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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..... *Petitioner,*

v.

STATE OF SOUTH CAROLINA..... *Respondent.*

PETITIONER'S BRIEF

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QUESTION PRESENTED

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

STATEMENT OF THE CASE

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

Lilly Bell Boyd was an elderly, African-American woman who lived alone in Summerville, South Carolina. App. 1032. She was last seen alive in her yard on Saturday, August 31, 1996, and she was found murdered in her home the following day. App. 1077. She had been beaten, strangled, and sexually assaulted. The Summerville Police Department actively investigated the case for a year without success, prompting the State Law Enforcement Division ("SLED") to form a task force to solve the case. The task force requested a suspect profile and then rounded up and interrogated nearly thirty men from the area who generally fit that profile. App. 1330-31; 1340.

In October of 1997, a task force member suggested Simmons, a black man from Boyd's neighborhood, as a potential suspect. Shortly thereafter, Simmons was arrested for placing two family packs of steaks down his pants at the Food Lion, and held until he could be questioned by task force members. App. 1442. From December 2-9, 1997, Summerville police detectives and/or SLED agents interrogated Simmons six times. App. 4231. He gave multiple incriminating statements and ultimately confessed to the Boyd murder. Simmons' statements are inconsistent, contradictory, do not correspond to any actual evidence, and are highly implausible. *Id.* Moreover, there are several situational reasons to doubt the reliability of Simmons' incriminating statements, and his intellectual disability is foremost among numerous risk factors associated with false confessions. *See Atkins*, 536 U.S. at 320 n.25.

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

> The State's case consists basically of Kenneth Simmons' confession, statements that are on tape that he gave Kenny Mears. And it also consists of DNA evidence. You'll also

> hear that an effort was made at the crime scene to take fingerprints, to identify footprints and that kind of thing. And there will be no fingerprint evidence that matches up with Kenneth Simmons. There will be no footwear that matches up with him. We're looking at confessions and DNA.

App. 1041-42.

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

None of this testimony was true. As discussed in greater detail below, the State's witnesses presented the jury with fabricated data to support their "match" conclusion, and the State failed to disclose evidence that would have revealed their expert testimony as false and unreliable.

After this Court affirmed his convictions and sentence on direct appeal, *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004), Simmons sought post-conviction relief. The PCR Court conducted an evidentiary hearing and issued an Order Granting Post-Conviction Relief Pursuant to *Atkins*, but denying relief on the merits of all other grounds. App. 5296-5311. The State filed a notice of appeal, and Simmons cross-appealed. On July 27, 2015,

this Court affirmed the lower court's order vacating Simmons' death sentence because he is intellectually disabled and, further, granted Simmons' Petition for a Writ of Certiorari regarding the DNA claim.

ARGUMENT

I. The State presented false DNA testimony at trial and withheld favorable, material evidence.

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

A. The State's witnesses testified to fabricated CTT results.

During Lauren Crane's testimony at trial, the State introduced a chart, labeled State's Exhibit Number 24, which she described in detail. App. 1464-71. The chart depicts the nine genetic locations to which Crane testified. The first six locations were tested in early January of 1998 with the DQ Alpha Polymarker kit (hereafter referred to as "DQA/PM"), which tests for six genetic locations (named LDLR, GYPA, HBGG, D7S8, GC, and HLADQA1). The last three locations were tested approximately two weeks later by a single test known as CTT (to represent the three genetic locations it identifies:

CSF1PO, TPOX and THO1). The chart, as it appeared before the jury, looked like this:

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

* indicates that a 1.2 allele may be present

( ) indicates allele of lesser intensity

The first two rows of this chart depict the genetic results obtained from Lilly Bell Boyd's and Kenneth Simmons' *known* samples, respectively. The last four rows purport to show the results obtained from the evidentiary samples – *i.e.*, vaginal swabs taken from the victim's body (sample number F156384 and sample number F156386). Crane and Baird both testified that Simmons' DNA was consistent with the evidentiary samples at nine out of nine tested genetic locations. App. 1470-71, 1480-82. Exhibit Number 24 likewise represented to the jury that CTT results from Simmons' known sample were exactly the same as the CTT results obtained from the vaginal swabs. This testimony was false.

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

Second, Lifecodes *did* complete a CTT test on sample number F156386, but the results reported at trial on State's Exhibit Number 24 are completely false. Crane testified that the CTT results for sample number F156386 were the same as those obtained from Simmons' known blood sample. In fact, the results that Lifecodes obtained from sample number F156386 ***do not match Simmons' DNA***. App. 4951 ("Q: Is Mr. Simmons incriminated in any way by the CTT testing results? A: Not from those results, no. *No way.*"). Instead, the CTT results from this sample were consistent with the victim's DNA

alone, and they indicate only a single DNA profile – not a mixture of DNA from more than one person. App. 4951, 5048, 5054.

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

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

Lifecodes never disclosed that it had conducted a CTT test on the evidentiary samples, nor did it ever report what those test results purported to show. In her deposition, Crane explained that Lifecodes never issued such a report because she considered all of the CTT testing to be ***inconclusive*** and ***she did not rely on those results in any way***:

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

App. 4830-31.

The jury that found Simmons guilty never learned that the CTT results were inconclusive and lacked any evidentiary value relevant to Simmons' case. On the contrary, both experts falsely claimed that Simmons' DNA was consistent with the evidentiary

samples at all nine locations, and they presented an exhibit purporting to show that his DNA matched the evidentiary samples at all nine locations, including those tested by CTT.

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

> Q: It seems to me that you testified about this chart as State's Exhibit Number 24 for the State.
>
> A: And at the beginning of my testimony I was asked if I had previously reviewed the chart that as a combination prepared to show the results, and my answer was, no, not – not recently, no. So the first time I saw that chart was when we were in court.
>
> Q: All right. You said, "Not recently, no."
>
> A: Right. And then he said, "Let me hand you the report."
>
> Q: "Would that chart be of assistance to you in explaining to the jury the results of your PCR analysis?"
>
> A: Right, because it had the types that were listed there.
>
> . . .

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

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

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

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

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

A: Correct.

App. 4803-06.

Subsequently, on December 15, 2011, the State offered live testimony from Solicitor Walter Bailey who claimed that *he* prepared the exhibit in preparation for trial, but he stated that he did so only with data provided to him by Crane and Baird. App. 4649-50. Further, Bailey initially corroborated Crane's story by insisting that "the exhibit was never given to anybody from Lifecodes prior to trial." App. 4652. He explained that he "intended to go over it with them, but they came in late. . . . [S]o the bottom line is I did not get an opportunity to go over the chart with her before she testified." App. 4652-54. On cross-examination, however, Bailey changed course and admitted that correspondence established that he sent the exhibit to Crane for review prior to trial. App. 4659; *see also* App. 4705 (letter from Bailey to Crane dated 12/21/98).

B. The State did not disclose evidence indicating testing error with regard to all nine genetic locations.

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

Moreover, after obtaining the surprising CTT test results, Lifecodes conducted an additional test on February 9, 1998, called an "amelogenin" test. App. 4953-54. This test determines the gender for the source of a DNA sample, and it is therefore more colloquially called a "gender-typing" test. All of the samples tested with the gender-typing test showed only an "X" chromosome, consistent with the DNA being solely from a female source. *Id.* In other words, ***no male DNA was identified*** in the evidentiary samples. App. 5055. ("[t] here is no hint of a band at the Y chromosome (i.e., male) location"). Lifecodes never reported that it had completed a gender-typing test or that the results indicated that no male DNA was present in the evidentiary samples. App. 4956-57.

The most likely explanation for the inconsistency between Lifecodes' purported DQA/PM results and the findings of the CTT and Gender-Typing tests is error during the DQA/PM testing. App. 4955. And, the most likely factual scenario is that the crime scene

samples never contained a testable mixture of DNA, but were contaminated with an outside source of DNA during the DQA/PM testing process. A reagent blank control process (also called an extraction blank control) would have been a crucial step in preventing testing error, but Lifecodes failed to use these controls. App. 5048; 5009-10. The need for a reagent blank control was well-known by the early 1990's, and it was specifically included in Guidelines for a Quality Assurance Program for DNA Analysis, published by the Technical Working Group on DNA Analysis Methods in 1991. App. 5060-61. Once again, Lifecodes never reported that it was not using reagent blank controls – even when trial counsel specifically requested information about the lab's quality assurance program. *See* App. 4515-16.

In addition to the errors identified above, Lifecodes failed to follow a number of other generally accepted practices and procedures. None of these errors was disclosed to trial counsel. As a result, the jury that ultimately convicted Simmons and sentenced him to death operated under the false impression that: (1) DNA evidence conclusively identified Simmons as the perpetrator of the crime; (2) that there was no reason to question the accuracy or reliability of the State's DNA evidence; and, (3) the State's witnesses were entirely credible. As the post-conviction evidence demonstrated, if the jury had known the truth about Lifecodes' numerous testing errors, reporting failures and general bad practices, there is – at a minimum – a reasonable probability that the jury would have concluded that the DNA evidence was unreliable and inaccurate and/or that the State's witnesses were not credible.

In fact, numerous courts have reached exactly that conclusion after receiving evidence that Dr. Baird and other employees of the Lifecodes lab (operating under Baird's

direction) were engaged in a variety of unscientific, irresponsible and untruthful practices. The Fourth Circuit and multiple state courts have found that Lifecodes improperly reported DNA matches, failed to use accepted scientific techniques, and performed statistical calculations in an unacceptable manner. *See, e.g., O'Dell v. Netherland*, 95 F.3d 1214, 1248-1249 (4th Cir. 1996) (finding Lifecodes testified to a DNA "match" when variations in the test results exceeded Lifecodes' own match criterion and therefore the results should have been deemed "inconclusive"); *Harvey v. State*, No. A-7963, 2004 WL 60771, at *10 (Alaska Ct. App. Jan. 14, 2004) ("Baird and his company, LifeCodes, were connected to controversial DNA testimony that prompted a National Research Council study of DNA evidence – a study that was critical of certain DNA testing, and that cautioned prosecutors and defense attorneys against 'over-sell[ing] DNA evidence' or arguing 'that DNA-typing is infallible.'"); *Caldwell v. State*, 393 S.E.2d 436, 443-44 (Ga. 1990) (rejecting Lifecodes' statistical calculations in favor of a more conservative calculation based on undisputed defense testimony that "seriously calls into question Lifecodes' enormous claimed power of identity."); *People v. Castro*, 545 N.Y.S.2d 985, 996-997, 998 n.15 (N.Y. Sup. Ct. 1989) (finding, *inter alia*: (1) Lifecodes "failed in its responsibility to perform the accepted scientific techniques and experiments in several major respects"; (2) Dr. Baird misrepresented the standard measurement of error he used to reach his conclusions; and, (3) the method that Dr. Baird used to perform his statistical calculations was "scientifically unacceptable.").

Further, even if there was no reason to doubt the accuracy or reliability of Lifecodes' test results, Dr. Baird's testimony claiming odds of 1 in millions to billions was false and misleading, and it grossly misrepresented the potential strength of the evidence, even if the

lab's testing results had been unquestionably accurate. Dr. Baird's statistical calculations were simply incorrect, and Dr. Baird knew or should have known that his testimony on this point was false. As Drs. Word and Cotton explained:

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

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

C. Simmons is entitled to a new trial.

The post-conviction evidence in this case establishes two distinct due process violations. First, the State's use of false evidence against a defendant violates the Fourteenth Amendment. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This is true even when the State has not deliberately introduced the false evidence, but fails to correct it after it is introduced. *See Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue*, 360 U.S. at 269; *Riddle v. Ozmint*, 369 S.C. 39, 47-48, 631 S.E.2d 70, 75 (2006). Moreover, false or misleading testimony by a representative of the State is imputed to the prosecution. *See, e.g., Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998); *Wedra v. Thomas*, 671 F.2d 713, 717 n.1 (2d Cir. 1982); *Curran v. Delaware*, 259 F.2d 707, 712-13 (3d Cir. 1958);); *see also Matter of Investigation of W. Virginia State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 505 (W.Va. 1993) ("It matters not whether a prosecutor using [the expert] ever knew that [the expert] was falsifying the State's evidence. The State must bear the responsibility for the false evidence. The law forbids the State from obtaining a conviction

based on false evidence."). A new trial is warranted when there is reasonable likelihood that the false evidence could have affected the verdict. *Napue*, 360 U.S. at 271.

Second, the State withheld favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Bagley*, 473 U.S. 667 (1985). A *Brady* violation includes three components:

> (1) the evidence must be favorable to the accused, either because it is exculpatory or impeaching
>
> (2) that evidence must have been suppressed by the State, either willfully or inadvertently, and by either the prosecutor himself or by those acting on behalf of the prosecuting entity; and,
>
> (3) prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 432-38 (1995). For *Brady* purposes, prejudice is established "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 432-36; *see also Bagley*, 473 U.S. at 682. Post-conviction relief must be granted if a *Brady* violation is found to have occurred. *Riddle*, 369 S.C. at 44, 631 S.E.2d at 73.

The evidence offered before the PCR Court established both claims. There can be no genuine dispute of a reasonable likelihood that the State's false DNA testimony affected the jury's verdict. *See Napue*, 360 U.S. at 271. It has long been recognized that jurors place special trust in expert scientific testimony – perhaps none more so than DNA. *See, e.g., United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or

confuse."); *United States v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass. 1999) ("[A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think, and give more credence to the testimony than it may deserve."). The State falsely represented that it had DNA evidence against Simmons with virtually infallible odds. The jurors would have had no reason to disbelieve that testimony, and it unquestionably affected their decision.

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

- The CTT results obtained for the victim's known blood standard.
- The CTT results obtained for the crime scene evidence.
- The fact that the CTT results did not incriminate Simmons; that the lab considered the CTT test results to be "inconclusive"; and, that Crane was not relying on the CTT results in any way.
- The fact that the CTT tests did not identify a mixture of DNA and that the CTT results identified only the victim's known profile.
- The Gender-Typing Test results, which indicated that no male DNA was identified in the crime scene samples.
- The fact that the lab failed to perform a reagent blank control process, contrary to national quality assurance guidelines, and even though defense counsel specifically requested information about the lab's quality assurance measures.
- The fact that Baird's statistical calculations were grossly incorrect and based on methods contrary to scientifically acceptable practices.
- Evidence of other errors and general bad practices by Lifecodes.

All of this undisclosed evidence is favorable to Simmons, either because it is directly exculpatory or impeaching (or both). The facts that: (1) the CTT test results did not

match Simmons' DNA; (2) the CTT results did not show a mixture of more than one person's DNA; and, (3) the gender-typing results did not show the presence of any male DNA are all, obviously, exculpatory. Moreover, even if Lifecodes' purported finding of a mixture of DNA for the DQA/PM locations were correct, Baird's statistical calculations were incorrect and grossly misleading, and all of the lab's other errors are impeaching because they raise serious doubts about the overall reliability of its work.

This favorable evidence was suppressed by those acting on behalf of the prosecution. *Brady's* obligations apply "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Moreover, *Brady's* obligations apply regardless of whether the individual solicitor is aware of the evidence, as long as it is in the possession of those acting on behalf of the prosecuting entity. *Kyles*, 514 U.S. at 437. The Due Process obligation extends to the prosecution as a whole, because it operates as "an entity" in serving as "the spokesman for the Government." *Giglio*, 405 U.S. at 154. This extension is "as it should be" because the prosecuting entity bears responsibility as "the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles*, 514 U.S. at 439 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Viewed collectively, the undisclosed evidence here must "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. The State's case for guilt rested on two items of evidence. Without conclusive DNA, the State would have been left only with a confession that police extracted from Simmons (a man with an average IQ of 69) after multiple, un-recorded interrogations. In *Gumm v. Mitchell*, No. 1:98-cv-838, 2011 WL 1237572 (S.D. Ohio Mar. 29, 2011), the federal

district court found prejudice for a *Brady* violation in similar circumstances. The court held:

> the evidence against Petitioner was not very strong. There was no physical evidence linking Petitioner to the crime. The police officers had only Petitioner's confession which, because of his mental retardation and his heightened susceptibility to police coercion, must be viewed with some skepticism. Under these circumstances, it would not take as much evidence to create reasonable doubt in the minds of the jurors.

Id. at *8. The outcome in Simmons' case simply cannot be deemed "fair" or one in which we can have confidence. The *Brady* violation in this case was clearly prejudicial.

Finally, even if the State's DNA presentation somehow did not amount to a constitutional violation, the evidence developed during Simmons' PCR proceeding is, *at a minimum*, "evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(a)(4) (2011).

CONCLUSION

The State relied on false DNA evidence to secure Simmons' conviction. In addition, the State violated its *Brady* obligations by failing to disclose the relevant evidence that would have made trial counsel aware of the State's false testimony. As a result, the outcome of Simmons' trial was unfair, unreliable and unconstitutional. This Court should reverse Simmons' convictions and grant him a new trial.

Respectfully submitted,

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KENNETH SIMMONS, SK5066..... *Petitioner,*

v.

STATE OF SOUTH CAROLINA..... *Respondent.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Brief was served by first class United States mail, postage prepaid, this 22nd day of , 2015 , upon the following:

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