

STATE OF SOUTH CAROLINA  
In the Supreme Court

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

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**S.C. Supreme Court**

C/A No.: 2005-CP-18-1368  
(Capital PCR Action)  
Appellate Case No. 2014-000387

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Kenneth Simmons, #5066,

Respondent/ Petitioner

vs.

State of South Carolina,

Petitioner/Respondent.

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PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a capital defendant may meet the preponderance of evidence burden of proof required to demonstrate mental retardation to avoid a death sentence where the record reflects a pre-*Atkins* determination by three medical professions that applicant was not mentally retarded in 1999; a 75 IQ test score from 1999; and, to attempt to show onset before age 18, he must rely on historical facts that are not probative of the legal conclusion.

## STATEMENT OF THE CASE

This matter comes before the Court by way of the State's appeal from a PCR order vacating Respondent/Petitioner's death sentence upon a finding of mental retardation. The Honorable Doyet A. Early, III, discounting a pre-*Atkins* rejection of mental retardation<sup>1</sup> at trial, a 75 IQ test score in 1999, un-contested evidence of drug use and family trauma accounting for lower performance in the final years of school academics and in post-eighteen years old mental function, found Respondent/Petitioner mentally retarded. Judge Early summarily rejected all other issues and remanded to the Court of General Sessions in Dorchester County for resentencing to life imprisonment. The following history preceded the grant of relief.

### *Procedural History*

Respondent/Petitioner, Kenneth Simmons, SCDC 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. Peebles, the jury found

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<sup>1</sup> Petitioner/Respondent, the State, acknowledges this specific condition is now referenced as "intellectual disability." *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). As the term "mental retardation" was used throughout the trial and the post-conviction relief proceedings, the State continues to use the term "mental retardation" in this particular case for continuity.

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 five (5) statutory aggravating circumstances: criminal sexual conduct, kidnapping, armed robbery, physical torture, and 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.

(App. p. 2381-82).

The trial judge also instructed the jury to consider "any nonstatutory mitigating circumstance," including specifically: "(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; or (3) The defendant's intoxication at the time of the crime." (App. p. 2382).

On March 2, 1999, the jury found the existence of each aggravating factor, and unanimously recommended a sentence of death. (App. p. 2454-2458). Judge Peoples allowed Respondent/Petitioner to address the Court before sentencing and he stated: "Your Honor, Yes; *I want to apologize to the family,*" and continued:

*I want to apologize to y'all. I hope y'all can forgive me for what happened. I love you; always will; always pray for you. My family, I love y'all, and I will be praying for y'all. And jury, you know I forgive you for judging me, but y'all have to do what you have to do and the way y'all feel about it and what y'all have seen. I can accept that. And I love y'all, too.*

(App. p. 2465) (emphasis added).

On that same day, Judge Peeples sentenced him 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. (App. p. 2467-2469). In imposing sentence, Judge Peeples, having also heard the evidence, noted:

... it is indeed a sad commentary that any citizen, whether in Dorchester County or anywhere in South Carolina or otherwise, should have to endure and suffer such an atrocious and brutal death as did Mrs. Lilly Bell Boyd. Every person under our law and our constitution and the morays of society, regardless of their walk or station in life, is guaranteed the right to be safe and secure in their homes. What we've heard here for the last eighty days is just another example of human tragedy directly caused by crack cocaine. An eighty-nine year old lady living alone, apparently a fine person, active in her church and in her community, a victim of burglary in her own home; armed robbery, kidnapping, physical torture, and with her hands tied behind her back was raped, fourteen ribs broken, then strangled to death all because the defendant was high on crack cocaine or because he need more money to buy more crack cocaine for his addiction. ...

(App. p. 2467).

Respondent/Petitioner moved for a new trial on an alleged instructional error, and to have a life sentence imposed because “[t]here 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 of the United States Constitution.” (App.p. 3223-24). The judge denied relief noting 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 he gave a series of mitigating circumstance instructions. (App. p. 3228).

On direct appeal, Respondent/Petitioner raised issues on evidentiary rulings, dismissing a juror, and the failure to charge robbery as a lesser include offense. (App. pp. 3260-3261). On June 20, 2002, while the direct appeal was pending, the United States Supreme Court issued *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.E.2d 335 (2002). On July 26, 2002, Respondent/Petitioner made a “*Motion to Allow Supplemental Briefing in Light of Atkins v. Virginia.*” (App. pp. 3528-3531). The motion was denied on September 19, 2002, without prejudice to renew the request following a decision in *Franklin v. Maynard*. (App. p. 3534). The *Franklin* action was initiated by petition for certiorari from several death-sentenced individuals (including Respondent/Petitioner) requesting procedures to be developed in light of *Atkins*. (See App. pp. 3379- 3395). This Court stayed the direct appeal pending the *Franklin* decision. (App. p. 3534). On November 3, 2003, this Court decided *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). On December 12, 2003, Respondent/Petitioner petitioned to allow supplemental briefing in light of *Franklin*. (App. pp. 3440-3445). His petition was denied January 28, 2004. (App. p. 3446). This Court 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. (App. pp. 3447-3458). See also *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004). Respondent/Petitioner filed a petition for rehearing on July 15, 2004, (App. pp. 3459-3463), which was denied on August 9, 2004, (App. p. 3465), the same day the remittitur was issued, (App. p. 3467). Respondent/Petitioner filed a petition for writ of certiorari in the Supreme Court of the United States on November 8, 2004, which included a challenge to this Court denying permission to brief the mental retardation issue. (App. p. 3479). The petition was denied on January 24, 2005. (App. p. 3581).

The post-conviction relief action followed and resulted in the Order now on appeal.

### *Petitioner/Respondent's Statement of Facts*

On Sunday, September 1, 1996, between 5 a.m. and 6 a.m., Respondent/Petitioner, 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, Respondent/Petitioner 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. Respondent/Petitioner 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.

Respondent/Petitioner 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 Respondent/Petitioner's semen in Mrs. Boyd. Later, he 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 Respondent/Petitioner was found in a vaginal swab sample from the victim.

### **ARGUMENT**

"On certiorari in a PCR action, the Court applies the 'any evidence' standard of review." *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This "Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court." *Id*

(emphasis added). “However, this Court will reverse if there is no *probative* evidence to support the PCR court’s findings or the decision is controlled by an error of law.” *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008) (emphasis added). “Probative” is defined as “tending to prove or disprove.” Black’s Law Dictionary (9<sup>th</sup> ed. 2009). In short, this Court gives deference to the PCR judge’s factual findings but is not bound to accept the legal weight of those facts. *Miller*, 379 S.C. at 115-116, 655 S.E.2d at 599 (“Although we are cognizant of our deferential standard of review, we find there is no probative evidence to support the PCR court’s findings of fact and conclusions of law regarding trial counsel’s effectiveness.”). The legal determination regarding mental retardation as a categorical bar to a death sentence necessarily requires an analysis of the legal sufficiency of the factual findings. *See Ybarra v. State*, 247 P.3d 269, 276 (Nev. 2011) (“the determination whether a capital defendant is mentally retarded is based on factual conclusions but requires distinctively legal analysis to determine whether the elements of mental retardation have been proven, and therefore, we will review such a determination as a mixed question of fact and law.”). In light of the full record here, Respondent/Petitioner (“Simmons”) did not meet his burden of proof.

Prior to the PCR proceedings, Simmons had not been diagnosed as mentally retarded. In fact, a report made in anticipation of 1999 capital trial rejected a diagnosis of mental retardation. The examiners determined a full scale IQ score of 75. In the PCR proceedings, the PCR court rejected the 1999 testimony and conclusions; rejected uncontested and substantial drug use as affecting intellectual functioning; and accepted a new medical opinion finding mental retardation. Further, each historical fact relied upon by the PCR judge in determining adaptive function and onset before age 18 was, at best, equally susceptible to support the finding as not, thereby limiting its use to meet the burden

of proof.<sup>2</sup> What cannot be contested on this record is there was no evidence of diagnosis before the age of eighteen or any IQ test of seventy or below which may definitively suggest mental retardation independent of the vague backward looking opinion accepted below. Further, the primary information presented in support of finding “significant deficits in adaptive behavior” was interpreted by a social worker, who on cross-examination, repeatedly admitted the skewed presentation of the selected examples offered on direct. The PCR judge should not have found mental retardation on the whole of the evidence before him. Relief is not warranted. See generally *James v. Otis Elevator Co.*, 854 F.2d 429, 432 n.3 (11<sup>th</sup> Cir. 1988) (“The record contains no direct evidence that either condition existed at the time of Otis’ inspection. The circumstantial evidence on this point is in equipoise” thus fact has not been “proven by a preponderance of the evidence”).

In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002),<sup>3</sup> the Supreme Court of the United States held that executing mentally retarded individuals constitutes cruel and unusual punishment under the Eighth Amendment, 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 Supreme Court has just recently in *Hall*

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<sup>2</sup> It is of no little note that the burden of proof required in Georgia is beyond a reasonable doubt. That heightened burden has been upheld in federal review. See *Hill v. Humphrey*, 662 F.3d 1335, 1338 (11<sup>th</sup> Cir. 2011), *cert. denied* 132 S.Ct. 2727 (2012). The burden of proof is tied directly to the court proceedings at issue and not simply the possibility of the condition. The medical community does not use a preponderance standard to diagnosis. It may be safely assumed that the medical community will not have consensus on a diagnosis unless the case is so severe as to remove all serious disagreement. This is not such a case.

<sup>3</sup> This Court allowed for such claims in cases tried prior to the *Atkins* categorical bar to be raised in a post-conviction relief setting. *Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003).

*v. Florida*, \_\_\_ U.S. \_\_\_, \_\_\_, 134 S.Ct. 1986 (2014) acknowledged one restriction on the states' ability to define the condition for Eighth Amendment purposes – that the states may not impose an IQ test score cutoff without consideration of the test's standard error of measurement.<sup>4</sup> Another subtle yet clear guidepost was acknowledged in *Hall* – the closer one tests to 75 on an IQ test, the more narrow the possibility becomes to establish the condition and a more pronounced level of adaptive deficits must be shown.<sup>5</sup> See *Hall*, 134 S.Ct. at 2001 (quoting DSM-5, at 37 (“[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is

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<sup>4</sup> *Hall* addressed the constitutionality of mandatory cutoffs for consideration of the disability. Having none, *Hall* does not directly impact South Carolina at all.

<sup>5</sup> Again, the holding in *Hall* was simply that Florida's interpretation of its statute requiring a bright-line cutoff of 70 failed to take into account the test's own standard error of measurement (“SEM”). Indeed, the Court concentrated on the difference between 70 and 71, not a range of five or ten points on either side of the attained score. *Hall*, 134 S.Ct. at 2001. The majority also noted the SEM for the WAIS-IV is actually 2.16. *Id* at 1995. However, the Court did not indicate the result of varying ranges based on actual test SEM. The adoption of two SEM for a ninety-five (95%) confidence rate when an actual test SEM was rated at 5 has been rejected by the Fourth Circuit for unsound results:

“[T]he application of a 95% confidence interval would permit diagnoses of mental retardation well above what has previously been considered the approximate upper bound for a finding of subaverage intellectual functioning.... If the court were to apply a 95% confidence interval to an IQ test with an SEM of 5, then a person could conceivably be diagnosed with mental retardation if his observed IQ score were 80—i.e., two SEMs above 70. So far as the court is aware, no court or clinician has made a finding of mental retardation based on such a high IQ score, and neither the AAIDD nor the APA has ever suggested that such an IQ score would be an indication of significantly subaverage intellectual functioning....

*United States v. Salad*, 959 F.Supp.2d 865, 872 (E.D.Va. 2013). This is a dramatic showing of how requiring the application of two SEM in a legal context would be in stark conflict with medical consensus. However, whether actual test SEM or one average range of possible SEM will control is not addressed in *Hall* and will likely generate additional litigation. See *id*, at 2010-2011 (J.Alito, dissenting). Specific to this case, though, Dr. Tasse agreed that if the “assume[d] ... confidence interval” of plus or minus five results in five being added to the 75 score, the IQ was 80 and Simmons could not be diagnosed as mental retarded under the prevailing norms. (App. p. 3977).

comparable to that of individuals with a lower IQ score”). 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) (emphasis added). “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).<sup>6</sup>

Whether Simmons is mentally retarded has been a contested issue from the 1999 trial to the presentation at the PCR hearing. Respectfully, Petitioner/Respondent submits that Simmons did not meet his legal burden of proof upon probative evidence of mental retardation. There is evidence in the record from the report and testimony from pre-*Atkins* evaluations and opinions that should have objected defeated the claim. The historical facts simply are not probative and at best rest in equipoise on the issue. This is admittedly a close issue, but the mere fact that an issue is close does not satisfy the burden of proof.

#### *Trial Testimony*

The presentation at trial primarily focused 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 South Carolina Department of Disabilities and Special Needs (“SCDDSN”), noted in the competency report that Simmons had been referred to them upon indication of mental retardation. The report was introduced

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<sup>6</sup> The PCR judge also indicated it he “reject[ed] Respondent’s argument that the Court should adopt a definition of mental retardation different from one approved by the South Carolina Supreme Court in” *Franklin*. (App. p. 5449). This is a curious finding when Respondent never suggested a different definition. Respondent consistently relied upon *Franklin* and the state statute quoted therein. See, for example, App. pp. 3973-3976 (cross examination of Dr. Tasse on state definition and discussion of that definition). Respondent may only assume that the PCR court misapprehended the argument on preponderance of the evidence.

at trial as State Exhibit 8 and in the PCR as State's Exhibit 5. (See App. p. 4485). In the report, Dr. Sandler and McAbee opined that Simmons was not mentally retarded with a reasonable degree of scientific certainty. In their conclusion, they reported:

... 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. . . .

(App. p. 4489). The report indicates that in addition to police records, the examiners had interviewed Simmons on four (4) occasions for approximately two (2) hours each meeting for around eight (8) hours. The examiners considered his high school transcript noting that he had completed eighteen (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 11<sup>th</sup> Grade Basic English and an A in remedial English in the 12<sup>th</sup> grade. They noted he had received grade equivalent scores in achievement tests in the 11<sup>th</sup> 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. (App. pp. 4485-4487).

The DDSN examiners noted that in forensic evaluations since his arrest that Simmons 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.<sup>7</sup> Concerning their own testing, 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 was 12 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 malingering.** 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 50<sup>th</sup> percentile); Picture Arrangement and Block Design tests (scaled scores of 8; the 25<sup>th</sup> percentile). His lowest sub-test scores were in the Information and Digit Symbol tests (scaled scores of 2; the 0.4 percentile rank. ...<sup>8</sup>

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<sup>7</sup> The examiners also noted much higher scores on other tests to determine IQ – age 7, 94, and at age 9, 104, both on the “Primary Abilities Test” – and, also at age 9, a 69 on the “Short Form Test of Academic Aptitude.” (App. p. 4487). These tests are simply not referenced at all in the PCR judge’s Order, rather, the PCR judge omitted any reference to these tests stating: “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.” (App. p. 5438). Also challenging for the correctness of the PCR judge’s factual findings is the fact that Simmons’ PCR expert only relied upon five tests – four given around the time of trial (1999) when Simmons was 37 years old, and one given for the PCR, ten years later. (See App. p. 4281). The PCR court’s finding of “un-contradicted” evidence, six tests, and thirty years, well-demonstrate a view of facts not supported by the facts of record. Further, though not standard instruments for measuring IQ, the primary mental abilities tests have been referenced in reviewing the history of similar cases. See, for example, *Moore v. Quarterman*, 342 Fed.Appx. 65 (5<sup>th</sup> Cir. 2009). Dr. Waid referenced them in his trial testimony. (App. p. 1781). Simmons’ PCR expert acknowledged them but discounted them because of the thirty point difference. (App. p. 3959). Still, they are the only pre-18 tests available, and it is uncontested Simmons was never diagnosed as mentally retarded either in school (though his sister was in the same school system) or for trial or at any time prior to *Atkins*. During Ms. Hammock’s testimony about school, the PCR court questioned her about these scores. (App. p. 3847). Ms. Hammock explained, “Well, they are group administered and there is some question about that validity” but also conceded the tests did not show a need for special placement. (App. pp. 3847-3848).

<sup>8</sup> The Supreme Court recently noted in *Hall*: “Petitioner does not question the rule in States which use a bright-line cutoff at **75 or greater**, Tr. of Oral Arg. 9, and so they are not included alongside Florida in this analysis.” *Hall*, 134 S.Ct. at 1996 (emphasis added). And as referenced in n. 5 supra, the test actual SEM may be controlling. Petitioner

(App. p. 4487) (emphasis added). 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. (App. p. 4487). 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. (App. p. 4488). 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 led a Bible discussion with other inmates and followed the rules of chess while playing other inmates.<sup>9</sup> (App. p. 4488).

The examiners also report their own observations of Simmons. (App. p. 4488). 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

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did not rely on actual test SEM, but a broad average range. At any rate, using even five points places Petitioner at 70 not below, and equally places him at 80 statistically speaking. Recalling this is a statistical probability issue, one must consider that the more one moves to the outside of the bell curve on either ends, the less probable the lower ends represent the true score. Further, one must keep in mind that it is well-accepted that while possible to fake a low score, it is not possible to fake a higher score. See *id.*, at 2011 n. 13 (J. Alito, dissenting, quoting Forensic Psychology). See also *Green v. Johnson*, 515 F.3d 290, 299 (4<sup>th</sup> Cir. 2008) (“Both of these witnesses testified that Green is not mentally retarded and that although it is possible for a person to fake a lower I.Q. score, it is not possible to fake a higher score.”).

<sup>9</sup> This statement is from the report. Dr. Sandler testified at trial that he had received information at the time that Simmons was seen reading magazines and that he was playing chess, but that it was later stated to him that Simmons was playing checkers rather than chess. At any rate, that was not basis of the opinion. (App. p. 1729). Dr. Sandler also testified that while had been told that Simmons was leading a Bible study group, he also later learned that Simmons “was involved in a Bible discussion group on a daily basis with other inmates.” (App. p. 1730). Ms. Hammock, in her PCR testimony, similarly admitted conflicting reports as to his extent of involvement. (App. pp. 3893-3894).

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 as a sign of malingering. (App. pp. 4488-4489). The PCR judge, though, did not find either the observed evidence of malingering, or the disparity in verbal and performance testing, (see App. p. 4487), as “persuasive” where there were also memory tests did not show malinger, (App. p. 5440).<sup>10</sup>

During the 1999 trial Dr. Sandler testified at competency hearing. (App. pp. 2593-2671).<sup>11</sup> In particular, Dr. Sandler opined that he was not mentally retarded. (App. pp. 2623-2625). 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. (App. p. 2623). However, he opined that Simmons was a malingerer, noted that his memory was remarkable when he wanted it to be. (App. p. 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. (App. p. 2626). Dr. Sandler noted on cross-examination that they took into consideration his elementary grade school scores into account. (App. p. 2658-59).

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<sup>10</sup> One of the record sites added in support of the PCR judge’s determination is App. pp. 1643-1645, actually only reflects a report of not malingering “at least as far as the test went and the results of the test....” (App. p. 1645). The same individual, Dr. Behrmann, also noted “concerns were raised about the potential form of malingering....” (App. p. 1643).

<sup>11</sup> An issue was raised concerning a disciplinary sanction against Dr. Sandler in 1989 in Pennsylvania. Neither defense counsel nor the solicitor were aware of the sanction at the time of trial, but the sanction resulted in the doctor being subject to supervision. At the time of trial, Dr. Sandler was a court witness independently employed by DDSN. He was adequately licensed to render an opinion. Further, it was not merely his opinion, but co-authored by Dr. McAbee. There is no claim that the testing was not completed as reported.

Dr. McAbee testified that Applicant was not mentally retarded. (App. pp. 2699-2702). 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. (App. p. 2702). The doctor testified that the February test scores were above the range of mental retardation. (App. pp. 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. (App. p. 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. (App. p. 2701).

At trial, other experts confirmed Simmons suffered from "an alcohol related persisting dementia," (App. pp. 1526-1530, Dr. Foxworth); and functioned in a "mentally deficient range," (App. p. 606 and pp. 1620-21, Dr. Saylor; p. 1690, Dr. Vidic). Another doctor, 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, (App. p. 1652), but noted, based solely on IQ scores, that mental retardation could be suspected, (App. p. 1675). He deferred to DDSN to make the diagnosis, if applicable. (App. p. 1674). Dr. Sandler, of DDSN, testified, again, that he concluded, from his testing and evaluation, that Simmons was not mentally retarded. (App. p. 1740).

Lastly, Lewis Randolph Waid, an expert in clinical and forensic psychology, and neuropsychology, testified, definitively, to an absence of mental retardation. (App. 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. (App. p. 1778). Dr. Waid opined that Simmons substance abuse was the cause. 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 ...” (App. p. 1778). He stated that Simmons was in the lower two percentile, that he was not an intellectual giant, and “from the first grade on, was failing behind...” (App. pp. 1780-1781). Dr. Waid continued: “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....” (App. pp. 1781-82). In sum, he was low average, not mentally retarded. Dr. Waid noted that Simmons’ 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. (App. p. 1782). He considered the evidence of Simmons overdose an incident with a high potential to affect his brain. (App. p. 1783). Dr. Waid testified mental retardation was not “an appropriate diagnoses for him.” (App. pp. 1881-1882). (See also App. p. 1897, lines 5-6, “he’s definitely not meeting the diagnostic criteria for mental retardation.”).

#### *PCR Testimony*

During the PCR hearing, Simmons presented Dr. Marc Tasse, a clinical psychologist and psychology professor from the Ohio State University. (App. p. 3916). He was qualified as an expert in mental retardation. (App. pp. 3922-3924). Dr. Tasse opined:

Based on the records and the previous psych evaluations in terms of intellectual functioning, adaptive functioning and information from the social history, in terms of the records and largely from information I heard Ms. Hammock discuss with me and presented today, Kenneth Simmons presents all three prongs and meets the definition of mental retardation.

(App. p. 3953).

Dr. Tasse considered all five (5) of Simmons' IQ tests scores over ten (10) years (see n. 7 supra) were below the cut-off for mental retardation, and specifically stated he saw, but did not consider, the school testing of 94 and 104 and 69 as "no individual should have a discrepancy essentially more than 30 to 35 points," and the test was old. (App. p. 3959).<sup>12</sup> He opined that "Mister Simmons' I.Q. scores have been fairly consistent *over these ten years of testing* across these five testing sessions, four different instruments, all between '66 to 75 full scale I.Q." (App. p. 3959) (emphasis added). Mr. Simmons was thirty-seven (37) years old at the time of the 1999 testing. (App. p. 4485).

As to adaptive functioning, Dr. Tasse testified he was satisfied by Dr. Keyes' (who retained by defense for trial preparation) 1999 testing – his interviews of Simmons, Simmons' ex-wife and an older sister and utilizing the Vineland Adaptive Scale – which reflected scoring indicating "significantly below average." (App. p. 3961).

Dr. Tasse found that "onset before 18" prong was more challenging to satisfy and he had to get more information from the social worker for the PCR action, Ms. Hammock:

The onset before eighteen is really the more challenging one in his case and I had requested when we met that I wanted to meet with Ms. Hammock because you had told me Ms. Hammock was interviewing family members and getting the history and the social history and my sense from the information I got from Ms. Hammock, looking at school records, looking at achievement scores. You know, the achievement scores are showing that this individual, Mister Simmons, was struggling in school. I mean, he's reading at a -- I understand that he has a high school diploma, but when we assess his reading, his arithmetic, his writing, he's at a first, second, third, grand reading level. So, clearly, there's some significant deficits in functional academics.

(App. p. 3962). Dr. Tasse discounted the effect of drugs and alcohol. (App. p. 3963). On cross-examination, Dr. Tasse conceded he reviewed existing materials to make his opinion. (App. p. 3971). When asked if he evaluated Simmons, he responded: "I reviewed the

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<sup>12</sup> Simmons' social worker for the PCR proceedings, Ms. Hammock, opined that there could be any number of reasons for sickness, lack of sleep, not paying attention, absence from the room for a comfort break. (App. p. 3864).

materials, the previous evaluations and I rendered an opinion based on the materials that I reviewed.” (App. p. 9372).

Dr. Tasse admitted that based upon the 75 score an examiner could conclude that a person was not mentally retarded. (App. p. 3979). Dr. Tasse conceded he relied upon the previously completed Vineland scales though he knew neither the specifics of testing structure or timeframe reference for the abilities reported. (App. p. 3983-3985). Dr. Tasse conceded that Applicant was not diagnosed as mentally retarded at any time in elementary school or high school. (App. p. 3985-3986). Dr. Tasse testified he did not test Simmons, though he suggested another IQ test may be helpful. (App. p. 3991). 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. (App. p. 3992).

Dr. Tasse testified, “I met with him but I did not interview him for the purpose of doing an adaptive behavioral evaluation,” but relied upon prior records. (App. pp. 3996 and p. 3999). He admitted, though, that there was information that Simmons had a joint checking account with his wife, yet Dr. Tasse was not aware whether Simmons understood the value of money, and the “poor money concepts skills” was based upon a Vineland test done by individuals who had little contact with Simmons for 17 years. (App. p. 3998). 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, but rather circuitously reasoned that the 1999 test at age 37 was adequately indicative of pre-18 function. (App. pp. 3998-3999). 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 *quite contrary to Simmons*, was identified as having mild mental retardation *through the school system*. (App. p. 4001). He stated that he was also unaware of any developmental delays. (App. pp. 4002-4003). He noted Simmons played football but rejected that he had shown self-esteem for the record when he announced his pride in the team's record. (App. pp. 4003-4004). Dr. Tasse further discounted that Simmons had gotten his driver's license, emphasizing that he lost his license when he was driving an uninsured vehicle. (App. pp. 4004-4005). Dr. Tasse conceded Simmons 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. (App. pp. 4009-4011). Dr. Tasse admitted that each of these factors would be looked at to assess adaptive functioning. (App. pp. 4013-4014).

Social worker Marjorie Hammock testified about her social history report. She testified that Simmons was "very devoted to his mother and ... one of the earliest events that was pretty traumatic for him was the loss of his mother when he was in his late teens and he had had a major role in taking care of her, so it was even more crucial to him that he lost her." (App. p. 3832). Though he "experimented with alcohol when he was about seventeen," "according to all the reports" his use of alcohol increased after his mother's death, and he moved on to cocaine. (App. p. 3832). She testified that he accomplished chores and cooked, cleaned and took care of animals while at home. (App. p. 3836). On cross-examination, Ms. Hammock also conceded that Simmons did participate in extracurricular activities in school, including football. She noted that he was able to receive letters for playing and was able to make grades (though she spoke with teachers, whether or not they actually provided the grade ... implied ... that football players often got some preference in terms of grades to maintain their eligibility and even that was not rigidly enforced at the time according to

some of the things I read by coaches and things like that” expressly conceding that “there’s no evidence” of that, “there’s speculation”). (App. pp. 3865-3864). Ms. Hammock had noted that his academic performance declined in 1978 in the 11<sup>th</sup> grade when Simmons was seventeen years old, but conceded on cross-examination that was when Simmons mother died from diabetes. (App. pp. 3868-3869). 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. (App. p. 3869). She also noted that in 1978 he also began using marijuana and drinking. (App. pp. 3871-3872). She conceded not only that he did, nevertheless, graduate from high school, and noted his class rank was 531 out of 615. (App. pp. 3872-PCR 56-57). She noted that Simmons met his future wife Valerie in 1977 and they got married in 1982. (App. p. 3873). 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. (App. pp. 3878-3879). 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. (App. pp. 3875-3876; pp. 3879-3880). She stated his marriage was from 1982 through 1988, with separations within the period, and the two had two sons. (App. p. 3880). She state that she understood that his drug and alcohol problems caused the separation and his attendance problems at work. (App. pp. 3881-3883). Concerning his driving, she noted that he only had one accident that was reported to her four years after he had received his license. (App. pp. 3885-3887). Ms. Hammock confirmed that at the Palmetto House, he would do chores, followed the rules and was well-liked. (App. pp. 3889-3891). She confirmed that before the age of eighteen, he could care for himself and his ailing mother, would go to school regularly, groomed himself appropriately, kept a neat room, would go to church regularly upon his father’s instructions. (App. pp. 3891-3893). She also testified Simmons “was trained to lead Bible studies,” and she testified, she was told he lead studies in jail, though

she opined “there is some question about the actual leadership. He’s with a group. He’s in a group. They are all participating.” (App. pp. 3893-3894).

### *Analysis*

The evidence reflected a mixed picture, but, as the DDSN examiners and Dr. Waid concluded, there is probative evidence in the record that Simmons does not satisfy the elements of mental retardation. His 75 score from the 1999 test could support a conclusion that his IQ was not 70 or below, and could be up to 80. 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 shows an individual who was able to care for his ailing mother and a sister, evidenced good grooming and met his responsibilities at home, 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. His history reflected that the downward spin in his life was not the product of mental retardation, but a combination of life style changes after the death of his beloved mother with the pursuit of drugs and alcohol. This evidence, though surely available for mitigation, and known for presentation at the trial in 1999, is evidence which the jury could consider in the individualized sentencing proceeding he was afforded. Petitioner/Respondent notes that the judge charged the jury they could consider evidence of mental retardation and mentality in general as statutory mitigating circumstances. (App. p. 2381-82).

In an implicit concession to the known historical facts failing to support mental retardation, the PCR court, in the Order Denying Respondent’s Motion to Alter or Amend Pursuant to Rule 59, relied on untested allegations plucked from various affidavits

speculating from a school employee and friends that Simmons would not be able to graduate today, and he was “slow,” a “follower,” and “gullible.” (App. pp. 5442-5443). No person named in those affidavits testified at the hearing to allow the court to assess credibility. The affidavits are stale in time, often speculative and one dimensional in description and worth, but do not, at any rate, paint the dire picture appearing in the Order (in fact, the allegations are often contradicted by Ms. Hammock’s testimony about driving, jobs, and household duties before 18). (See App. pp. 4207-4219). The PCR court, in part based upon the presence of these varied sympathetic affidavits, summarily rejected Dr. Sandler and Dr. McAbee’s body of work in this case as a product of failing to utilize “appropriate clinical standards.” (App. p. 5442). Again, neither Dr. Sandler nor Dr. McAbee were called nor testified at the evidentiary hearing, but both professionals were employees of the state agency that was charged with determining mental retardation. (App. pp. 1712-1714; pp. 1735-1736). Dr. Sandler was the “chief psychologist for all forensic activities dealing with mental retardation, autism, head injury, and other special needs...”. (App. p. 1737). And, while the PCR court rejected the considered and lengthy report and opinion of DDSN examiners (including their consideration of personal meetings and evaluations, see App. pp. 1744-1745), it did so on a record where trial counsel investigated the possibility of mental retardation and had no expert who could establish mental retardation at the time. It simply is not unexpected that teachers, friends and relatives may feel sympathy for a death-sentenced inmate, but that does not undermine the professional opinions of the DDSN examiners, and, for that matter, Dr. Waid. Finally, the PCR court found the affidavit from Dr. Waid, (App. p. 4220), supports a lack of a full assessment. (App. p. 5446-5447). At bottom, the affidavit directly contradicts Dr. Waid’s trial testimony summarizing his work which included review of the social history by the defense social worker, (App. pp. 1752-1754; pp. 1784-1785), and his oft repeated opinion ruling out mental retardation, (App. p. 1778; pp. 1781-1783, in

review of school records and testing concluding, “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 in my opinion related to his life-style that has involved poly-substance abuse and dependence.... The lower your I.Q., the more that process including toxins like cocaine and substance affect you.... He has low average in my opinion, not mentally retarded. And I do believe the years associated with his abuse as well as potential blows to the head from his life-style has contributed to the diminished level of functioning he now has.”; p. 1782; p. 1795; 1873-1874, reviewing school records, “not the type of scores that would be associated with the intellectually deficiency afforded mentally retarded individuals either. They would be further behind and less efficient.”; p. 1879, decline since high school years; p. 1881-1882, does not fit criteria for mental retardation; p. 1897, “well, he’s definitely not meeting the diagnostic criteria for mental retardation.” ). It is correct to the extent the opinion was pre-*Atkins* and “did not have the same legal significance.” (App. p. 4220). Aside from the obvious bias and motivation by insertion of this fact, there is no explanation of what changed in his professional requirements, why he gave an opinion at trial but contrarily states in the affidavit he failed to determine whether Simmons was mentally retarded, and certainly does not opine on the standards of the DDSN examiners. Petitioner/Respondent agrees that the legal significance is different – that is why Simmons is not precluded from raising this issue again after having raised the same issue at trial. *Bobby v. Bies*, 556 U.S. 825, 129 S.Ct. 2145 (2009). But no one has attempted to state (nor could the assertion be credibly made) that *Atkins* changed the rules of diagnosis. *Accord Hall*, 134 S.Ct. at 2000 (“The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community’s diagnostic framework.”).

Simmons later lack of motivation in school and in testing is evident; however, this does not require a court to find the existence of mental retardation where other expert witnesses – not motivated by attempts to avoid a death sentence by categorical exemption by soft science determination – court witnesses Dr. Sandler, Dr. McAbee and Dr. Waid (a defense witness), concluded that it was not present. When viewed in the totality of the circumstances and in consideration of the burden of proof, Simmons cannot carry his burden of proof on this record.

This matter shares many of the same circumstances of the *Dufour* case from Florida. In *Dufour v. State*, 69 So.3d 235 (Fla.), *cert. denied* 132 S.Ct. 1150 (2011), “the circuit court concluded that Dufour failed to establish that he is mentally retarded by a preponderance of the evidence.” 69 So.3d at 252. Focusing on the very definition of a preponderance of the evidence, *i.e.* “evidence ‘which as a whole shows that the fact sought to be proved is more probable than not,’” the state court upheld the lower court decision finding:

The extensiveness of the evidence concerning Dufour’s drug use and abusive childhood and the conflicting evidence with regard to his adaptive behavior provides competent, substantial evidence in support of the circuit court’s conclusion under the lesser standard. The fact that the circuit court attributed Dufour’s behavior to an alternative explanation demonstrates that there is another, equally likely reason for his behavior other than mental retardation. Therefore, Dufour did not present evidence that demonstrates the existence of mental retardation as required.

*Id.*

Other courts have similarly held such a mixed record does not tip the preponderance burden of proof. *State v. Vela*, 777 N.W.2d 266, 308 (Neb. 2010), *cert. denied* 560 U.S. 945, 130 S.Ct. 3364 (2010) (upholding finding capital defendant “failed to prove significant deficits in adaptive behavior” where “Vineland Adaptive Behavior Scales test administered by Piersel was based on information Piersel received from Vela’s sister. Although the results showed deficits in five adaptive behaviors, the accuracy of the information provided by

Vela's sister was significantly challenged during the cross-examination of Piersel, and he acknowledged the possibility that the sister's reliability as a reporter could be affected because she had the same motivation for secondary gain as Vela himself" and "there was also evidence that Vela had demonstrated normal adaptive behavior in several areas. Vela's middle school records reflect mostly grades of C, with A's and B's in some subjects and D's and F's in others. Testimony established that he was thought to have a learning disability and received special education services for that diagnosis, but he was never placed in an academic program designed for students with mental retardation" further there was evidence of some work and being "well-liked," and correctional facility officers testified "Vela selected books from the prison book cart and subscribed to other publications ... and communicated clearly with correctional officers and other prisoners" ruling that "The district court did not err in concluding that Vela failed to prove clinically significant deficits in adaptive behavior which would support a diagnosis of mental retardation."); *Ochoa v. State*, 136 P.3d 661, 666 (Okla.Crim.App.), cert. denied 549 U.S. 1061, 127 S.Ct. 680 (2006) ("While we do not dispute that a mentally retarded person can learn and develop skills, that ability is limited and the ability to learn and to adaptively function suggests the individual was likely not mentally retarded in the first place but fell into that borderline range or classification due to environmental or other factors which affected present ability."). Compare *State v. White*, 885 N.E.2d 905 (Ohio 2008) (finding trial court abused its discretion in "fail[ing] to prove that his adaptive-skills limitations began before age 18" where "there was no evidence to suggest that White's current impairments could be explained by anything that happened after he turned 18, such as a brain injury ... Nor does anything in White's history indicate that he functioned at a higher level before age 18 than he does today").

In sum, this Court gives deference to the PCR judge's factual findings but is not bound to accept the legal weight of those facts. *Miller, supra*. The facts of this case will not support the legal conclusion. Simmons did not meet his burden of proof. Having no probative evidence in the record to support the PCR court's Order, this Court should reverse.

### CONCLUSION

For all the foregoing reasons, the State submits that this Court should grant certiorari in this case on the issue presented by Petitioner/Respondent, the State, and reverse the lower court grant of relief.

Respectfully submitted,

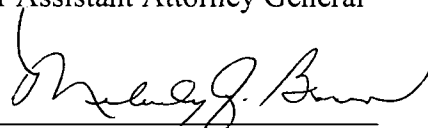
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STATE OF SOUTH CAROLINA  
In the Supreme Court

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

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C/A No.: 2005-CP-18-1368  
(Capital PCR Action)  
Appellate Case No. 2014-000387

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Kenneth Simmons, #5066,

Respondent/Petitioner,

vs.

State of South Carolina,

Petitioner/Respondent.

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**CERTIFICATE OF SERVICE**


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I, Melody J. Brown, Senior Assistant Attorney General, certify that I have served the Petition for Writ of Certiorari by Petitioner/Respondent on counsel for Respondent/Petitioner by depositing one copy of same in the United States mail, postage prepaid, addressed as follows:

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