

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Court Judge

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

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**RECEIVED**

AUG 25 2014

**S.C. SUPREME COURT**

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

v.

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

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**RESPONDENT-PETITIONER'S REPLY**

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**EMILY C. PAAVOLA**  
SC Bar No. 77855  
Death Penalty Resource & Defense Center  
900 Elmwood Ave., Suite 101  
Columbia, SC 29201  
(803)765-1044

*Counsel for Respondent/Petitioner*

## RESPONDENT-PETITIONER'S REPLY

Respondent-Petitioner, Kenneth Simmons, hereby files his Reply to the State's Return to his Petition for Writ of Certiorari, in which he raised two grounds for relief: (1) that the State presented false, misleading and unreliable DNA evidence at trial, in violation of, *inter alia*, *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972), and failed to disclose material and favorable evidence regarding its DNA testing in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; and, (2) that trial counsel was ineffective for failing to retain a false confession expert.

The State does not address Simmons' *Brady* claim, but argues only that the State did not present false evidence at trial because what occurred was only a "minor chart error" affecting merely a "demonstrative aid." Return at p.8, 12. Incredibly, although the State concedes that the exhibit used to present the State's purported DNA test results contained false data, it nevertheless claims that Lauren Crane's testimony "would have been exactly the same" even if there were no errors on the exhibit. Return at p.12. This argument is refuted by Crane's post-conviction deposition testimony.

At trial, Crane, Michael Baird and Solicitor Baily all told the jury that Simmons' DNA was consistent with the crime scene evidence at ***nine out of nine*** tested genetic locations. App. 1470-71, 1474-75, 1481-82, 2005, 1041 ("nine out nine locations on DNA molecules that they compared with the semen in that vaginal swab matched the DNA from Kenneth Simmons' blood"). There is now no dispute that this assertion was false. As Crane explained in her deposition, three of the nine tested genetic locations (the CTT test results) do not "match," "include" or incriminate Simmons in any way. App. 4830-32. But, of course, Crane did not tell the jury that the CTT results do not match Simmons' DNA, and the defense was never told that the CTT results did not

match Simmons DNA.<sup>1</sup> It is simply ridiculous to suggest that this false testimony amounted to nothing more than a minor error on a demonstrative aid.

As explained in Simmons' Petition for Writ of Certiorari, the results Lifecodes actually obtained from the CTT testing showed only *a single DNA profile* consistent with the victim's DNA. Accordingly, the CTT test results were wholly inconsistent with the lab's purported finding of a mixture of more than one DNA profile with the DQ Alpha Polymarker ("DQA/PM") test conducted on the same samples. Moreover, after the CTT testing failed to show a mixture of DNA, Lifecodes conducted a gender-typing test and *no male DNA was identified* in the evidentiary samples. The State did not disclose the gender-typing test results, nor did it disclose that the CTT test results did not match Simmons' DNA and that they did not show a mixture of more than one

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<sup>1</sup> See App. 4832-33

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

A: Correct.

Q: But your testimony today is you were not relying on the last three loci, just the first six?

A: I state that they are in – based on my results that I can see here and the scans that I have, I cannot make a conclusion on those results.

Q: There's no report that says that you can't make a conclusion on those results?

A: Correct.

Q: As far as you know, the defense was never told that you couldn't make a conclusion on those results?

A: I have no idea what the defense was told.

DNA profile. Further, the State failed to disclose a variety of other information, such as Lifecodes' failure to use important quality control procedures and other errors showing the lab's sloppy work.

It simply cannot be true that the DQA/PM test results showed a mixture of DNA, but the subsequent, more sophisticated CTT tests showed only a single DNA profile which does not contain any male DNA.<sup>2</sup> The only reasonable explanation for this discrepancy is some kind of error, likely due to cross-contamination, during the DQA/PM testing process.<sup>3</sup> The jury that ultimately convicted and sentenced Simmons to death was never aware of any of the evidence demonstrating that Lifecodes' testing was wholly unreliable and fraught with error. And, the jury remained ignorant of these factors because the State unconstitutionally failed to disclose this evidence. In its Return, the State does not even address most of these issues. Its assertion that the DNA evidence offered at trial was not "false" or that any error did not matter is (at best) wishful thinking, and the State makes no attempt at all to address the obvious *Brady* violation that occurred in this case.

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<sup>2</sup> The State speculates that perhaps the gender-typing test results did not show any male DNA because the sample was too small, but of course, that does not explain how the sample was somehow large enough to produce results for the DQA/PM test, which requires a larger sample, but inexplicably small enough just days later to register only an "X" chromosome but not a "Y" (i.e., male) chromosome. Moreover, the jury was never given an opportunity to consider that argument and weigh it against other evidence pointing to the possibility that there was never any sperm in the samples to begin with, including evidence that the sample was degraded, App. 1432, that Crane oddly reported only that "[d]ata suggest that sperm was visualized" by SLED, App. 4312, but never documented that she had herself visualized any sperm, and that the Lifecodes file does not contain any information, as one would typically expect, verifying that sperm was identified in the samples. App. 5060.

<sup>3</sup> As Dr. Cotton explained, contamination could have occurred from the lab technician's own DNA or from another sample being tested at the same time, as Crane's lab notebook indicates that she completed the DQA/PM testing for this case simultaneously with multiple samples from other cases and, further, failed to use a reagent blank control process as a quality assurance mechanism to ensure that no human DNA was inadvertently introduced during the testing process. App. 5011-12, 5048, 5061.

Finally, Simmons' PCR experts did not, as the State claims, agree that his DNA profile is included in the crime scene samples to the exclusion of 99% of the population. Rather, they testified that *if and only if* Lifecodes' DQA/PM test results are completely accurate (which they are clearly not because of the errors discussed above and in Simmons' Petition for Writ of Certiorari), Simmons' DNA would be included at three of the six genetic locations tested by DQA/PM (and countless other people in the world are also "included" by these locations). Moreover, Simmons' experts testified that Dr. Baird's statistical calculation was grossly inaccurate, seriously misrepresented the strength of the potential evidence, and "[n]o credible forensic scientist would report the results from DNA testing in this manner." App. 5048.

Dr. Baird performed his statistical analysis by calculating the frequency of Simmons' known alleles at all nine of the DQA/PM and CTT genetic locations. First, it was error for Dr. Baird to include the CTT locations *at all* since, as explained above, the CTT results from the evidentiary sample to not match Simmons' DNA. Second, Dr. Baird's statistical calculations inappropriately fail to account for the fact that *countless other people, apart from Simmons, would also be "included" as possible contributors to the crime scene samples.*<sup>4</sup> In order for the jury to properly assess the weight of the DNA evidence in this case, they must know the likelihood

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<sup>4</sup> The DQA/PM test has limited capabilities by today's standards. It tests for only six genetic locations and can only identify several locations by a process of elimination rather than conclusive identification. By contrast, today's tests can specifically identify an average of 13 to 16 genetic locations in a much more precise manner. Of the six genetic locations tested by DQA/PM in this case, only three of those locations provide any information potentially relevant to Simmons. This is because two of the genetic locations (LDLR and GYPA) include everyone in the world – i.e., 100% of the population would "match" the crime scene sample at these locations. A third genetic location (HBGG) does not give us any information relevant to Simmons because he and the victim have identical DNA at this location. At the remaining three genetic locations, if there was no testing error by Lifecodes, Simmons' DNA is "included," but so are countless other people with different genetic profiles than Simmons.

that Simmons' "inclusion" could arise by chance or coincidence. Thus, the relevant statistical question in this case is "*what is the statistical probability of randomly selecting some other person, other than Simmons himself, whose DNA would likewise not be excluded as a potential contributor to the evidentiary sample?*" Performing the calculation necessary to answer this question is sometimes called conducting "mixture statistics." That is not the calculation that Dr. Baird performed. Instead, Dr. Baird testified to what are known as "single source statistics." In other words, Dr. Baird calculated *the statistical probability of randomly selecting some other person in the world, other than Simmons, whose DNA is identical to Simmons' (i.e., his genetic twin)*. This meaningless calculation bears no relation to and sheds no light on the ultimate issue in this case: was Kenneth Simmons the perpetrator.<sup>5</sup>

Throughout his PCR deposition, Dr. Baird admitted that there are other genetic profiles (other than Simmons') that would likewise be included by the DQA/PM test results, that mixture statistics would account for those other genetic profiles, and that the mixture calculation offered by Simmons' experts is a correct calculation.<sup>6</sup> App. 4743-44, 4747. Moreover, Dr. Baird

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<sup>5</sup> To use a simplified analogy, suppose a forensic test was able to identify that the perpetrator of a crime had red hair. If Simmons has red hair, then he would be "included" as a potential contributor. To properly assess the strength of that "inclusion," the jury would need to know how many other people, other than Simmons, also have red hair and therefore are likewise included. If 30% of the world's population has red hair, then the correct answer would be that roughly 30% of people, other than Simmons himself, are "included" as potential contributors. Instead of answering this question, Dr. Baird told the jury how many people in the world, other than Simmons himself, have the exact same genetic profile as Simmons – i.e., 0%. The fact that there is a 0% chance of finding Simmons' genetic twin is irrelevant, because it does not relate in any way to the crime scene evidence, and this figure is therefore grossly misleading.

<sup>6</sup> Simmons experts testified that if the DQA/PM results are reliable, the DNA of approximately 1 in 145 whites are included and 1 in 336 African-Americans are included (not 1 in a billion and 1 in 8 million, as Dr. Baird claimed). App. 5052-53.

acknowledged that THE EVALUATION OF FORENSIC DNA, by the National Research Council, is an authoritative text on the subject of DNA testing, reporting and testimony. App. 4757-58. This book was published in 1996, three years before Dr. Baird testified at Simmons' trial. Dr. Baird was well aware of its contents. In fact, unscientific and irresponsible practices by Dr. Baird and the Lifecodes lab (under his direction) were actually the impetus for the NRC study that led to this publication. See, e.g., *Harvey v. State*, No. A-7963, 2004 WL 60771 at \*10 (Alaska App. 2004) ("Baird and his company, LifeCodes, were connected to controversial DNA testimony that prompted a National Research Council study of DNA evidence – a study that was critical of certain DNA testing, and that cautioned prosecutors and defense attorneys against 'over-sell[ing] DNA evidence' or arguing 'that DNA-typing is infallible.'"). Dr. Baird sent several chapters of THE EVALUATION OF FORENSIC DNA to Solicitor Bailey in preparation for Simmons' trial, and Dr. Baird admitted that this book specifically instructs experts *not* to report single source statistics in this kind of case.<sup>7</sup> App. 4756. Further, Dr. Steve Lambert, Dr. Charlotte Word and Dr. Robin

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<sup>7</sup> See App. 4757-58

Q: Dr. Baird, I think I was referring you to page 129 in Evaluation of Forensic DNA, a publication by the National Research Council.

A: Correct.

Q: In that, on that page is where it details how to calculate the appropriate statistical frequencies for a mixed sample.

A: Correct. And, again, this is copyrighted 1996.

Q: And this testing was done in 1998?

A: Correct.

Cotton all testified that this is not a matter on which reasonable experts could differ. As Drs. Word and Cotton explained:

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

App. 5048.

In any event, Dr. Baird's egregiously incorrect statistical calculation would really only matter if there were absolutely no reason to otherwise doubt the reliability of Lifecodes' DQA/PM test results. But, as explained above, that is not the case. The State's witnesses falsely claimed that Simmons' DNA was a "match" at all nine genetic locations, testified to fabricated data to support this false claim, failed to disclose a mountain of evidence that would have undermined its purported finding of a mixture of DNA from the DQA/PM test results, and withheld additional

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Q: And you'd agree with me that this is the book that every expert relies on in the appropriate calculation for DNA frequencies?

A: Yes.

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

A: Correct.

Q: That's not what you did?

A: Correct.

Q: You used the single source frequency?

A: Correct.

evidence that would have raised serious questions about the lab's general quality, accuracy, and credibility. That Dr. Baird compounded these constitutional violations with yet another false piece of testimony simply reinforces the lab's propensity toward error, unreliability and fiction.

Finally, the State erroneously suggests that Simmons' false confession claim is unpreserved because it was not included in his post-hearing brief. However, as the State acknowledges, the PCR court requested briefing only on the intellectual disability claim. Despite that request, Simmons did discuss the false confession claim in his post-hearing brief and, further, specifically noted "[t]o be clear, Mr. Simmons does not waive any of the claims raised in the PCR Application. Undersigned counsel will be happy to provide additional briefing if the Court determines it necessary for any other claims." App. 5118, *see also* App. 5145-47, 5173. The State also argues that trial counsel could not have been ineffective for failing to retain a false confession expert because it was a "novel" area of research at the time of trial in 1999, and remains so now. This claim is contradicted by a vast body of scholarly publications (much of which the State cites in its Return) that predates Simmons' trial and has continued to present day.<sup>8</sup> Similarly, the State's claim that expert testimony on false confessions is inadmissible in South Carolina is disproven by the very cases on which the State' relies. *See State v. Myers*, 359 S.C. 40, 51, 596 S.E.2d 488, 494 (2004) (the record reflects that in fact Dr. Kassin was allowed to testify about specific cases of false confession); *see also State v. Cope*, 405 S.C. 317, 347, 748 S.E.2d 194, 210 (2013) (noting

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<sup>8</sup> *See, e.g.,* Leo & Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Criminology 429 (1998); Saul M. Kassin and Karlyn McNale, "Police Interrogations and Confessions," 15 Law and Human Behavior No. 3 (1991); Paul G. Cassell, Protecting the Innocent from False Confessions and Lost Confessions – And from Miranda, 88 J. Crim. L. & Criminology 497 (1998); Saul M. Kassin & Katherine L. Kiechel, "The Psychology of False Confessions: Compliance, Internalization and Confabulation," AM. PSYCHOL. 227 (March 1996).

that the defendant presented “extensive and thorough testimony [which] informed the jury of the nature of coerced internalized false confessions and the factors that often accompany such false confessions—such as fatigue, stress, recent trauma, and aggressive police methodology.”).

For all of the reasons discussed above, and in Simmons’ Petition for Writ of Certiorari, this Court should grant *certiorari* and reverse Simmons’ conviction. A new jury should have the opportunity to assess – based on accurate and scientifically credible evidence – whether Kenneth Simmons, a person with intellectual disability, committed the murder and sexual assault at issue.

Respectfully submitted,

**EMILY C. PAAVOLA**

Death Penalty Resource & Defense Center  
900 Elmwood Ave., Suite 101  
Columbia, South Carolina 29201  
(803) 765-1044  
Emily@deathpenaltyresource.org

BY:   
ATTORNEY FOR APPLICANT

August 21, 2014

THE STATE OF SOUTH CAROLINA  
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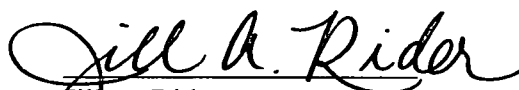
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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a copy of Respondent/Petitioner's Reply was served by first class United States mail, postage prepaid, this 21<sup>st</sup> day of August, 2014, upon the following:

Donald J. Zelenka  
Melody Brown  
SC Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211

  
Jill A. Rider