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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Court Judge

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

KENNETH SIMMONS, SK5066. *Respondent/Petitioner,*

v.

STATE OF SOUTH CAROLINA *Petitioner/Respondent.*

**RETURN TO PETITIONER-RESPONDENT'S
PETITION FOR WRIT OF CERTIORARI**

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RESTATEMENT OF THE QUESTION PRESENTED

Whether there is “any evidence” to support the PCR Court’s conclusion that Kenneth Simmons is intellectually disabled under circumstances where: (a) the PCR court determined that “the evidence *overwhelmingly* shows that [Simmons] meets all three prongs of South Carolina’s definition of [intellectual disability] by a preponderance of the evidence,” App. 5310; and, (b) Petitioner-Respondent itself describes the evidence in this case as raising “admittedly a close issue.” App. 5218, 5318, 5347, 5389; Petitioner-Respondent’s Petition for Writ of Certiorari at p.9.

STATEMENT OF THE CASE

Kenneth Simmons was found guilty of murder and sentenced to death by a Dorchester County jury on March 2, 1999. Three years later, the United States Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the execution of persons with an intellectual disability. *Atkins v. Virginia*, 536 U.S. 304 (2002). In so holding, the Supreme Court recognized that “by definition, [intellectually disabled persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” *Id.* at 318. In light of this diminished capacity, the justifications for the death penalty are not satisfied. *Id.* at 319-20. Furthermore, the death penalty is inappropriate for persons with intellectual disability because their reduced capacity enhances the possibility that a death sentence will be imposed despite factors that would normally result in a lesser penalty. *Id.* at 320. For example, people with intellectual disability are more likely to give false confessions, less able to make a persuasive showing of mitigation, less able to give

meaningful assistance to counsel, and are poor witnesses in their defense.¹ *Id.* at 320-321.

Recently, in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Supreme Court reaffirmed that because “[n]o legitimate penological purpose is served by executing a person with intellectual disability,” they are not eligible for “the law’s most severe sentence.” *Id.* at 1992-93. Moreover, the Court observed that “*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.” *Id.* at 1989. Rather, the legal definition of intellectual disability must be “informed by the medical community’s diagnostic framework.” *Id.* at 2000.

In accordance with *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), Kenneth Simmons filed a PCR application on September 2, 2005, raising an *Atkins* claim. The PCR court heard multiple days of testimony and arguments on February 1-4, 2010, December 15, 2011, July 2, 2012, and December 4, 2013, and, ultimately, issued an Order finding that Simmons is intellectually disabled and therefore ineligible for a death sentence pursuant to state and federal law.

ARGUMENT

I. THE PCR COURT’S FINDINGS ARE CLEARLY SUPPORTED BY THE RECORD.

South Carolina’s definition of intellectual disability is found in the current death penalty statute, which defines that condition as:

¹ As Simmons explained in his own Petition for Writ of Certiorari, this case highlights the *Atkins* Court’s concerns given that Simmons’ conviction rests exclusively on false forensic evidence and an incriminating statement obtained under a variety of circumstances associated with false confessions, including – foremost among them – Simmons’ intellectual disability.

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 (quoting S.C. Code Ann. § 16-3-20(C)(b)(10)).² Thus, the definition of intellectual disability consists of three prongs: (1) sub-average intellectual functioning; (2) deficits in adaptive behavior; and, (3) a manifestation of these attributes before age eighteen.

A. PRONG ONE: SUB-AVERAGE INTELLECTUAL FUNCTIONING.

The first prong of an intellectual disability diagnosis requires an individual to display sub-average intellectual functioning. A person meets the sub-average intellectual functioning component if his or her full-scale IQ score is 75 or less. *Atkins*, 536 U.S. at 309 n.5 (“It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition.”).³ Each IQ test has an

² In *Atkins*, the Supreme Court cited two professional organizations for their definitions of mental retardation – the American Association on Mental Retardation (AAMR), which is now known as the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR). *Atkins*, 536 U.S. at 308 n.3; see also *Hall*, 134 S. Ct. at 1998. Since *Atkins*, other courts throughout the country, including every court in South Carolina to decide an *Atkins* issue, have routinely applied these same definitions, noting that they are essentially identical. See, e.g., Order Finding Defendant Mentally Retarded in South Carolina v. Pearson, 96-GS-32-3338; Order Granting Post-Conviction Relief in Franklin v. South Carolina, 96-CP-45-117, Order Granting Post-Conviction Relief in Elmore v. South Carolina, 05-CP-24-1205; Order Granting Post-Conviction Relief in Mercer v. South Carolina, 09-CP-32-5465. Moreover, at the PCR hearing, Dr. Marc Tassé testified that the AAIDD and DSM-IV-TR definitions are essentially the same as South Carolina’s statutory definition. App. 3926-29, 4015-16.

³ See also INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 36 (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010) [hereafter, AAIDD MANUAL]; DSM-IV-TR 41-42 (“[I]t is possible to diagnose

inherent “standard error of measurement” or “SEM,” which must be considered. As the Supreme Court explained in *Hall*:

The SEM reflects the reality that an individual’s intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual’s score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual’s true IQ score lies. . . . Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor.

134 S. Ct. at 1995.

The PCR court heard evidence of six individually administered IQ test scores and concluded that “[a]ll six test scores reflect that [Simmons] functions in the [intellectually disabled] range.”⁴ App. 5300. The PCR court’s order contains a chart summarizing these scores:

Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior”).

⁴ Petitioner-Respondent falsely claims it is “uncontested” that there was no evidence of an IQ score below 70 or a diagnosis of intellectual disability prior to the PCR hearing. See Petitioner-Respondent’s Petition for Writ of Certiorari at pp.6, 7, 11, n.7, 17. On the contrary, Simmons offered evidence, and the PCR Court specifically found that:

[Simmons] was first given an IQ test at the beginning of the 1978 school year, during his second attempt at the eleventh grade, when he was evaluated for the Resource Program at Summerville High School. Resource was a special education program. In order to qualify for Resource placement, the student had to be given an individually administered IQ test by a certified psychologist and score in the 50-70 range. The actual testing records from [Simmons’] placement in the Resource program have been destroyed, but, according to school officials and written protocols in effect at the time of [Simmons’] placement, an individually administered IQ score of 50-70 is the only way he could have been placed into the Resource Program.

Psychologist(s)	Test Date	Test Name	Full-Scale IQ Score
Summerville High School	1978	Individually administered IQ test	50-70
Dr. Saylor	5/15/1998	WAIS-R	69
Drs. Behrmann & Vidic	1/8/1999	WAIS-III	66
Drs. Sandler & McAbee	2/9/1999	WAIS-R	75*
Dr. Keyes	2/5/1999	KAIT	70
Dr. Knight	12/10/2008	WAIS-IV	67

*The State's expert, Dr. Leslie Sandler, testified at trial that this score is likely artificially inflated due to practice effect. See *ROA at p.2614*.

The PCR court noted that Simmons' "highest IQ score is 75, which is within the range of acceptable IQ scores for a diagnosis of mental retardation," and that "even the State's expert who conducted this test, Dr. Leslie Sandler from the Department of Disabilities and Special Needs (DDSN), acknowledged that the score of 75 is most likely artificially inflated due to practice effect."⁵ App. 5300-01.

Further, the PCR Court found that Simmons' IQ scores are "remarkably consistent over time," and in harmony with: (1) Simmons' long history of poor academic performance; (2) his repeated school failures and social promotions; and, (3) academic

App. 5300; see also, App. 4246-53. Moreover, Dr. Dennis Keyes, conducted a full evaluation prior to trial in 1999, and diagnosed Simmons as intellectually disabled. App. 4153.

⁵ "Practice Effect" refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same or similar test within a relatively short period of time – generally within one year. For this reason, established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence. The PCR Court observed that Simmons had taken "had taken two previous tests (one exactly the same and one substantially similar) within a period of 9 months before scoring a 75 on this WAIS-R. And, even with two recent opportunities to "practice," applicant still scored within the mental retardation range." App. 5299-5300.

achievement testing showing that Simmons consistently functions at approximately a first to third-grade level in reading, spelling and math. App. 5301-02. In sum, the PCR court concluded that Simmons' "IQ scores, . . . school history and formal academic achievement test scores (which are consistent both pre- and post-age 18)" all provided "significant evidence that his intellectual functioning is sub-average." App. 5302-03. This conclusion is clearly supported by the record.

B. PRONG TWO: DEFICITS IN ADAPTIVE BEHAVIOR.

The second requirement for a diagnosis of intellectual disability looks at the *expression* of intellectual deficits in the life of an individual. "Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives."⁶ AAIDD Manual 43. Limitations in adaptive

⁶ South Carolina's definition of mental retardation refers without elaboration to "deficits in adaptive behavior." S.C. Code Ann. § 16-3-20(C)(b)(10)(2011). Similarly, the text of the *Atkins* opinion refers to "significant limitations in adaptive skills such as communication, self-care, and self-direction." *Atkins*, 536 U.S. at 318. A footnote in *Atkins*, however, quotes approvingly the definitions adopted by the AAMR and the DSM-IV-TR. *Id.* at 308 n.3. The AAMR definition requires limitations in two (2) or more of the following ten (10) applicable skill areas:

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

AAMR Manual 22 (10th ed.). The American Psychiatric Association's definition is virtually identical. See DSM-IV-TR 41. Both definitions have been accepted by courts in South Carolina. See, e.g., *Elmore Order* at 13; *Pearson Order* at 12; *Mercer Order* at 36.

behavior “should be established through the use of standardized measures,”⁷ which should be augmented by observations, interviews and other methods of assessment. App. 3935; AAIDD MANUAL 47-48.

First, the PCR Court concluded that the Vineland Adaptive Behavior Scales are a reliable, standardized measurement of adaptive behavior, and that the composite score of 43 obtained by Dr. Keyes on this instrument in 1999 is “significantly below average.” App. 5304. Second, the PCR court determined that Simmons’ significant deficits in adaptive functioning are “corroborated by an extensive social history investigation,” *id.*, including, the testimony of Marjorie Hammock, as well as “school records, multiple affidavits from [Simmons’] teachers, employers, family, friends, football coaches and classmates, various psychological evaluations, . . . academic achievement test scores, and the trial record.” App. 5449. The PCR court concluded that Simmons exhibits deficits in at least the five following areas: (1) functional academics; (2) home living; (3) work; (4) self-direction; and, (5) Communication. App. 5304-07.

After the PCR Court issued its Order finding Simmons intellectually disabled, Petitioner-Respondent moved to alter or amend the judgment, raising many of the same argument it raises now in its Petition for Writ of Certiorari. App. 5312-32. The PCR Court held oral arguments on the motion and informed that parties that the court had undertaken a “very, very deliberate process” and concluded that “by the greater weight of the evidence, the preponderance of evidence [was] that [Simmons] was [intellectually disabled.]” App. 5390-91. The PCR court stated that it had taken the motion to alter to

⁷ “[L]ike intellectual functioning, significant limitations in adaptive behavior are operationally defined as performance that is approximately two standard deviations below the population average.” AAIDD MANUAL 47.

heart, and would continue to do so, and ultimately issued a detailed order rejecting Petitioner-Respondent's arguments and reaffirming its conclusion that Simmons' death sentence must be vacated because he is intellectually disabled. App. 5450. The PCR Court issued detailed orders recounting the evidence supporting its finding of significant deficits in adaptive functioning. That Petitioner-Respondent disagrees with the PCR court's ultimate decision does not mean that there is "no probative evidence" to support the court's conclusions. *See, e.g., Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("The PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record.") (citing *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)).

C. PRONG THREE: ONSET BEFORE AGE 18.

Because intellectual disability is a developmental disorder, the final prong of the definition is onset before age eighteen.⁸ App. 3937. The PCR court found that "the record is replete with evidence that [Simmons'] condition began before he reached the age of eighteen." App. 5307. Specifically, the PCR Court noted that the 1978 IQ test was administered before Simmons turned eighteen. All of the information contained in the school records and collected from Simmons' teachers, classmates and football coach related to his functioning before the age of eighteen. Simmons' stuttering and difficulties with written communications began when he was a young child. Ms. Hammock focused on the pre-eighteen period in her interviews with Simmons' siblings and family members,

⁸ Dr. Tassé explained that a pre-eighteen IQ score is not required, nor must a person receive a diagnosis prior to the age of eighteen. Rather, it is simply necessary to have information to corroborate that a person's current intellectual and behavioral impairments were present during the developmental period. App. 3938.

who described him as slow and developmentally delayed. Finally, both informants who provided information to Dr. Keyes for the Vineland Adaptive Behavior Scales – Simmons’ older sister and his ex-wife – knew Simmons during the developmental period. “Viewed as a whole,” the PCR Court concluded, “the hearing evidence affirmatively demonstrates that [Simmons’] intellectual and adaptive functioning were significantly impaired before age eighteen.” App. 5307. Once again, the evidence in the record clearly supports this finding.

II. PETITIONER-RESPONDENT’S ARGUMENTS ARE WITHOUT MERIT.

Petitioner-Respondent repeatedly describes the evidence in this case as presenting a “mixed picture,” and raising “a close issue,” but nevertheless concludes that there is “no probative evidence in the record to support the PCR court’s Order,” and complains that the PCR court must have ignored or overlooked a variety of evidence, such as Dr. Sandler’s opinion, evidence of Simmons’ drug use, and the trial testimony of Dr. Randy Waid. Petition at pp. 9, 20, 25. These arguments are not only fundamentally at odds with the “any evidence” standard of review, but they are also demonstrably false. The evidence in this case is not “close” by any stretch of the imagination. The PCR Court thoroughly addressed (and expressly rejected) all of the issues Petitioner-Respondent now raises here. This Court should do the same.

A. PETITIONER-RESPONDENT’S RELIANCE ON DR. SANDLER’S OPINION IS NOT PERSUASIVE.

First, as the PCR Court correctly found, Dr. Sandler (who testified at trial but not at the PCR hearing) did not conduct a reliable assessment of mental retardation using appropriate clinical standards. App. 5441. Instead, Dr. Sandler began with an erroneous and misleading understanding of Simmons’ school performance and pre-18 abilities and,

from there, concluded that Simmons must be malingering any symptoms of intellectual disability. This point is evident from the DDSN report quoted in Petitioner-Respondent's Petition, in which Dr. Sandler stated:

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

Petitioner-Respondent's Petition for Writ of Certiorari at p.10.

As the PCR evidence demonstrates, however, none of the factors cited by Dr. Sandler are true. Simmons was classified in school as "Educably Mentally Handicapped" after individualized testing, and he received special education services. App. 4192-97, 4207-08, 4246-53. His special education teachers used reading materials for him that were written at a fourth grade reading level. He received special help in all of his subjects. His Resource teacher, Ms. Linda Shwec, read his assignments to him, gave him extra time on tests, re-worded questions for him in simple terms that he could understand and evaluated his overall school performance as "consistent with the abilities of a person with mental retardation." App. 4192-97. Although Mr. Simmons received a high school diploma, there were no graduation criteria nor were any special certificates given for special education students. Instead, anyone could get a diploma as long as he or she came to school and attended the required number of classes. As Ms. Shwec noted, Mr. Simmons "would be unable to earn his high school diploma by today's standards." App. 4197. Moreover, there was no required grade point average for students to play on the

Summerville High School football team. App. 3909. Simmons' coaches and fellow players said he was extremely slow, acted as a follower and not a leader, and required specific, concrete directions from others. App. 3915, 4191, 4219. Finally, Simmons was only able to obtain a driver's license after the examiner read the test questions aloud to him on his eighth or ninth attempt. App. 1567. Simmons did not own a car, and he lost his driver's license after he was cited for driving uninsured and failing to pay traffic tickets. App. 3886.

Dr. Sandler's assessment was neither thorough nor proper according to clinical standards, and it did not comport with the directives of the AAIDD or the DSM-IV-TR. Dr. Sandler did not conduct any standardized measure of Simmons' adaptive behavior. He did not interview any of Simmons' family members, teachers, friends, classmates, football coaches or employers. He did not talk to any school administrators to learn about the level of classes available, the school's special education programs, or the requirements for placement in those programs. Instead, Dr. Sandler made assumptions based on factual errors about Simmons' life history and stereotypes about what people with mild mental retardation can achieve.⁹

⁹ In fact, it is not clear that Dr. Sandler even had mild mental retardation in mind. During his trial testimony, Dr. Sandler compared Mr. Simmons to "individuals that Dr. McAbee and I have examined who are seriously and profoundly mentally retarded." App. 1706. Of course, Dr. Sandler's testimony occurred well before the Supreme Court's decision in *Atkins*, which ultimately made clear that the categorical bar extends to those in the "mild" mental retardation category, and is not limited to those with "severe" or "profound" mental retardation. *Atkins*, 536 U.S. at 308; see also *Bobby v. Bies*, 556 U.S. 825, 829 (2009) (holding that a pre-*Atkins* determination of mental retardation as a general mitigating factor was not the same as an evaluation of "mental retardation for purposes of *Atkins*").

Further, despite Dr. Sandler's assumption, there is no evidence of malingering in this case. On the contrary, every expert who tested for malingering found no results indicating that Simmons ever attempted to malingering. App. 1609, 1643-45, 1687-88, 1826-27. In addition, Dr. Tassé explained that the best way to assess the possibility of malingering is to look for a pattern of consistency over a long period of time. Simmons' IQ scores, academic achievement scores, and limitations in adaptive functioning all converge into a tight, consistent pattern across his entire life history. It is baseless to conclude that Simmons has been faking symptoms of mental retardation across multiple domains from early childhood through to his present age of fifty-one.¹⁰

¹⁰ Not only is Dr. Sandler's opinion not credible for the reasons discussed above, but Dr. Sandler himself has a credibility problem. Dr. Sandler's medical license was issued by the State of Pennsylvania. In 1989, Dr. Sandler admitted to a Pennsylvania administrative court that he lied about administering a WAIS IQ test, along with several other tests. Specifically, Dr. Sandler admitted

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

App. 4179-89. Moreover, Dr. Sandler confessed that he falsely stated his credentials under oath on two other occasions. *Id.* Dr. Sandler was sanctioned by the State Bureau of Professional and Occupational Affairs. His medical license was placed on probation and he was ordered to "undergo supervision in professional ethics and monitoring in psychological assessment" for a period of one year. *Id.*

By contrast, Dr. Tassé has extensive experience in the area of intellectual disability and is nationally recognized as a leader in his field. He is a co-author of the AAIDD's diagnostic manual and of its user's guide – both of which are critical texts on mental retardation. In a recent opinion from the United States District Court for the Western District of Tennessee, Dr. Tassé's credibility was evaluated as follows:

The Court finds Dr. Tassé to have been an exceptionally well-qualified and credible witness, and the Court concludes that his testimony deserves great weight. Not

B. PETITIONER-RESPONDENT'S RELIANCE ON DR. WAID'S TRIAL TESTIMONY IS EQUALLY MISPLACED.

Petitioner-Respondent's arguments regarding Dr. Waid's trial testimony are easily refuted by Dr. Waid's PCR affidavit, in which he specifically explained that, in preparation for his trial testimony in 1999:

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

App. 4220. Dr. Waid noted that, at the time of his pre-trial evaluation of Simmons, "distinguishing between mental retardation, borderline intellectual functioning or brain damage due to injury or drug use did not have the same legal significance that it has today." *Id.* Thus, Dr. Waid "did not make a formal assessment of Mr. Simmons' deficits in adaptive functioning or whether his significantly subaverage intellectual functioning manifested itself during the developmental period." *Id.*

Dr. Waid testified at trial 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

only is Dr. Tassé clearly a leading expert in the field of mental retardation, but he also impressed the Court with his honesty and frankness in responding to questions from counsel. Although the Government's witnesses both indicated that they have some familiarity with making mental retardation evaluations, neither can even begin to match the experience and expertise possessed by Dr. Tassé.

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third grader, seven or eight years old.” App. 1780. But, without access to a complete social history or a formal assessment of adaptive skills, Dr. Waid was also under the misimpression that Simmons received a regular high school diploma and maintained a certain level of academic success in order to play on the football team. App. 1881. Thus, Dr. Waid concluded that Simmons must have previously functioned at a higher level but had declined post-18 due to some other cause, such as a potential head injury or substance abuse, particularly alcohol. App. 1882-83. Dr. Waid acknowledged, however, that there was no actual evidence that Simmons had ever sustained any serious head injuries, and that some people can drink a lot of alcohol and, for whatever reason, it does not affect them. App. 1797, 1800. Finally, an MRI, neurological examination and EEG all showed no evidence of that Simmons suffered brain damage from substance abuse.¹¹ App. 1909, 1911-12, 2655, 3963.

Dr. Waid previously operated from an uninformed misunderstanding of Simmons’ school history and pre-18 abilities, and he has since disavowed his prior testimony. Moreover, Dr. Waid never made a formal assessment of whether Simmons meets all three prongs of South Carolina’s definition of intellectual disability. Thus, the PCR court properly concluded that Dr. Waid’s pre-*Atkins* trial testimony should be given little weight “in rendering a decision on exactly that question.” App. 5446.

¹¹ Accordingly, Petitioner-Respondent is equally mistaken in its claims that the PCR Court failed to properly consider the possibility that drug and alcohol use could account for Simmons’ deficits. App. 5446.

C. PETITIONER-RESPONDENT IGNORES THE FULL FACTS OF SIMMONS' SOCIAL HISTORY AND RELIES ON STEREOTYPE.

Petitioner-Respondent incorrectly states many "facts," largely ignores the bulk of Simmons' true social history, and heavily relies on stereotype to support its baseless claim that the "[t]he evidence reflected a mixed picture." Petitioner-Respondent's Petition for Writ of Certiorari at p.20. For example, Petitioner-Respondent has repeatedly claimed that Simmons led a Bible study and played chess with other inmates in prison. Petition at p.12. These alleged "facts" were cited in Dr. Sandler's written report to the trial court. App. 4487. On cross examination, however, Dr. Sandler admitted that neither allegation is accurate. In fact, a correctional officer reported that he once saw Simmons play checkers and that Simmons attended a Bible study, not that he served as its leader. App. 1729. Following this admission, Dr. Sandler stated that, in any event, these allegations were merely based on hearsay and he did not rely on them in any way. *Id.*

Petitioner-Respondent also contends that Simmons cared for his mother and sister, had a bank account with his wife, gained employment when he wanted to, was a successful football player and received adequate grades to maintain his position on the football team. Petition at pp.17-20. Again, none of Petitioner-Respondent's allegations can withstand record scrutiny. In fact, the evidence presented below reflects that Simmons' siblings regularly came to the house to help care for him and his mother. App. 3910, 4210, 4214-15. Simmons' wife, Valerie, opened a checking account in their names and paid all of the bills because Simmons was unable to handle the finances. App. 3912-13. Moreover, all of Simmons' employment opportunities consisted of odd jobs secured for him by a network of family and friends. App. 3836-37, 4210, 4213-16. He performed simple tasks and unskilled labor. Simmons never formally applied for a job or

filled out a job application. App. 3837. In high school, Simmons played a defensive position on the football team that did not require significant intellectual abilities. App. 4191. Students were not required to maintain adequate grades to play on the football team. App. 3909. Simmons' final grade point average at Summerville High School was 0.8222. App. 4199.

Petitioner-Respondent also points out that Simmons is able to use multi-syllable words, maintain his personal hygiene, read on a second-grade level, get a driver's license, follow rules and attract girlfriends. Petition at p.18. None of this evidence is inconsistent with mental retardation. Rather, as both the clinical literature¹² and the case law establishes, these are stereotypes that lay people have about what a person with mental retardation is able to achieve.¹³ Dr. Tassé did not, as Petitioner-Respondent claims,

¹² See AAIDD Manual 151 (people with mental retardation may “be able to live independently” and “[d]ocumented successful outcomes of individuals with appropriate supports contrasts sharply with incorrect stereotypes that these individuals never have friends, jobs, spouses, or children.”); DSM-IV-TR 46 (“There are no specific physical features associated with mental retardation”); *id.* at 43 (people with mild mental retardation can acquire academic skills up to a 6th grade level, have minimal impairment in sensori-motor areas, are often indistinguishable from children without mental retardation until a later age, and can achieve vocational skills and even successfully live independently).

¹³ See, e.g., *Wiley v. Epps*, 625 F.3d 199, 203 (5th Cir. 2010) (noting expert testimony that “it is widely accepted in the medical community that mentally retarded persons are often able to perform basic life functions and tasks, such as holding jobs, driving cars, and supporting their families”); *United States v. Lewis*, No. 1:08CR404, 2010 WL 5418901, at *20 (N.D. Ohio Dec. 23, 2010) (crediting expert testimony that it is a stereotype that people with mental retardation cannot carry on a conversation); *Lambert v. State*, 126 P.3d 646, 655-58 (Okla. Crim App. 2005) (holding evidence that the defendant abused drugs, committed prior crimes and could talk with police, relate events and answer questions was not inconsistent with mental retardation); *Pickens v. State*, 126 P.3d 612, 618-19 (Okla. Crim. App. 2005) (holding evidence that the defendant filled out medical request forms in prison, wrote letters to the trial court and dated a woman was not inconsistent with mental retardation).

“admit[] that each of these factors would be looked at to assess adaptive functioning.” Petition at p.18. On the contrary, Dr. Tassé repeatedly explained that these are misconceptions, and – as such – are irrelevant to an assessment of whether or not a person meets the diagnostic criteria for intellectual disability. App. 4009-12. Specifically, Dr. Tassé stated: “For lay people, when they look at somebody, these are things that come into conflict with their image, distorted however it may be, that someone with mental retardation should look and act like. It has nothing to do with diagnostic features.” App. 4012-13.

CONCLUSION

At bottom, Petitioner-Respondent asks this Court to ignore the entirety of the record below, as well as South Carolina’s definition of intellectual disability. Although Petitioner-Respondent now claims that it “never suggested a different definition” of intellectual disability apart from the one this Court adopted in *Franklin*, its previous written submissions demonstrate otherwise. In post-hearing briefing, Petitioner-Respondent criticized Simmons for using the three-pronged definition discussed above “as a guide in his post-hearing brief,” App. 5253, and chastised him for his “underlying . . . belief that the legal definition of [intellectual disability] for Eighth Amendment purposes should match the clinical definition.” App. 5257. Petitioner-Respondent encouraged the PCR Court to consider some other, alternative definition of intellectual disability, claiming that “[m]any States do not strictly adhere to the clinical standards.” App. 5262. When the PCR Court declined to do so, Petitioner-Respondent again

complained that the court had erred by crediting Dr. Tasse's expert testimony about the clinical guidelines as "bedrock science."¹⁴ App. 5321.

As explained above, in both *Atkins* and *Hall* the United States Supreme Court relied on the clinical definitions of intellectual disability set forth in the DSM-IV and by the AAIDD. Every court in South Carolina to address an *Atkins* claim has employed these two definitions for guidance and found them identical to the statutory definition set forth in S.C. Code § 16-3-20(C)(b)(10), and embraced by this Court in *Franklin*. Thus, Petitioner-Respondent's incessant protest about "too much science" is perhaps its most telling argument, since it effectively acknowledges that, under any definition of intellectual disability, Simmons clearly satisfies all clinical criteria.

In any event, there can be no doubt that probative evidence supports (and overwhelmingly so) the PCR court's conclusions in this case. This Court must affirm the PCR court's decision.

¹⁴ Even now, Petitioner-Respondent vaguely suggests that this Court should depart from *Franklin* by noting that "the burden of proof required in Georgia is beyond a reasonable doubt," and then stating, inexplicably, "[t]he medical community does not use a preponderance standard to diagnosis [sic]." Petition at p.7, n.2. South Carolina does not, of course, use a "beyond a reasonable doubt" standard for post-conviction claims, and this Court clearly held in *Franklin* that "[a]s with other PCR claims, the applicant must show he or she is [intellectually disabled] by a preponderance of the evidence. If [intellectual disability] is proven, the PCR court will vacate the death sentence and impose a life sentence. 356 S.C. at 280; 588 S.E.2d at 606.

Respectfully submitted,

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August 11, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Court Judge

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

KENNETH SIMMONS, SK5066. *Respondent/Petitioner,*

v.

STATE OF SOUTH CAROLINA *Petitioner/Respondent.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Respondent/Petitioner's Return to
Petitioner/Respondent's Petition for Writ of Certiorari was served by first class United States
mail, postage prepaid, this 11th day of August, 2014, upon the following:

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