and that he had no idea how that information got onto the exhibit. App. 4733-34. However, during her deposition on November 29, 2010, Lauren Crane repeatedly asserted that it was *Dr. Baird* who prepared Exhibit Number 24 in preparation for trial. App. 4799, 4800, 4803, 4806, 4809, 4815, 4821, 4823, 4827, 4828. She further claimed that she had never previously viewed the exhibit prior to her trial testimony, and that she just read the information off of the chart without realizing that it was incorrect because she assumed Dr. Baird had properly prepared it:

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[t]hey're going to 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 that you'll hear later on in this case.

App. 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. . . . In this case, as I said **they looked at nine locations.** Mrs. Crane had this chart she testified from. (Indicating.) I'll try to kind of go over what she said. Y'all will have this in the jury room. . . . And it's based the best way as I can put it, just kind of summarizing what she said. So you've got **nine different locations** . . .

App. 2005-06.

Q: It seems to me that you testified about this chart as State's Exhibit Number 24 for the State.

A: And at the beginning of my testimony I was asked if I had previously reviewed the chart that was a combination prepared to show the results, and my answer was, no, not – not recently, no. So the first time I saw that chart was when we were in court.

Q: All right. You said, "Not recently, no."

A: Right. And then he said, "Let me hand you the report."

Q: "Would that chart be of assistance to you in explaining to the jury the results of your PCR analysis?"

A: Right, because it had the types that were listed there.

...

Q: And the numbers that you said were "10,11"?

A: Right. Reading it from the chart, not looking at the gel and not having seen this chart before. Assuming that this chart was prepared by Mike and it was correct. I stated I had not seen this chart before that moment.

Q: Well, you said you hadn't seen it recently. You mean you had never seen it prior to it being shown at trial?

A: I had not seen that chart that they prepared for the court, no.

Q: Okay. So when you said that your findings were at 10,11, you were just reading off the chart, assuming the chart was correct. In actuality, the chart was incorrect?

A: Correct.

App. 4803-06.

Subsequently, on December 15, 2011, the State offered live testimony from Solicitor Walter Bailey who claimed that *he* prepared the exhibit in preparation for trial, but he stated that he did so only with data provided to him by Crane and Baird. App. 4649-50. Further, Bailey

initially corroborated Crane's story by insisting that "the exhibit was never given to anybody from Lifecodes prior to trial." App. 4652. He explained that he "intended to go over it with them, but they came in late. . . . [S]o the bottom line is I did not get an opportunity to go over the chart with her before she testified." App. 4653-54. On cross-examination, however, Bailey changed course and admitted that correspondence established that he sent the exhibit to Crane for review prior to trial. App. 4659; *see also* App. 4705 (letter from Bailey to Crane dated 12/21/98).

**B. THE STATE DID NOT DISCLOSE EVIDENCE INDICATING TESTING ERROR WITH REGARD TO ALL NINE GENETIC LOCATIONS.**

As explained above, the CTT results that Lifecodes actually obtained from the evidentiary samples were consistent with the victim's known blood sample only. In other words, the CTT results do not show a mixture of DNA at all. Rather, only a single DNA profile consistent with the victim is evident from the CTT tests. As Drs. Charlotte Word and Robin Cotton explained, this discrepancy indicates a testing error, since the CTT tests were performed on the same samples that were examined with the DQA/PM test, which Lifecodes claimed included a mixture of male and female DNA. Given that Lifecodes purported to find a mixture with the DQA/PM test results, "it is expected that DNA from a second individual should have been detected with the CTT testing of the same DNA." App. 5055. It simply cannot be true that the DQA/PM test results showed a mixture of DNA, but the subsequent, more sophisticated CTT tests showed only a single DNA profile.

Moreover, after obtaining the surprising CTT test results, Lifecodes conducted an additional test on February 9, 1998, called an "amelogenin" test. App. 5054; 4953. This test determines the gender for the source of a DNA sample, and it is therefore more colloquially called a "gender-typing" test. All of the samples tested with the gender-typing test showed only

an “X” chromosome, consistent with the DNA being solely from a female source. App. 5055; 4953-54. In other words, *no male DNA was identified* in the evidentiary samples. App. 5055. (“[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 evidentiary samples.<sup>9</sup>

The most likely explanation for the inconsistency between Lifecodes’ purported DQA/PM results and the findings of the CTT and Gender-Typing tests is error during the DQA/PM testing. App. 4955. And, the most likely factual scenario 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.<sup>10</sup> 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. App. 5048. 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

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<sup>9</sup> Other evidence also points to the possibility that there was never any sperm in these samples to begin with. 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.” App. 4312. 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. Crane’s “statement is awkward and hints that there may have been a problem confirming the presence of sperm.” App. 5050. Second, there is no documentation in the Lifecodes file verifying that sperm was identified in any of the crime scene samples. App. 5060.

<sup>10</sup> 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. Crane’s lab notebook indicates that she completed the DQA/PM testing for this case simultaneously with multiple samples from other cases. App. 5011-12.

DNA Analysis Methods in 1991.<sup>11</sup> App. 5060-61. Once again, Lifecodes never reported that it was not using reagent blank controls – even when trial counsel specifically requested information about the lab’s quality assurance program. *See* App. 4515-16.

In addition to the errors identified above, Lifecodes failed to follow a number of other generally accepted practices and procedures.<sup>12</sup> None of these errors was disclosed to trial counsel. As a result, the jury that ultimately convicted Simmons and sentenced him to death operated under the false impression that: (1) DNA evidence conclusively identified Simmons as

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<sup>11</sup> The reagent blank control process works as follows:

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.

App. 5061.

<sup>12</sup> For example, 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. But, no report or other information was provided to Simmons’ trial counsel. Crane explained during her deposition testimony that she thought the first CTT test did not run properly. App. 4810-11. However, she never reported this test or explained to trial counsel that she was discounting it. She testified that the lab notes related to the first CTT test were likely withheld from trial counsel because she did not specifically rely on that test. App. 4810-11. Indeed, Lifecodes failed to properly document, report and disclose much of its testing. On page 83 of the Lifecodes lab notebook, it is noted that Lifecodes received a blood sample for Sinclair Mazyck. App. 4377. However, there are no additional notes regarding Mazyck’s sample and no reports stating what results were obtained from this sample. App. 5062. Sinclair Mazyck was a suspect in the Boyd murder. He was identified by several people in Boyd’s neighborhood as having a motive and opportunity to commit the crime. He had a history of violence, particularly against older women. According to trial counsel, “Mrs. Boyd bore a striking resemblance to [Mazyck’s] former girlfriend.” App. 1345. Moreover, police believed that an unidentified shoe print left at the scene of the Boyd murder was consistent with Mazyck’s shoeprint. Trial counsel attempted to offer much of this evidence at trial, but the trial court excluded it as inadmissible under South Carolina’s rules for third-party guilt evidence. App. 1336-1351.

the perpetrator of the crime; (2) that there was no reason to question the accuracy or reliability of the State's DNA evidence; and, (3) the State's witnesses were entirely credible.<sup>13</sup> However, as the post-conviction evidence demonstrated, if the jury had known the truth about Lifecodes' numerous testing errors, reporting failures and general bad practices, there is – at a minimum – a reasonable probability that the jury would have concluded that the DNA evidence was unreliable and inaccurate and/or that the State's witnesses were not credible.

In fact, numerous courts have reached exactly that conclusion after receiving evidence that Dr. Baird and other employees of the Lifecodes lab (operating under Baird's direction) were engaged in a variety of unscientific, irresponsible and untruthful practices. *See, e.g., 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 v. State*, No. A-7963, 2004 WL 60771, at \*10 (Alaska Ct. App. Jan. 14, 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

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<sup>13</sup> Further, even if there was no reason to doubt the accuracy or reliability of Lifecodes' test results, Dr. Baird's testimony claiming odds of 1 in millions to billions was false and misleading, and it grossly misrepresented the potential strength of the evidence, even if the results had been unquestionably accurate. Dr. Baird's statistical calculations were simply incorrect, and Dr. Baird knew or should have known that his testimony on this point was false. As Drs. Word and Cotton explained:

It is never appropriate to report results in the manner used by Dr. Baird. . . . ***No credible forensic scientist would report the results from DNA testing in this manner.***

App. 5048; *see also*, App. 5156-64; 5015-16 (Dr. Baird's method of statistical calculation was “inappropriate” and “irresponsible”). Thus, even if Lifecodes' test results could be considered reliable, Dr. Baird's testimony regarding the potential strength of those results was false, misleading and incorrect.

prosecutors and defense attorneys against ‘over-sell[ing] DNA evidence’ or arguing ‘that DNA-typing is infallible.’”); *State v. Buckner*, 890 P.2d 460, 462 (Wash. 1995) (en banc) (finding reversible error where Dr. Baird incorrectly testified that DNA patterns in samples taken from the defendant and murder victim were unique in the population); *Caldwell v. State*, 393 S.E.2d 436, 443-44 (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.”); *People v. Castro*, 545 N.Y.S.2d 985, 996-997, 998 n.15 (N.Y. Sup. Ct. 1989) (finding, *inter alia*: (1) Lifecodes “failed in its responsibility to perform the accepted scientific techniques and experiments in several major respects”; (2) Dr. Baird misrepresented the standard measurement of error he used to reach his conclusions; and, (3) the method that Dr. Baird used to perform his statistical calculations was “scientifically unacceptable.”).

**C. SIMMONS IS ENTITLED TO A NEW TRIAL.**

The post-conviction evidence in this case establishes 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 withheld favorable 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, 432-38 (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 the PCR Court established both claims. There can be no genuine dispute of a reasonable likelihood that the State’s false DNA testimony affected the jury’s verdict. *See Napue*, 360 U.S. at 271. 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.”). The State falsely represented that it

had DNA evidence against Simmons with virtually infallible odds. The jurors would have had no reason to disbelieve that testimony, and it unquestionably affected their decision.

Moreover, the falsity of the State's representations was not uncovered at trial because favorable evidence was never properly disclosed to defense counsel in violation of *Brady* and its progeny. In particular, the State failed to disclose:

- The CTT results obtained for the victim's known blood standard.
- The CTT results obtained for the crime scene evidence.
- The fact that the CTT results did not incriminate Simmons; that the lab considered the CTT test results to be "inconclusive"; and, that 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, and even though defense counsel specifically requested information about the lab's quality assurance measures.
- The fact that Baird's statistical calculations were grossly incorrect and based on methods contrary to scientifically acceptable practices.
- Evidence of other errors and general bad practices by Lifecodes.

All of this undisclosed evidence is favorable to Simmons, either because it is directly exculpatory or impeaching (or both). The facts that: (1) the CTT test results did not match 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 Simmons must be absolutely excluded. Moreover, even if Lifecodes' purported finding of a mixture of DNA for the DQA/PM locations were correct,

Baird's statistical calculations were incorrect and grossly misleading, and all of the lab's other errors are impeaching because they raise serious doubts about the overall reliability of its work.

This favorable evidence was suppressed by those acting on behalf of the prosecution. *Brady's* obligations apply "irrespective of the good faith or bad faith of the prosecution." 373 U.S. 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. 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)).

Viewed collectively, the undisclosed evidence here must "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. 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 Simmons (a man with an average IQ of 69) after multiple, un-recorded interrogations. In *Gumm v. Mitchell*, No. 1:98-cv-838, 2011 WL 1237572 (S.D. Ohio Mar. 29, 2011), the federal district court found prejudice for a *Brady* violation in similar circumstances. 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.

*Id.* at \*8. The outcome in Simmons' case simply cannot be deemed "fair" or one in which we can have confidence.<sup>14</sup> 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 evidence developed during 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).

## **II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OFFER TESTIMONY FROM A FALSE CONFESSION EXPERT.**

Trial counsel challenged the admissibility of Simmons' statements by arguing that Simmons' cognitive functioning was so significantly impaired that he was not able to make a valid waiver of his *Miranda* rights. Trial counsel offered expert testimony to support this particular argument,<sup>15</sup> but failed to challenge the statements further by obtaining the advice and testimony of a false confession expert. At the time of Simmons' trial in 1999, the science and literature regarding the phenomenon of false confessions was prevalent in the legal and forensic psychology community, and there were a number of available false confession experts.

PCR counsel retained the services of Dr. Richard Leo, a highly acclaimed false confession expert and author of many books, papers, and clinical studies on the prevalence of

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<sup>14</sup> See, e.g., *Elmore v. Ozmint*, 661 F.3d 783, 851-55 (4th Cir. 2011) (holding that the State's flawed forensic evidence "had a palpably adverse effect on the defense," and Elmore was prejudiced by his trial counsel's failure to investigate the State's forensic evidence where such an investigation "would have exposed a multitude of questions about its legitimacy and reliability."); see also *id.* at 870 (Elmore suffered prejudice because, had the flaws in the State's forensic evidence been exposed, "there is a reasonable probability that the jury would have doubted the [SLED] agents' account—a conclusion that is bolstered by additional clear evidence that the SLED team was at least mistake-prone, as well as by other persuasive evidence that the agents were outright dishonest.").

<sup>15</sup> For example, Dr. Randy Waid testified that 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." App. 1780.

false confessions. Dr. Leo conducted a review of all the relevant materials, including the police investigation surrounding the crime, the circumstances involved in Simmons' multiple interrogations and various statements, and information regarding Simmons' intellectual disability. Dr. Leo testified by way of deposition and provided an affidavit setting forth several reasons to doubt the reliability of Simmons' statements.

First, Dr. Leo noted that Simmons' initial statements involving the fictional characters Shorty and Blackie and the multiple fictional murders that Simmons confessed to "are bizarre, incoherent, and clearly false," as well as "inconsistent, contradictory, and [contrary to] the physical evidence." App. 4235. Second, Simmons' ultimate confession to Boyd's murder contained many errors relating to essential facts about the crime. For example, Simmons stated that the murder happened on Friday night because he and his friend Derek always went to the club on Friday nights, but the victim was last seen alive on the following Saturday afternoon and the pathologist testified at trial that she was killed sometime on Saturday evening. App. 4235-36. Further, the victim's official cause of death was manual strangulation, but Simmons' confession stated that she was beaten and made no mention of asphyxiation or strangulation. App. 4236. The pathologist also testified that sperm was found in the victim's oral cavity and that she was raped with an object, but Simmons' statements do not include these facts. App. 1228. Moreover, Simmons stated that he picked up the victim's telephone to call 911, but fingerprints taken from the only telephone inside the house did not match Simmons. App. 1174-75.

Third, Dr. Leo concluded, "it cannot be demonstrated that Mr. Simmons provided any unique, non-public details that could not have been the product of contamination." App. 4236. The victim's death was widely discussed in the small community where both Simmons and the

victim lived. The victim's relatives who discovered her body lived just across the street from the house where Simmons often stayed with friends. Task force members went door-to-door throughout the neighborhood and interrogated nearly thirty men from the community. Moreover, immediately following the crime, the local media reported that: the victim was found with her hands and feet tied behind her; her front door had iron bars on it; the victim was raped and beaten; the victim was found lying on her kitchen floor; the victim's back door was ajar; police believed someone was waiting in her back yard and either slipped into her home while she fed her chickens or followed her inside when she finished; and that robbery was the apparent motive. App. 4235. Thus, all of the facts mentioned in Simmons' final confession were available publicly and/or could have been fed to him by his interrogators.

Finally, Dr. Leo explained that this case includes both "individual and situational factors associated with the eliciting of, and believed to cause, false confessions." App. 4236. The detectives and agents who elicited Simmons' statements never recorded the entirety of their interrogations, but only recorded, in some instances, the "recap" or conclusion of the interrogation. Thus, there is no objective record of what transpired during most of 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 Simmons told the interrogators throughout his various accounts. App. 4231. According to Simmons' recollection, the police told Simmons that they had unassailable evidence against him and continually accused him of committing the murder and implored him to tell them how he did it, to which Simmons could not answer. App. 4232. They asked leading questions suggesting an answer such as "are you sure you did not strangle her" and "did you rob her" or "did you hit her with a stick?" Simmons' speculative answers – "maybe I did" or "I could have" and "however you say I did it

is how I did it” – are often identified by false confession experts and literature as indicative of a potential false confession. App. 4232-33.

Moreover, Dr. Leo noted that intellectually disabled people in general “possess personality characteristics that increase their risk of giving interrogation-induced false confessions.” App. 4227. He explained:

[b]ecause of their intellectual deficits and limited social skills, the mentally handicapped and cognitively impaired are slow thinking, easily confused, concrete (as opposed to abstract) thinkers, often lack the ability to appreciate the seriousness of a situation, may not understand the long-term consequences of their action, and tend to have short attention spans, poor memory and poor impulse control. The mentally handicapped and cognitively impaired also tend to be highly submissive (especially eager to please authority figures), compliant, suggestible, and unable to withstand to high levels of stress or conflict.

App. 4233. In addition to his intellectual disability, Simmons possesses several other individual risk factors common in false confession cases, including memory problems, a history of blackouts, and personality traits like being eager to please, easily led and submissive. App. 4233.

In sum, there were several false confession experts available at the time of Simmons’ trial who could have testified about false confessions and the many risk factors present here. App. 4238. Such an expert could have described academic studies and police interrogation training manuals that indicate how police use a variety of manipulative and deceptive interrogation methods and strategies to elicit confessions and how these methods, when misapplied to innocent suspects, especially the mentally handicapped, can and do lead to false confessions. App. 4225-38. The testimony of a false confession expert would have significantly undermined the jury’s confidence in the reliability of Simmons’ statements and, accordingly, trial counsel’s failure to offer this testimony raises a reasonable probability that the outcome of the trial would have been

different.<sup>16</sup> Trial counsel was ineffective for failing to retain a false confession expert. *Strickland v. Washington*, 466 U.S. 668 (1984).

### CONCLUSION

The State relied on false DNA evidence to secure Simmons' conviction. The jurors did not know that, in fact, Lifecodes' testing was wholly unreliable and fraught with error. Moreover, the State violated its *Brady* obligations by failing to disclose the relevant evidence that would have made trial counsel aware of these issues. Finally, trial counsel failed to adequately challenge the reliability of Simmons' statements with readily available expert testimony – particularly where Simmons' intellectual disability was foremost among numerous risk factors associated with false confessions. For all of the foregoing reasons, this Court should grant *certiorari*, reverse Simmons' convictions and award him a new trial.

Respectfully submitted,

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BY:   
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<sup>16</sup> Approximately 30% of all DNA exoneration cases have involved some form of false confession. “People with mental disabilities have often falsely confessed because they are tempted to accommodate and agree with authority figures. Further, many law enforcement interrogators are not given any special training on questioning suspects with mental disabilities.” The Innocence Project, “Understand the Causes: False Confessions,” available at: <http://www.innocenceproject.org/understand/False-Confessions.php>.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Court Judge

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CA No. 05-CP-18-1368  
Appellate Case No. 2014-000387

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KENNETH SIMMONS, SK5066. . . . . *Respondent/Petitioner,*

v.

STATE OF SOUTH CAROLINA . . . . . *Petitioner/Respondent.*

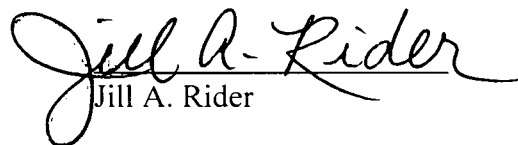
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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a copy of Respondent/Petitioner's Petition for Writ of Certiorari was served by first class United States mail, postage prepaid, this 26<sup>th</sup> day of June, 2014, upon the following:

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