STATE OF SOUTH CAROLINA
In the Supreme Court

On Grant of Certiorari Review

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

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

Kenneth Simmons, #5066,

Petitioner

vs.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

Federal Cases:

State Cases:

State Statutes:

State Rules:

Other Authorities:

ISSUE 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).

COUNTER STATEMENT OF ISSUES PRESENTED

1. May a PCR applicant receive review on appeal on an issue that the PCR judge summarily dismissed when the PCR applicant, who provided the proposed order with the summary language, did not request by way of a post-trial motion that the PCR judge amend his ruling to include the required factual findings and conclusions of law in order to properly preserve the issue for review on appeal?

2. Is a PCR applicant on appeal entitled to a new trial where (a) he fails to show he is excluded from DNA evidence used at trial; (b) there was no testimony or argument suggesting automatic guilt by virtue of the fact that he could not be excluded from the sample, and (c) other evidence of guilt exists including his own detailed confession and apology at trial?

STATEMENT OF THE CASE

This matter comes before the Court by way of a cross-appeal. Petitioner/Respondent ("the State") appealed from the PCR order vacating Respondent/Petitioner's ("Simmons") death sentence upon a finding of mental retardation.[1] This Court denied certiorari review on the State's issue and granted review only on the DNA issue in Simmons' cross-petition, denying review of the question presented on the false confession expert testimony.

Simmons does not claim actual innocence. He cannot. None of his PCR experts testified the DNA evidence was exculpatory, and, in fact conceded – in the most favorable testimony Simmons could muster after years of reviewing the samples and testing results – ***over 99% of the population was excluded:*** "...its less than 1% of the population ... Like .2% of the population would be included." (App. p. 4129, lines 18-22). (See also pp. 4979-4980). Simmons declaration to this Court that the "conviction rests exclusively on false DNA testimony" and a "false confession," (Brief of Petitioner, p. 1), is, well, false. At least, it is not reconcilable with the actual evidence of record, the credibility findings implicit in the PCR judge's denial, and a proper application of law. None of the statements have ever been found inadmissible.

Simmons attempts to avoid his conviction in most part by discounting the evidence at trial in reliance of the post-trial decision that he is barred from receiving a death sentence under *Atkins v. Virginia*, 536 U.S. 304, 318, 122 S. Ct. 2242 (2002). However, he has received all the required relief under *Atkins* by virtue of the re-sentencing order:

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[1] 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). However, the term "mental retardation" was used throughout the trial and in the PCR.

> There is no evidence that [the intellectually disabled] are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins v. Virginia, 536 U.S. at 318.

The initial bar to reaching Simmons' issue on the DNA evidence, however, is the lack of factual findings. Judge Early's order provides factual findings only for the mental retardation issue. Judge Early summarily rejected all other issues. The lack of specific factual findings and conclusions of law prevents fair and proper appellate review. At any rate, as noted, Simmons could not show he was excluded from the DNA sample. Simmons is not entitled to any relief.

Procedural History

Simmons 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 Simmons. On February 28, 1999, after a trial before the Honorable Rodney A. Peeples, the jury found Simmons 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 statutory and non-statutory mitigating circumstances, including the mentality of the defendant and whether he was mentally retarded. (App. pp. 2381-2382).

On March 2, 1999, the jury found the existence of each aggravating factor, and unanimously recommended a sentence of death. (App. p. 2454-2458). Before imposing his

sentence, Judge Peeples allowed Simmons to address the court. Simmons 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.* (App. p. 2465) (emphasis added). Judge Peeples then sentenced Simmons 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).

Simmons 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, including evidence he "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).[2] Judge Peeples also noted that in light of this conflicting evidence he gave a series of mitigating circumstance instructions. (App. p. 3228).

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[2] Curiously, Simmons has not alleged the defense presented false evidence at trial, though a defense expert repeatedly testified that Simmons was not intellectually disabled at the time of trial. The opinion evidence at trial was overwhelmingly supportive of the fact that Simmons was not intellectually disabled:

- Dr. Leslie Sandler opined Simmons was not intellectually disabled, (App. p. 4485);
- Dr. Thomas McAbee testified Simmons was not intellectually disabled, (App. pp. 2699-2702);
- Dr. John Michael Foxworth testified Simmons suffered from "an alcohol related persisting dementia" (App. pp. 1526-1530);

- Dr. William Behrmann testified that he did not diagnosis Simmons with any "mental illness or defect that would have prevented him ... from waiving his rights" (App. p. 1652); and, most specifically,

- Dr. Lewis Randolph Waid testified to an absence of mental retardation, (App. pp. 1882, 1897), and that Simmons suffered from diminished mental capacity from substance abuse, (App. pp. 1778), which was acquired through "life-style that has involved poly-substance abuse and dependence, (App. pp. 1781-1782). Dr. Waid testified intellectual disability was not "an appropriate diagnosis for him" (App. pp. 1881-1882). (See also App. p. 1897, "he's definitely not meeting the diagnostic criteria for mental retardation"). Dr. Waid was the defense expert in clinical and forensic psychology and neuropsychology.

Further evidence in support of the absence of intellectual disability included uncontroverted facts such Simmons was not identified as intellectually disabled in school in a district that could and did have resources and ability to identify such students. In fact, Simmons' sister was so identified. (App. p. 4001). Simmons was not. Further, Simmons began the use of alcohol at age seventeen and such use greatly intensified at the death of his mother (in his late teens) and he added use of cocaine. (App. p. 3832). His academic decline in school began at the death of his mother. (App. pp. 3868-3869). He graduated 531 out of 615 – 84 other students being situated below his achievements. (App. pp. 3872-3873). The continued drugs and alcohol issues eventually led to his subsequent divorce. (App. pp. 3881-3883).

The State properly preserved the issue that there was no probative evidence supporting the PCR judge's decision which rested on one post-trial, post-*Atkins* opinion, of intellectual disability and Dr. Waid's post-trial, post-*Atkins*, affidavit that essentially recants his testimony in light of *Atkins*. (See App. p. 4220, not asked to assess, not given complete social history, and evaluation "prior to the Supreme Court's decision in *Atkins v. Virginia*. Thus, 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."). Though this Court declined to review the issue, the record still reflects that the overwhelming evidence at trial was that Simmons was not intellectually disabled.

Of particular note, which undermines any legal decision finding Dr. Waid's assertions via affidavit credible, the assertions in the sworn statement in PCR directly contradict his 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

On direct appeal, Simmons raised issues on evidentiary rulings, dismissing a juror, and the failure to charge robbery as a lesser include offense. (App. pp. 3260-3261).[3] 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).[4] Simmons 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). Simmons filed a petition for writ of certiorari in the Supreme Court of the United States on November 8, 2004, (App. p. 3479), which was denied on January 24, 2005, (App. p. 3581). The post-conviction relief action followed.

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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. The State has always agreed in the PCR action 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 v. Florida*, ___ U.S. ___, ___, 134 S.Ct. 1986, 2000 (2014) ("The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework.").

[3] 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, Simmons 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). On November 3, 2003, this Court decided *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). On December 12, 2003, Simmons petitioned to allow supplemental briefing. (App. pp. 3440-3445). His petition was denied January 28, 2004. (App. p. 3446).

[4] Reported as *State v. Simmons*, 360 S.C. 33, 599 S.E.2d 448 (2004).

In the PCR action, testimony was developed over a series of hearings (February 1-4, 2010; December 15, 2011; and, July 2, 2012). The Court also allowed testimony to be taken by deposition (Dr. Leo, Ms. Crane, and Dr. Baird); and, accepted two affidavits regarding DNA evidence (Drs. Charlotte Word and Robin Cotton). The PCR court also received post-hearing briefs. Judge Early granted relied by order dated October 15, 2013, and filed October 21, 2013. (App. pp. 5296-5311). The Order was adopted from Petitioner's submissions[5] and addressed specifically only the intellectual disability issue. The State filed a petition for rehearing. Petitioner did not file a petition for rehearing or seek factual findings on the remaining issues. Both the State and the Petitioner appealed.

Petitioner raised the following issues in his petition:

I.

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

II.

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

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[5] Generally, capital case PCR applicants on appeal argue when a circuit judge makes a wholesale adoption of a party's proposed order (or even adopts language from a party's post-hearing brief) it is evidence that the circuit court judge abdicated his duty to make his own findings of facts and conclusions of law. *See, for example, Steven Vernon Bixby v. State*, Appellate Case No.: 2015-000821; *Steven Corey Bryant v. State*, Appellate Case No.: 2013-000518; *Marion Alexander Lindsey v. State*, Appellate Case No: 2012-206087. *See also Hall v. Catoe*, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004) ("Hall argues that the PCR judge erred in adopting the state's proposed order because the order did not resolve issues of fact, indicating that the judge did not render an independent judicial judgment."). No such complaint by Simmons has been registered here on the adoption of his language.

On July 27, 2015, this Court denied the State's petition for review, and granted Simmons' petition only as to Question I. Simmons filed his brief on October 22, 2105. This brief follows.

STATEMENT OF FACTS

This Court has previously found the following facts to be supported by the record:

> On September 1, 1996, the battered body of an eighty-nine-year-old female, whom we will refer to as Ms. B [electing not to include Ms. Boyd's name in the published opinion], was found bound and gagged on the kitchen floor of her home in Summerville. She had been raped, severely beaten, and strangled.
>
> The crime went unsolved for more than a year until December 1997 when Simmons, who was incarcerated on other charges, confessed to the killing. He said he smoked crack and drank beer at a club before riding his bicycle home in the early morning hours on the day of the murder. Simmons saw Ms. B in her yard feeding her chickens and followed her into her house. Simmons pushed her and demanded money. Ms. B fell to the floor and hit her head. Simmons then hit her with a stick he had picked up on the back porch. He described the stick as being about two feet long and an inch and a half or two inches in diameter. Simmons raped Ms. B. She was "half and half" alive when he fled the scene.
>
> The State's pathologist testified Ms. B died from blunt trauma and manual strangulation. She had multiple rib fractures caused by stomping or slamming, severe head trauma, and severe vaginal lacerations from the insertion of an object such as a stick or finger. She had semen in her vagina and also in her mouth. DNA testing indicated the semen taken from Ms. B's body was consistent with Simmons' DNA.

State v. Simmons, 360 S.C. 33, 37, 599 S.E.2d 448, 449 - 450 (2004).

The experts presented by Simmons in the PCR action agree that DNA sample testing produced a result consistent with Simmons' DNA profile. Moreover, Simmons experts agreed that ***more*** *than 99% of the population was excluded.* (App. p. 4129 (Lambert); pp. 4979-4980 (Word)). Again, no test excludes Simmons.

Further, and, as conceded in Simmons' brief, (see Brief of Petitioner, p. 2), the police investigation was lengthy and suspicion did not fall directly upon Mr. Simmons. Rather, Mr. Simmons was identified after detailed investigation well-over a year after the crime.

Mr. Simmons, like many other criminal defendants, attempted to deflect in initial statements, [6] but eventually confessed to the crime.[7] At trial, as he had previously done in

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[6] Instead of citing to the statements, Simmons cites to Dr. Leo's affidavit as a basis for asserting the facts of the interrogation and that he was interrogated six times by multiple officers in the local agency and SLED. (Brief of Petitioner, p. 2 citing App. p. 4231). Dr. Leo was the PCR "false confession expert." His affidavit was apparently either rejected or found not credible by the PCR judge. This Court did not grant certiorari review on the rejected issue regarding Dr. Leo. However, Respondent notes the appendix contains transcripts from the taped interviews. (See App. p. at 3170-3220). These are detailed with the agent's questions included and are available for the Court's review.

[7] In fact, Simmons attempted to provide an excuse for being framed and an excuse of how and why his semen was at the crime scene, suggesting that he was in the area to repay a debt, the trailer where he had to go was close to Ms. Boyd's house, the people were mad at him and "they might have took it out like that," and his girlfriend told him "they were setting [him] up ... by raping them and putting my sperm [from a used condom] up in them." (App. pp. 3172-3173). "Shorty" was supposedly the individually who set him up and prevented Simmons from calling 911 to help the victim. (App. p. 3173). Moreover, the questioning agent asked Simmons if he saw the victim, and if so, to describe her, "the scene that [he] saw." (App. p. 3174). Simmons stated: "She was in the kitchen laying on the floor, hands tied ... in the back." (App. p. 3175). He stated she had been beaten and bruised, and "Shorty" used a "blackjack stick." (App. p. 3175). He had no explanation why the victim was targeted, but insisted he was being framed. (App. pp. 3175-3176-3177). He consented to a blood test. (App. p. 3188). The full transcript of the statement is included in the appendix at 3170-3197.

Simmons later confessed in detail, denying anyone else's involvement, stating he had been smoking crack and "needed some more money." (App. p. 3201). Again, that statement was transcribed and available for detailed review. Simmons gave this chilling account of the last minutes of his eighty-nine (89) year old victim:

> ... I got on my bicycle and went riding around to (N/A) my drug spot and whatever, I saw Ms. Boyd on the other side. I went through the front gate ... Between 5:00 o'clock and 6:00 o'clock ... Saturday morning ... I went to the back ... I was by myself .... I went in the house and catch her coming back outside push her back in the house .... As she was coming back out I catch her and push her back in the house ... It was in the back porch okay and I push her back inside the house and I ask her to give me the money. She grabbed the money and start try to pull back and I push her ... [the money was in] An envelope and I push her, she fall and hit her head, and was getting back up when I was trying to catch her, she was trying to hold on to me I try to hold her. She fall. She was getting back up and I hit her with A stick ... a little stick off the tree [from] the back porch, the stick was sitting on the back porch ... [hit her] Almost three times ... On her head. On her head ... After that, I had sex with her ... she was still living at that time ....

his detailed confession, he apologized to the victim's family for what he did and asked for forgiveness. (App. p. 2465). He also accepted the verdict from the jury recognizing they had "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." (App. p. 2465). Now Mr. Simmons argues to undo the whole of the jury's verdict, not on new evidence of actual innocence, but on questions of clarification of the DNA testing and statistics that his experts concede not only do not exclude him, but also exclude over 99% of the population. The PCR judge found his evidence did not warrant any relief. It still does not warrant relief.

(App. pp. 3201-3202).

Simmons was asked if he understood what could happen to him, to which he replied: "I could get the death penalty, locked up forever, as long as I got my soul, right, You know, that's all I got leave to come home. That's all I got leave." (App. p. 3208). Simmons made the following additional statement on the taped interview:

> ... Y'all treat me with respect like somebody, so I was glad y'all come back, so I could get my story right and confess and get my soul right with God. Mr. Mears I appreciate everything what you do for me ... I am sorry what I did to the community and Ms. Boyd and their family. To my family, I'm sorry for that, but it's the price I got to pay. I willing of a man To stand up for what happened and what I had already done.

(App. p. 3210).

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.* The record fully and fairly supports the PCR judge's determination that the claim does not warrant relief. However, the issue presented is procedurally deficient for a review on the merits as Simmons failed to request the required findings of facts and conclusions of law.

A. The DNA evidence claim is procedurally barred from review. Simmons failed to request factual findings and conclusions that allow fair review of the issue on appeal.

As the State asserted in the return to Simmons' petition, (Return p. 8), Simmons failed to obtain a sufficient ruling with factual findings and legal conclusions for review, or point out any incorrect matter of law. Simmons did not request a sufficient ruling by the PCR judge and has not even requested within this appeal that the order be vacated and remanded for specific findings. Of note, the PCR judge adopted the language submitted by Simmons in Simmons' proposed order that *specifically did not address any other issue.* [8] Therefore, this issue is procedurally barred and may not be considered on the merits.

Further, there are no findings on credibility or other facts that would allow for sufficient and fair review of this issue – none. The only arguments from either side are speculative based upon each parties position presented and not the PCR judge's ruling.

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[8] Judge Early announced his ruling in general terms by email dated September 6, 2013. Simmons submitted a proposed order by email dated September 11, 2013. The Clerk of Court records reflect the Order granting relief was filed October 21, 2013. See http://publicindex.sccourts.org/Dorchester/PublicIndex/CaseDetails (Case Number 2005CP1801368) (last checked January 22, 2016).

Simmons should not be rewarded for his failure to obtain a specific ruling that could support fair appellate review. The record shows Simmons made a choice to narrow his presentation, and, ultimately, to narrow representation to protection of the ruling after receiving a favorable ruling on intellectual disability. Simmons is not entitled to any relief much less *de novo* review. This would be especially troubling without complete credibility findings which were clearly and soundly against Simmons and his evidence when the matter was before the PCR judge. At most, the only relief available at this juncture would be for this Court to vacate the order and remand for sufficient findings by Judge Early to effect any semblance of fair review. However, this Court's precedent would dictate finding the issue barred from appellate review on the merits.

Discussion

Simmons briefed only the mental retardation issue and DNA issue prior to trial,[9] (App. pp. 3784- 3796), and only the mental retardation issue and DNA issue were briefed for the PCR judge after receipt of testimony, (See App. pp. 5148-5173).[10] The PCR judge's order addressed the mental retardation claim with specific findings of facts and a conclusion of law.[11] However, as to all other claims, Judge Early found:

> ... Applicant has raised a number of other claims challenging his conviction and death sentence. ***The claims relating to his conviction are denied as without merit.*** In light of this Court's finding that applicant is mentally retarded, the remaining claims attacking the sentence are moot. ...

(App. p. 5311) (emphasis added).

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[9] In his pre-trial brief, Simmons advised: "... the evidence offered at the hearing will primarily focus on two primary claims: (1) ... mental retardation; and, (2) that the DNA evidence offered at Mr. Simmons trial was – in several respects – false, misleading, incomplete and incorrect." (App. p. 3790).

[10] The PCR judge allowed briefing on any issue but asked for focus on the mental retardation issue. (See App. p. 5024).

[11] Again, the inaccuracies in the findings of fact were the subject of the State's motion to alter or amend and the State's appeal.

The State moved to alter or amend contesting the basis for many of the factual findings in and conclusions expressed in the Order adopted by Judge Early. Simmons did not request rulings on the remaining issues. Simmons only responded to the State's motion to alter or amend. Under clearly established law in this jurisdiction, the instant issue is procedurally barred from review.

S.C. Code Ann. § 17-27-80 requires specific findings of fact and conclusions of law on the issue presented in a PCR action. This Court "has made it abundantly clear that, where a PCR court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule 59(e) motion requesting the PCR court make specific findings of fact and conclusions of law on the allegations." *Smith v. State*, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012). *See, e.g., Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007); *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991) ("The PCR court's conclusions regarding ineffective assistance are insufficient for appellate review and fail to meet the standard set forth in the statute.").

This Court has mandated that "counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP." *Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992). General language denying issues not addressed in the order are insufficient to "constitute a sufficient ruling" and precludes appellate review. *Marlar v. State*, 375 S.C. at 409, 653 S.E.2d at 266. Further, mere legal conclusions, like the one here, are also deemed insufficient. *McCray, supra.* Insufficiency or irregularities in the order of dismissal or order process are waived if the PCR applicant fails to request the PCR court alter or amend the order for the specified reason. *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("Hall waived his right to make this

challenge [regarding sufficient of review by PCR judge] when he failed to file a motion to alter or amend the order.").

Defense attorneys as well as the State are held to this principle which has been widely noted in articles and case law. *See, e.g.*, John H. Blume & Emily C. Paavola, *A Reintroduction: Survival Skills for Post-Conviction Practice in South Carolina*, 4 Charleston L. Rev. 223, 269 (2010) ("In order to preserve all issues for appellate review, counsel must carefully review the final order and address any insufficiency through a Rule 59(e) motion requesting the PCR court to specifically address each issue raised in the application."); John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. Rev. 235, 256 (1994) ("Furthermore, as noted above, the South Carolina Supreme Court recently held that counsel must file a rule 59(e) motion if the order does not set forth the findings and the reason for the findings relevant to each and every ground for relief contained in the application."); Charles E. Carpenter, Jr., Preserving Error for Appeal – A Special Case – Rule 59(e) Motions, S.C. Law., MARCH/APRIL 1995, at 15, 18 (issue may be preserved by sufficient ruling or by post-trial motion requesting a specific ruling: "if the trial judge rules against a party but does not, for whatever reason, state why, the lawyers must go back and ask a second time. Maybe they will have more success the second time around. Probably not. But sometimes they do. Always they must ask."); *Burgess v. State*, 402 S.C. 92, 95, 738 S.E.2d 264, 265-66 (Ct. App. 2013) ("Because the State failed to file a Rule 59(e) motion asking the PCR court to make specific findings of fact and conclusions of law regarding the prejudice prong, we find the issue on appeal is not preserved for our review.").

PCR applicants may also be instructed individually by a law review written by an inmate acknowledging same. *See* Demetrio L. Sears, *South Carolina Post-Conviction Relief:*

Practical Considerations and Procedures from A Prisoner's Perspective, 64 S.C. L. Rev. 1169, 1253-54 (2013) ("In order to preserve all issues for appellate review, counsel must carefully review the final order and address any insufficiently through a Rule 59(e) motion" noting this Court in *Pruitt* "placed an obligation on counsel to file a Rule 59(e) motion when an order fails to set forth findings regarding issues raised and the reasons for those findings").

Thus, experienced defense counsel (in this case, one of whom co-authored one of the articles cited above), failed to preserve the issue for appellate review on the merits and failed to at any point (and not even now) attempt to redress the error by requesting a remand. Simmons – having failed to secure any record of specific factual findings, including credibility findings that are squarely in the province of the PCR judge – is not entitled to have the issue reviewed *de novo* here. The issue is barred from review.

To the extent Petitioner would seek alternatively to have the order vacated and the matter returned to the circuit court, the State agrees there is some precedent for that route. *See Bryson v. State*, 328 S.C. 236, 236-37, 493 S.E.2d 500 (1997) ("remand this matter to the circuit court to issue an order addressing its decision to dismiss McCullough's second application as successive"); *McCullough v. State*, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995) ("vacat[ing] the order of dismissal, and remand[ing] this matter to the post-conviction relief judge to make specific findings of fact and conclusions of law as to each issue raised by petitioner in his post-conviction relief application and at the hearing thereon"). However, in *Marlar v. State*, this Court noted that prior precedent vacating and remanding to the PCR judge was "extraordinary action" to push compliance with precedent that instructed counsel to carefully review orders and make appropriate post-trial motions to ensure the sufficiency of the ruling for appeal. 375 S.C. at 410, 653 S.E.2d at 267. This

Court denied all relief, including remanding the matter to the lower court: "Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge." *Id.* Consequently, in equal application of the law, the issue should be considered procedurally barred from review on the merits. *But see Lindsey v. State*, Appellate Case No.: 2012-206087 (vacating Order of Dismissal "in light of the Court's concern with the frequency and severity of the drafting errors in the Order of Dismissal and with this Court's admonishments ... to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law.").

Even so, if one presumes the credibility rulings were against the Petitioner, which is necessarily required for consistency with the conclusion at issue, the record fully and fairly supports the PCR judge's ruling that the claims were without merit.

B. The DNA evidence claim fails on the facts of record.

Again, nothing in the evidence is exculpatory. Simmons challenges only the accuracy the demonstrative aid used by the State and the DNA statistics presented at trial. Each is addressed separately below though the overwhelmingly weighty factor in the analysis must be the lack of exculpatory DNA evidence. Simply, he failed to show a basis for relief. [12]

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[12] It is of no little note that Simmons also raised an ineffective assistance of counsel claim regarding a failure to challenge the DNA evidence. That issue was abandoned. Defense counsel Theos testified, though, that he retained and work with a DNA expert, Dr. Ron Ostrowski. (App. p. 4145). Counsel consulted with that expert, requested and received specific discovery on the DNA testing for his expert to review, and shaped the cross-examination, not on incorrect entries on the solicitor's chart or subjective consideration, but on the firm concession by Ms. Crane that a specific "1.2 allele" could not be confirmed, and it could be that Simmons was completed excluded. (See App. pp. 4145-4152). (See also

The Solicitor's Chart

The Solicitor's chart of DNA samples and results, which was used as a demonstrative aid during the trial, has incorrect entries. Simmons contends that by relying on the chart, the State presented "false, misleading, inaccurate and unreliable DNA *evidence*." (See App. p. 3733; pp. 5148-5156; Petition, p. 5; Brief of Petition, pp. 4 and 8) (emphasis added). Such an argument fails for several reasons.

First, a demonstrative aid is not primary evidence but its value depends upon the testimony connected to the exhibit. *Clark v. Cantrell*, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000) ("Such evidence has secondary relevance to the issues at hand..."). *See also* Danny R. Collins, *South Carolina Evidence*, 400 (2d ed. 2000) ("[d]emonstrative evidence is not the thing itself; it only demonstrates or illustrates the facts given by other evidence."). Simmons simply failed to show that the use of the chart at trial affected the presentation of

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App. pp. 1472-1473, and p. 4522, report noting review of Life Codes lab report and conclusions that "vaginal swab sample (male fraction) indicates a "mixed sample" which supports the "sample contains DNA from Simmons and Boyd" or "DNA from more than one sperm donor and possibly Boyd" and suggesting strategy on "short comings of the dot ... system"). Defense counsel not only attempted to neutralize the DNA evidence results with questions on this key allele, but also to neutralize the statistical evidence with such questions. (See App. pp. 1482-1484).

Also of note, Simmons' PCR expert in DNA, Mr. Lambert, agreed that the 1.2 allele information was reported correctly, and that no test exists to firmly identify that allele, So, in essence, the PCR expert agreed the defense expert at trial correctly advised trial counsel and trial could correctly and fairly argue that Simmons could be excluded under the theory advanced at trial. (App. pp. 4084-4085; p. 4135). The DNA evidence was not ignored by counsel, and the defense strategy was proven sound. In sum, if excluded of course the statistics – whatever they may be – would be neutralized. *See Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052 (1984) ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable ...a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.").

the results and evidence offered by Life Codes scientist Dr. Lauren Crane.[13] In short, Ms. Crane's testimony was an accurate reflection of her tests and her results.

The jury was aware that the chart was "a combination of charts" not a chart from the laboratory – that was implicit in the question on identification. (App. p. 1464). Ms. Crane not only clarified in her deposition for the PCR action that she had not seen the combination chart prior to trial,[14] but also confirmed that there was an error in the CF1PO column, ("It

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[13] Simmons generally challenges Life Codes' reliability. (See Petition, pp. 16-17; Brief of Petitioner, p. 15). Of note, the State did not attempt to avoid SLED testing or obtain different results. Rather, SLED determined the sample was too small to perform the testing in house, but that private firms, such as Life Codes, could perform more sophisticated testing. (App. p. 4078). Further, the cases Simmons has relied to suggest an issue with Life Codes in general, however, do not support his assertion.

For instance, in *People v. Castro*, 545 N.Y.S.2d 985 (N.Y.Supreme Ct. 1989), the court simply found a third prong to the admissibility test set out in *Frye v. United States*, 293 F.1013 (D.C. Cr. 1923) was necessary and was not met. Several years later, in *People v. Wesley*, 633 N.E.2d 451, 430 (N.Y. 1994), the Court of Appeals of New York rejected a defendant's reliance on *Castro* to show error in the LifeCodes testing and results. *See also Spencer v. Murray*, 5 F.3d 758, 763 (4th Cir. 1993) (*Castro* does not support argument "that DNA tests performed by Lifecodes are inherently suspect"); *People v. Lamming*, 833 N.E.2d 925, 928 (Ill.App. 5 Dist. 2005) (rejecting reliance on *Castro* and noting opinion "that Lifecodes' reputation in the scientific community, in general, was good."). Reliance on the other listed cases is likewise misplaced: *Harvey v. State*, 2004 WL 60771 (Alaska App. 2004) (court considered "critiques" of LifeCodes method available, but found counsel, nonetheless, handled the defense competently based on a different approach); *O'Dell v. Netherland*, 95 F.3d 1214, 1248 (4th Cir. 1996)("O'Dell presented expert testimony *embracing the first LifeCodes conclusion* and attacking the second.")(emphasis added); *Caldwell v. State*, 393 S.E.2d 436, 444 (Ga.1990) ("Although in a future case the state may establish scientifically that the populations represented in Lifecodes' (or some other laboratory's) databases are in Hardy-Weinberg equilibrium, we conclude the state has not done so in this case.").

[14] In the petition, Simmons questions the credibility of this statement by asserting Solicitor Bailey initially agreed then "changed course and admitted ... that he sent the ***exhibit*** to Crane to review prior to trial." (Brief of Petitioner, p. 12) (emphasis added). The letter mentions he sent a chart, not the actual exhibit. (App. p. 4705). He did not state whether Ms. Crane reviewed it or any discussion was made. Moreover, a copy of that chart was not attached and was not offered in the PCR hearing. That is important because Simmons' issue here is the trial exhibit was wrong. In essence, neither party is sure what was on the actual exhibit before the jury as no one actually knows when the mistake was made. Respondent notes for clarity that several searches were made for the trial exhibit and that exhibit could not be located in Clerk of Court's Office.

should be 10, 12, not 10, 11").[15] (App. pp. 4799-4800). Further, she stated in her deposition, "I didn't testify to the likelihood based on this chart." (App. p. 4800). Ms. Crane that stated the chart, though admittedly having errors, still aided in the presentation of testimony "because it had the types that were listed there," and noted she did not "go through all the details of each allele" in her trial testimony but spoke in more general terms. (App. p. 4804). This is confirmed by her testimony at trial that only referenced the incorrect "10, 11" when explaining banding patterns were explained by numbers, and the method of testing in general. (App. p. 1466, lines 15-23).

In essence, Ms. Crane did not review each entry on the chart for the jury and it follows it was not critical for the jury to know each result, but the opinion on inclusion or exclusion.[16] Further, at trial, though a question about a DNA "match" was posed, ***Ms. Crane's response did not address a "match,"*** but reflected (much like Dr. Baird's testimony),[17] a broad response indicating Simmons was not "eliminated" based on testing:

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[15] The mistake was consistent in three entries and did not reflect a difference from sample to sample.

[16] The solicitor did use the chart and apparently reviewed some of the specific entries in his closing. (App. pp. 2010-2012). But, the solicitor, as noted above, concluded with broad statements on "not excluded" and arguing that nothing in tests were inconsistent with *either* victim or Simmons. (App. p. 2012, lines 9-12). The solicitor also advised the jury that they were "to take the fact as you find those facts to be from the witness stand" and"[w]e had a lot of technical stuff of DNA and psychiatrists and psychologist; and I've tried to keep notes; and I try to be as accurate as I can. But if I accidently misstate something, you remember it differently. You go by your memories and not by what I said. And you do have the ability if you want to hear testimony again if you think that's necessary or if there's some dispute over it." (App. p.1951, line 24 - p.1952, line 11).

[17] The statistical evidence presented by Dr. Baird was not presented as a "match," rather, Dr. Baird testified to a general "does not exclude" conclusion:

> A. Right; in the vaginal swab is a DNA profile consistent with Mr. Simmons being a contributor as well as the victim.

(App. p. 1481, line 24 - p. 1482, line 8).

A. Basically what we found was a mixture of DNA which ***we could not eliminate Kenneth Simmons' blood*** as being a contributor to.

(App. p. 1470, line 21 - p. 1471, line 5) (emphasis added). *See State v. Wright*, 253 P.3d 838, 845-46 (Mont. 2011) (no *Napue* violation where, though some points the state prosecutor made were in error, the points were not intentionally presented while known to be false and the expert pointed out several times in the proper general terms that the defendant was not "excluded").

Simmons asserts that the CTT results were incorrect on the chart and should not have been used at all. Dr. Crane maintains they were not used in her official report. (App. pp. 4809-4810). Simmons also asserts the jury "never learned that the CTT results were inconclusive and lacked any evidentiary value relevant to Simmons' case." (Brief, p. 10). Curiously, though Simmons slings allegations of false evidence and misleading evidence and even a *Brady* allegation in not disclosing those CTT result, his own expert in PCR agreed with Dr. Crane about not reporting same in that the testing was inclusive and misleading:

> ... you also see faint bands that are down at the bottom that would indicate, if those are real, they would indicate that Mister Simmons was excluded, because they don't match him. We've got a band at 5 and 6 at the THO1 position and that would actually exclude him. ***I'm not saying that he's excluded. I would throw this whole result out as inconclusive.*** ...

(App. p. 4102) (emphasis added).

Not even a capital defendant has the right to present intentionally false and/or misleading evidence during either phase of a capital trial. *State v. Bixby*, 388 S.C. 528, 544, 698 S.E.2d 572, 581 (2010) (noting exclusion properly where evidence would mislead jury to fact which was contrary to state law); *Lockett v. Ohio*, 438 U.S. 586, 605 n. 12, 98 S. Ct. 2954 (1978) ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the

circumstances of his offense."). *See also State v. Johnson*, 862 N.W.2d 757, 774 (Neb. 2015) ("because of the significance that jurors will likely attach to DNA evidence, the value of inconclusive testing results is substantially outweighed by the danger that the evidence will mislead the jurors"); *Com. v. Cavitt*, 953 N.E.2d 216, 231 (Mass. 2011) ("testimony regarding inconclusive DNA results is not relevant evidence because it does not have a tendency to prove any particular fact that would be material to an issue in the case").

Even so, while Simmons blends the lab testing and the solicitor's chart, it is an inescapable fact that those items remain in separate lines of origin and authenticity. In other words, the solicitor's chart did not affect testing or the report of testing. Simply, errors on the chart do not equate with errors in testing or results.

Lack of Credible Evidence in PCR

Second, Simmons' assertion of false evidence lacks credibility. While Simmons presented initial testimony that some of the "dots" for the DNA results were not visible at the time of PCR review of the testing materials, Dr. Word candidly admitted at the July 2, 2012 hearing, that the "dots" may have been visible at the time of the initial test. (App. p. 4992). This demonstrates the weakness in backwards looking review.

Simmons also argues that gender testing may have indicated no male DNA in the sample. However, Simmons' DNA expert at the first PCR hearing, Mr. Lambert, testified that SLED initially identified semen in the sample before ever sending the sample to Life Codes. (App. p. 4078).

Further, Ms. Crane's notes reflect that sperm was "visualized." (See App. pp. 4988-4989). Though Dr. Word testified she did not understand the "visualized" description, she did not contest the presence of the note. Dr. Word also noted that gender testing showed no "y" chromosome, though she candidly admitted that lack of "y" chromosome could simply

be attributed to the sample being at a level below that which the test could detect. (App. p. 4988). It is also undisputed that the sample was small – that is exactly why SLED sent the sample to LifeCodes for more sophisticated testing. (App. p. 4078). Again, nothing in the DNA evidence – at trial or in the PCR – is exculpatory.

Further still, the defense expert at trial confirmed a "male fraction" and noted a mixed sample in the DNA lab reports. (See App. p. 4522).

Lack of Unfair Prejudice

At any rate, defense counsel could have objected to the chart as far as the incorrect recording of the "10,11," but it makes little difference. Ms. Crane's testimony would not change based defense counsel addressing the error on the chart. Simmons failed to show an incorrect interpretation by Ms. Crane, though he has challenged the subjective dot testing and sufficiency of the gel slides at the time of the PCR hearing as opposed to the 1996 and 1997 tests. And again, Dr. Word testified that the "dot" simply may not be prominent or as prominent in 2012 as it was then. (App. p. 492).

And, as candidly conceded by Mr. Lambert, he would not use the CTT testing at all. (App. pp. 4098-4102; p. 4126; p. 4136). Thus, while Simmons produced some evidence that different questions could have been asked at trial, and the errors on the chart could have been questioned at trial, he failed to even show a stronger case could have been made on cross-examination than was actually made. (See App. p. 4135, Mr. Lanbert conceded that trial DNA expert "acknowledged, like I do, that he would be included as a possible contributor" and advised emphasis on an allele that "can't be typed for certainty"). As the PCR judge found, Simmons failed to carry his burden of proof. His false evidence claims fails given the facts of record.

Legal Analysis Rejecting False Evidence Finding

It is well settled that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment...." *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959). *See also Riddle v. Ozmint*, 369 S.C. 39, 47-48, 631 S.E.2d 70, 75 (2006), *quoting Giglio v. U.S.*, 405 U.S. 150, 153 (1972) ("A 'prosecutor's *deliberate* deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.'"). "In order to show a violation of *Napue,* petitioner must show that [the] testimony was false, that the prosecution knew of the falsity, and that the falsity affected the jury's judgment." *Porter v. Warden of Sussex I State Prison*, 722 S.E.2d 534, 540-41 (2012).

The chart is wrong, but there is no evidence the testing was wrong much less deliberate deception. Simmons did not prove even that the witness or the solicitor recognized the error on the chart at the time of trial.

Further, there is no evidence that the "falsity affected the jury's judgment." *Id.* Ms. Crane stated in her deposition that ***her tests allowed her to conclude that Simmons could not be excluded***; thus, the error – whether typographical or reading error in transferring the numbers to the chart – could not have affected Simmons negatively. Further, the error was consistent in the column and did not show created discrepancy in that respect. At any rate, ***whether the CTT results where included or not on the chart at all, the testimony would have been exactly the same as Ms. Crane's testimony did not rely on the chart.*** *See Wright, supra.* The error at issue does not present a key fact or even a specific fact for the jury to consider. Rather, the DNA evidence was consistently referenced in broad terms that Simmons was not excluded and/or every marker was consistent with *either* Simmons or the victim.

Lastly, the numbers from Life Codes were correct and were disclosed to the defense. (See App. p. 4104, line 22 - p. 4105, line 1).[18] The minor chart error remains just that. Simmons is not entitled to any relief.

The Challenge to Statistical Evidence

Again, the DNA evidence, admittedly, is not exculpatory. The testimony developed at the PCR hearing reflects, however, that there is disagreement on how the statistical information should have been presented in explanation of its value. In essence, Simmons contends the statistical information presented was incorrect, not as to calculation but as to significance, which was misleading. (Petition, p. 19). The following excerpt from the February 2010 PCR hearing expresses Simmons position, as offered by his PCR expert in DNA, Steve Lambert, regarding the challenge to the Life Codes statistics offered at trial:

> ... What they calculated was how rare Mister Simmons is in the population. What they should have calculated was how rare the DNA profile that showed up on the evidence was. Those are going to be two vastly different numbers, which we saw between millions down to 1 in 500. They calculated his frequency and reported that which is – they calculated it correctly for him but it doesn't mean anything. I mean, I have a frequency associated with me but that doesn't have anything to do with evidence at the crime scene.

(App. p. 4128, line 17 - p. 4129, line 1).

According to random match calculations offered by Simmons at the February 2010 PCR Evidentiary Hearing, the DNA evidence demonstrates:

> The probability of selecting an unrelated individual that could have contributed to that evidence found on the vaginal swab of Ms. Boyd and then

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[18] Simmons presented his DNA expert, Mr. Lambert, to confirm the discovery received for the trial. Mr. Lambert made reference to "page 15" of the "Orchid CellMark file," (Exhibit 16) not being disclosed to the defense. (See App. p. 4077, lines 2-16). However, Mr. Lambert described the page as being attached to evidence that had been returned to the clerk of court. (App. p. 4137, lines 3-11). Mr. Lambert could only guess at its origins. (App. p. 4131, lines 15-21). Even so, Mr. Lambert indicated the page reflected a run that he considered not reliable. (See App. p. 4100, line 24 - p. 4105, line 18). Simmons again failed in his burden of proof in showing that any information, even impeachment information, was not disclosed – he can show neither origin nor relevance of the page.

> taking somebody at random out of the room and testing them, what is the probability that they are going to randomly match that evidence is approximately 1 out of every 500 individuals.

(App. p. 4129, lines 4-9).

Simmons is included in that number. (App. p. 4129, lines 10-15). Further, that number, according to Mr. Lambert, reflects a sequence that would "eliminate over 99% of the population, because 1 in a 100 is 99 and so it's probably, you know, its less than 1% of the population ... Like .2% of the population would be included." (App. p. 4129, lines 18-22). Another of Simmons' PCR experts, Dr. Charlotte J. Word, similarly testified at the July 2, 2012 hearing that nothing in the results excluded Simmons, and also concluded more than 99% of the population would be excluded. (App. pp. 4979-4980).

There is little question that statistical information may be characterized in vastly different ways – the same number can be used to wrongly suggest a probability of guilt, or a larger pool of possibilities. Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings L.J. 1159, pp. 1178 -1179 (2008) (explaining the "Prosecutor's Fallacy" and the "Defense Attorney's Fallacy," noting "The first error overvalues the evidence and the second undervalues it."). It is not disputed that care should be taken in referencing both results and statistics. However, not every error in this vein will negatively affect a trial to the extent that confidence in the result is undermined. *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665 (2010), provides some clarification of the potential impact of such errors.

In *McDaniel v. Brown*, the Supreme Court specifically considered the concept of the "prosecutor's fallacy" and its impact on the trial, along with an allegation of statistical inaccuracies. In that case, convicted defendant Troy Brown challenged the accuracy of the DNA evidence by submitting a new report in federal habeas proceedings. The new report

indicated that the State's DNA expert "mischaracterized the random match probability and misstated the probability of a DNA match among his brothers." 558 U.S. at 126. Brown argued discounting the inaccurate testimony in whole, "there was insufficient evidence to convict him." *Id.* Brown eventually agreed that the new report should not have been considered in regard to sufficiency of the evidence as the report was not part of the evidence before the jury. 558 U.S. at 130. Even so, the Supreme Court reasoned:

> The Report did not contest that the DNA evidence matched Troy. That DNA evidence remains powerful inculpatory evidence even though the State concedes Romero overstated its probative value by failing to dispel the prosecutor's fallacy.

558 U.S at 132.

The state's evidence at Brown's trial reflected essentially "a 1 in 6,500 chance that one brother would match," while the habeas defense expert whittled the figure to as low as "1 in 66." 558 U.S at 132. The Supreme Court found "[e]ven under [the habeas defense expert's] odds, a rational jury could consider the DNA evidence to be powerful evidence of guilt." *Id.* It should be noted that the DNA evidence in that case was critical, with the State conceding at one point that absent the evidence, there was insufficient evidence to support a conviction. *Id.* The record under review here is quite different.

First, neither Dr. Crane nor Dr. Baird suggested guilt. Further, the solicitor suggested guilt *only* in context of viewing ***all the evidence together***:

> ... DNA is never going to be able to tell you with a hundred percent certainty this is the person who's semen is found her based on DNA match because they can't possibly look at each DNA allele they did nine of them in this particular case. All they can do is say whether or not a person is excluded from that DNA profile or not excluded. Then they can do statistical probabilities of how often that particular profile exists in the population. And that's what these people testified to. And again, I'm not going to stand up here and tell you with 100 percent certainty that you should convict on DNA evidence alone. It's just part of the State's case.

(App. p. 2005, lines 1-14).

> ... So the bottom line, Ladies and Gentlemen, is everything that's in his vaginal swab is consistent with the combination of Mrs. Boyd's blood and Kenneth Simmon's blood. There's nothing inconsistent. There's nothing in here that is not in one of the other of Mrs. Boyd's blood or Kenneth Simmons' blood. So Kenneth Simmons is not excluded as a donor of that DNA.
>
> He's not excluded in the frequency of occurrence that Kenneth Simmons' blood in the Black population is one of 8,029,316. And again, I'm not asking y'all for a conviction based on DNA. DNA merely corroborates Kenneth Simmons' testimony, the confession where he says he raped her. Now, if you want to really stretch your imagination of these DNA figures, you might say somebody else could have that same DNA profile. And I guess that's conceivable. But the only person with that consistent DNA profile that confessed to raping Lilly Bell Boyd is Kenneth Simmons. That's one in the world, and he's the only one.

(App. p. 2012, line 5 - p. 2013, line 1).

Consequently, the results and statistics may be criticized or questioned in individual parts, but, when reviewing the record as a whole, it is a fair and reasonable determination that the conclusions, and arguments, on the DNA evidence and testing presented at trial were "presented in a fair and reliable manner." *Id* at 675. *See also Id,* at 673 ("That DNA evidence remains powerful inculpatory evidence *even though the State concedes Romero overstated its probative value by failing to dispel the prosecutor's fallacy.*") (emphasis added); *State v. Wright, supra.*

This Court has just recently had occasion to note that "the presence or absence of DNA evidence does not taint the remainder of the evidence in the record, nor does it overwhelm the jury's ability to make credibility determinations and decide whether a defendant is guilty." *State v. Jenkins*, 412 S.C. 643, 773 S.E.2d 906 (2015). This Court, like the United States Supreme Court in the *McDaniel v. Brown* case, fairly considered the DNA

evidence in context of the consideration of all the evidence, not the definitive answer to guilt. The solicitor firmly placed the DNA evidence in that camp.

In short, the statistics challenged here, by Simmons' PCR expert's own admission, goes only to occurrence of his profile and simply does not matter – not that it was wrongly calculated for what it was. (See App. p. 4092, lines18-20, "... they were quoting a meaningless number. They are quoting Mister Simmons' frequency of his DNA profile which is completely ***irrelevant to the evidence***."). Statistics, however, cannot be used to point to sufficiency of the evidence of guilt. And, in this case, that number was not tied specifically to probability of guilt. The testimony was neither presented as nor could it be viewed as conveying the existence of a conclusive match.

Second, the evidence would be considered, even if challenged in the specifics of the chart or CTT testing. And, those tests – even after years of re-evaluation in PCR by multiple experts – still show that ***over 99% of the population is excluded***, a significant, but still not conclusive result. *Cf. State v. Bostick*, 392 S.C. 134, 142, 708 S.E.2d 774, 778 (2011) (DNA testing of blood on defendant's clothes eliminated 99% of the population but could not be actually matched to the victim).[19]

Third, Simmons' confession corroborates the DNA evidence, and, together, create a substantial case for guilt. Though Simmons now contests his confessions, his confessions have never been found inadmissible. Simmons suggests, though, that his confession should be considered false because he is now considered intellectually disabled. Of counsel, this Court did not grant certiorari review on Simmons' issue regarding his false confession

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[19] *Bostick* is an interesting case to consider in regard to the use of DNA evidence in narrowing possibility as it was fact along with the the lack of any definite circumstantial evidence that resulted in the conclusion Bostick was entitled to a directed verdict. To the contrary here, we have a confession that includes details supported by forensic evidence; opportunity and connection to the victim; and DNA evidence that cannot exclude Simmons.

expert and the PCR judge simply summarily rejected that issue below. However, the record shows defense counsel reasonably investigated his client's mental background and the circumstances surrounding the three statements, and questioned the truthfulness of the statements based on same. (See App. pp. 4164-4165). Importantly, though the testimony at the trial established that Simmons was not then intellectually disabled, defense counsel did make Simmons' intellectual ability an issue at trial. The post-*Atkins* revision to the diagnosis does not affect the material before the jury on functioning limitations, whatever its cause.

Also importantly, the "false confession" theories rest on proof of the falsity. Generally that is tied to exculpatory DNA evidence which is not present here. Identification of actually false confessions without this exculpatory scientific evidence have been somewhat difficult. Research that attempts to study false confessions reflects that a "false confession" for scientific study purposes depends upon whether "it can be objectively established that the suspect confessed to a crime that did not happen," or that "the defendant could not have committed the crime," or that "the true perpetrator of a crime is identified and his guilt can be objectively established," or that "scientific evidence—in recent years, ***most commonly DNA evidence***—dispositively establishes the false confessor's innocence." Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 NC L R 891, 925–926 (2004). (emphasis added).[20] In his deposition in this case, Dr. Richard Leo, a

[20] There are two amicus briefs filed in support of Petitioner. One from the Innocence Network and one from a collection of organizations who work on behalf of the intellectually disabled. Neither aids in the determination here. Again, there is not exculpatory DNA evidence. Innocence is not at issue. Further, the second brief merely suggestion that the intellectually disabled are prone to false confessions. This Court has already acknowledged that very point. *State v. Stanko*, 402 S.C. 252, 287, 741 S.E.2d 708, 726 (2013) ("these defendants are more susceptible to false confessions"). However, the presence of intellectual disability does not equate with a finding a confession is false. Simply, nothing in the two briefs actually aids in the resolution of this particular case.

psychologist offered as an expert regarding false confessions, stated that while his study characterized 18 cases as "highly probable false," he admitted that it did not mean that they could prove that they were absolutely false. (App. p. 4900). Dr. Leo conclusively declared that while he may possess training to make a determination whether a confession is false which is different from a lay juror, he "would never testify before a jury that [he] believe[d] a confession is false because that would invade the province of the [jury], that's not the nature or purpose of the testimony." (App. p. 4908). At any rate, he conceded many of the facts that would make him challenge a confession as false may not apply. For instance, Dr.

As to the actual confession, again, one need only look at the statements given to see fair questioning upon detailed advice that included not just a right to remain silent, and the right to counsel, but also: "If you decide to answer any questions now without a lawyer present you will Still have the right to stop answering questions at any time, you also have The right to stop answering questions at any time until you talk to a lawyer." (App. p. 3170). The record supports care was taken to ensure Simmons understand the advice, and his waiver: "That means you are willing to talk with us and you asked to talk with us ... are you still willing to talk to us?" (App. pp. 3170-3171). There is nothing to indicate either police coercion or overreaching. There is no cause to suppress this statement:

> Absent coercive police conduct causally related to a confession, there is no basis for finding a confession constitutionally involuntary. A defendant's mental condition in and of itself does not render a statement involuntary in violation of due process. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Further, under State law, a confession is not inadmissible because of mental deficiency alone. *State v. Doby*, 273 S.C. 704, 258 S.E.2d 896 (1979), *cert. denied*, 444 U.S. 1048, 100 S.Ct. 739, 62 L.Ed.2d 735 (1980). Here, the only factor appellant relies on as evidence of involuntariness is his mental condition. The statements in question were spontaneously made and there is no evidence of police coercion. Since mental condition alone does not support a finding of involuntariness, this issue is without merit.

State v. Hughes, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999). *See also State v. Johnson*, No. 2012-209267, 2014 WL 2720357, at *1 (Ct. App. Apr. 9, 2014) *cert. dismissed as improvidently granted*, No. 2015-MO-067, 2015 WL 7760219 (Dec. 2, 2015) (statement of defendant who was ineligible for capital proceeding due to finding of intellectual disability was still admissible where evidence supports there was no evidence of threats or coercion, rights were explained, and transcript of statement indicated an understanding of the questions posed).

Leo conceded the same interrogation techniques he criticized could lead to a truthful confession. (App. p. 4904).

Further, he admitted that guilty people do not always confess the first time that they are asked, and that guilty people frequently make statements to put themselves in a more favorable light, and, further still, that a guilty person may want to place the blame on a third party to place themselves in a more favorable light. (App. pp. 4904-4905).

As to the facts of this case, Dr. Leo admitted that DNA testing had been done that did not eliminate Simmons as a contributor and that he had given multiple statements where he had confessed to being the perpetrator and the sole perpetrator in the matter. (App. p. 4905). Dr. Leo admitted that he had reviewed the transcripts of the tape-recorded statements; did not read about any physical threats; did not see any specific promises; and, was aware that law enforcement had denied that any threats had occurred. (App. pp. 4905-4906).

Dr. Leo further acknowledged that in the transcripts, he did not see any evidence that Simmons had been provided with information about the crime, but suggested that since most of the interrogation was not recorded that he could not show where the information given by Simmons came from. (App. p. 4907).[21]

He also conceded that Simmons gave several statements that he killed Lily Mae Boyd which were inconsistent with each other. In them, Simmons admitted that he had sexual contact with the victim, that he strangled the victim, after he had given statements that a third party had killed, strangled and beaten the victim. (App. p. 4909-4910). He admitted that the victim was strangled and beaten about the head. (App. p. 4910).

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[21] Dr. Leo's speculation that there would have been community gossip about the facts is just that – speculation. (See App. p. 4235). Simmons could have addressed the information and whether he received it from a source other than his own activities. He did not so testify at trial or in this hearing.

Dr. Leo also admitted that Paul Cassell had in an article criticized him assessment as being 45% wrong. (App. pp. 4916-4917).[22] App. pp. 4918-4919).

At any rate, the inconsistencies between the actual statements and the forensic evidence was shown to the jury and pointed out by defense counsel in a request to reject their reliability. For example, counsel began his opening statement with the suggestion that the statements were bizarre and unbelievable, and indicated Simmons thinks like a seven year old and acts like a second grader. (App. pp. 1051-1053). Counsel called Dr. John Foxworth who opined about Simmons mental health history and the impact of substance abuse on his level of functioning. (App. pp. 1517-19, testifying "He tends to agree with just about anything he thinks that you want him to say or to agree with . . .he is easily led"). Dr. Barton Saylor opined that Simmons was functioning in a mentally deficient range and had consistently displayed significant deficits in his ability to make a knowing and intelligent waiver of his rights. (App. pp. 1606 and 1610). Dr. Thomas Behrmann, a forensic psychiatrist, opined that he was concerned about Simmons' ability to waive his rights. (App. pp. 1640-1641), though he also opined that he could not identify a mental illness which would have prevented Simmons from waiving his rights. (App. pp. 1651-1652). Dr. Leslie Sandler testified it took a lengthy period of time to go over the rights with Simmons, but did not agree that it was necessarily based upon an inability to articulate a sufficient understanding of the rights, suggesting that it could have been based upon an unwillingness to do so. (App. pp. 1715 – 1724). Dr. Randy Waid, testified that Simmons' mental capacity is diminished and that he had neuro-cognitive impairments. He opined that Simmons had lost intellectual abilities due to his life-style involving poly-substance abuse. He opined that

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[22] See Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions - -And from Miranda*, 88 J. Crim. L. & Criminology 497 (1998). Also, Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 Harv. J.L. & Pub. Pol'y 523, 582–587 (1999).

he did not believe that Simmons suffered from mental retardation, but believed that he was in the borderline to intellectual functioning range. (App. pp. 1778 and 1880). He opined that Simmons was in an age equivalent range of a 7 to 9 year old or second or third grader. (App. pp. 1780 and 1880). Dr. Waid opined that in assessing the *Miranda* rights that he could not get reliable responses and stated that he did not believe that Simmons was a reliable historian. (App. pp. 1883-1884). In his guilt phase closing argument, counsel emphasized mental status, and Simmons' inability to answer questions and be easily led as a factor to reject the confessions. (App. pp. 2037- 2046). In addition, he asserted that the statements were uncorroborated, inconsistent with the medical facts and the evidence and given by a person with a limited mental capacity. (App. p. 2059). The theory of a false confession was certainly argued but it was also certainly rejected by the jury, and subsequently by the PCR judge.

In sum, Simmons has not shown that his confessions were false by exculpatory DNA evidence or any other means. The confession and the DNA make a formidable barrier to relief. The PCR judge correctly rejected Simmons evidence and found relief was not warranted. The post-*Atkins* label of "intellectually disabled" which makes him ineligible for a death sentence does not eradicate the DNA evidence and the detailed confessions. It seems only to have eradicated Simmons desire to apologize and accept responsibility and punishment for the murder of his eighty-nine year old victim.

CONCLUSION

Both prosecution and defense should be aware that the weight of DNA evidence may be either understated or overvalued. The trial at issue, though, shows an ordinary error – a mistake on a chart and inartfully presented statistics. What is most important is there was, and still is, ***no exculpatory evidence***, not even when the DNA evidence was examined under the microscopic review undertaken in collateral proceedings and multiple experts attempting to devalue evidence. Still, without question, the evidence excludes over 99% of the population in a case where the defendant confessed with confirmable details. In light of the evidence and argument at trial, error in presentation of the DNA evidence was not so prejudicial as to necessitate a new trial.

However, the exact error and exact ruling for lack of prejudice is not present before the Court. Each side may do little more than guess what the PCR judge found persuasive or the testimony found credible. Simmons failed to request factual findings to ensure a fair review. His issue must necessarily be considered procedurally barred or this case remanded for findings of facts and conclusions of law.

Respectfully submitted,

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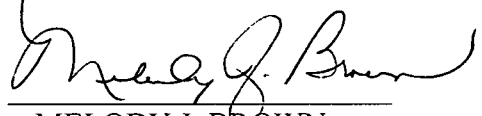
BY: 
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January 22, 2016.
Columbia, South Carolina.

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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Grant of Certiorari Review

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

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

Kenneth Simmons, #5066,

Petitioner,

vs.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

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

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