ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 25 2017
S.C. SUPREME COURT

July 25, 2017

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Kenneth Simmons, #5066 v. State of South Carolina;
Dorchester County Death Penalty PCR Action - 2005-CP-18-1368;
Status of Remand from Opinion No. 27641, *Simmons v. State*,
416 S.C. 584, 788 S.E.2d 220 (2016); and,
Informal Motion to Dissolve Stay as Moot.

Dear Mr. Shearouse:

The death sentence for PCR applicant, Kenneth Simmons, was stayed by an Order of this Court issued on February 2, 2005. The stay was entered to allow resolution of state post-conviction relief remedies. Applicant challenged his February 1999 jury conviction for the September 1996 murder and criminal sexual assault of an 89-year-old woman; and his March 2, 1999 death sentenced imposed by the Honorable Rodney A. Peeples pursuant to the jury verdicts returned. This Court assigned the Honorable Doyet A. Early, III, to preside over the PCR proceedings.

At the conclusion of the first PCR proceedings, Judge Early found Applicant had shown by a preponderance of the evidence that he was mentally retarded (now termed "intellectually disability"), and was ineligible for death pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). While Judge Early "vacated Simmons's death sentence pursuant to *Atkins*" he "summarily denied the remaining claims, including Simmons's challenge to the DNA evidence, 'as without merit.'" 416 S.C. at 591, 788 S.E.2d at 224. The State appealed the *Atkins* determination and Applicant cross-appealed on issues not addressed in the Order including the DNA overstatement issues. Though recognizing Applicant failed to challenge the prior ruling the DNA issues lacked merit, and noting the State agreed there were errors in the presentation of the DNA evidence, the Court allowed a remand for Judge Early to reconsider the DNA matters and issue an Order properly addressing the merits and prejudice. *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016).

No additional hearings were held and no additional evidence was submitted. By Order dated August 31, 2016, Judge Early found Applicant was entitled to a new trial. The State moved to alter or amend on September 10, 2016. In denying the State's Rule 59 motion, Judge Early concluded he was unable to determine what affect the adjusted, though still inculpatory, DNA evidence would have had on the jury in light of the recorded confession, the admission to family, and Applicant's apologies at trial. *But see Sears v. Upton*, 561 U.S. 945, 952 (2010) (finding error in prejudice analysis including reasoning by state court that "'it is impossible to know what effect [a different mitigation theory] would have had on [the jury]'"). The State received formal written notice of entry of the Order from the Clerk of Court on July 3, 2017, reflecting the Order was entered on June 29, 2017. The State has critically considered appeal. See SCACR Rule 203(b)(1).

In South Carolina, the standard of review in a post-conviction relief appeal is whether there is any evidence of probative value to support the PCR judge's findings. If any evidence of probative value is found, the state appellate court must affirm the ruling of the PCR court. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Upon undersigned counsel's review of the Orders, the State has decided that it is not going to appeal the order for a new trial. This case was also presented to the Attorney General's Office Criminal Litigation Division Appellate Review Committee consisting of lawyers with prior appellate court clerking experience and senior lawyers. The committee agrees. The reason for deciding to not appeal is that there exists some probative evidence in the record to support the ruling that "evidence of material facts, not previously presented and heard," exists which, in turn, supports the grant of new trial. See S.C. Code § 17-27-20. Namely, that evidence is the incorrect presentation of the DNA statistical evidence and the incorrect demonstrative aid which was not discovered and/or realized by the State or Defense Counsel at the 1999 trial. Further, whether an error is prejudicial or harmless is a weighing function uniquely reserved for the judiciary. In short, it is not a matter of the absence of probative evidence but weight to be given recognized evidence; therefore, appeal from this narrow finding is not warranted under the present standard of review.

The remaining findings are contested for all the reasons previously stated in the filed Rule 59 motion; however, an Applicant need not win on all grounds to obtain relief and it is unlikely that the Court would accept jurisdiction to correct errors of facts and errors of law not necessary to the disposition of the case. Additionally, Judge Early specifically included provisions for the DNA inculpatory evidence to be presented again, with adjusted statistically analysis, and the confessions to be presented again. Given the age of the case, the preservation of the ability to present the inculpatory DNA evidence and confessions, and the

uncertainty the victim's family has endured these many, many years, the State of South Carolina has resolved the PCR matter should be ended. Thus, taking the whole of the case into consideration, the State of South Carolina will not appeal this matter.

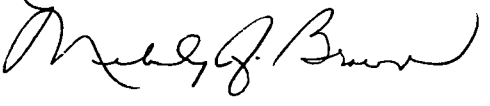
I have advised the Solicitor of the First Circuit, the Honorable David Pascoe, of this decision and have requested he take steps to have the order for new trial carried out.

I note this action will not require this Court to appoint a new circuit court judge. Though originally a death penalty case, on retrial Mr. Simmons is no longer eligible for the death penalty due to the *Atkins* ruling from the first PCR proceedings. His case should return to the non-capital roster for disposition.

I am also asking this Court to dissolve the February 2, 2005 stay of execution as moot.

Finally, by copy of this letter, I am advising opposing counsel and Bart Vincent, the General Counsel of the South Carolina Department of Corrections, of our position in this matter and of this communication. The Department of Corrections should return Mr. Simmons to Dorchester County to be held in pretrial detention pending a new non-capital trial on the murder and criminal sexual assault charges.

Sincerely,



Melody J. Brown
Sr. Asst. Deputy Attorney General
State of South Carolina

Enclosures: Order granting new trial;
Order denying Rule 59.

cc: The Honorable David Pascoe, Solicitor, First Judicial Circuit,
140 N. Main Street, Suite 102, Summerville S.C. 29483
Barton J. Vincent, General Counsel, South Carolina Department
of Corrections, 4444 Broad River Road, Columbia, S.C. 29221-1787
James Morton, Esq., Post Office Box 707, Rock Hill, S.C. 29731
Emily C. Paavola, Esq., 900 Elmwood Ave, Suite 200, Cola., S.C. 29201
Trisha Allen, S. C. Attorney General Office, Victim Advocate

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2005CP1801368

Kenneth Simmons	2016 SEP -7 AM 11:24	Department of corrections	South carolina state of

PLAINTIFF(S) DEFENDANT(S)

CLERK OF COURT
DORCHESTER COUNTY

Submitted by: Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

D.A. Early III — 2136 — 9/7/2016

Circuit Court Judge **Judge Code** **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on 9/7/2016, and a copy mailed first class or placed in the appropriate attorney's box on 9/7/2016, to attorneys of record or to parties (when appearing pro se) as follows:

James M. Morton Morton And Gettys, LLC PO Box 707 Rock Hill, SC 29731
Emily C Paavola Attorney At Law Ctr. Capital Litigation, 900 Elmwood Ave. Suite 101 Columbia, SC 29201

Donald J. Zelenka PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

cc: David Pascoe/Don Sorenson, Dorchester County Solicitor's Office

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	Case No.: 05-CP-18-1368
KENNETH SIMMONS	)	
Applicant,	)	**ORDER GRANTING**
	)	**POST-CONVICTION RELIEF**
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	

This matter is before the Court following a remand from the South Carolina Supreme Court. Applicant, Kenneth Simmons, was convicted and sentenced to death for the 1996 murder and criminal sexual assault of an 89-year-old Summerville woman. Simmons raised a number of claims for post-conviction relief (PCR), which this Court granted in part. Because Simmons is intellectually disabled, this Court vacated his death sentence pursuant to *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), and denied all other PCR claims as without merit. The Supreme Court affirmed this Court's *Atkins* ruling, but remanded for specific findings on Simmons' DNA claims due to the "extraordinary circumstances" of this case. After a careful and thorough review of the evidence and record of this proceeding, this Court finds, by a preponderance of evidence, that: (1) the presentation of the DNA evidence in the trial was false, misleading, confusing, and failed to include all of the test results, thus warranting a new trial; (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).

I. FINDINGS OF FACT

1. Following the victim's murder, the Summerville Police Department actively investigated this case for a year without success, prompting the State Law Enforcement Division ("SLED") to form a task force to solve the crime. A task force member suggested Simmons, who lived in the victim'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. From December 2-9, 1997, Summerville police detectives and/or SLED agents interrogated Simmons six times. He gave multiple incriminating statements and ultimately confessed to the murder.

2. DNA was the most vital evidence the State relied on in its prosecution of the defendant. Solicitor Bailey in his opening statement told the jury "[t]he State's case consists basically of Kenneth Simmons' confession" and the DNA evidence. He told the jury that the DNA evidence would show "that nine out of nine of the locations on DNA molecules that they compared with the semen in that vaginal swab matched the DNA from Kenneth Simmons' blood." (TT 1041).

3. The DNA analysis performed on the evidence in this case was not done at SLED because of "[t]he amount of sample and the quality of the sample." The blood sample taken at autopsy from the victim in this case was a highly degraded sample unsuitable for R.F.L.P. testing. SLED was unable to evaluate the evidence in house. Therefore, they "farmed" it

out to a private laboratory. SLED sent the evidence to Lifecodes Laboratory in Connecticut, a lab they had used in the past. (TT 1431-33).

4. Two employees of Lifecodes, Dr. Michael Baird and Lauren Crane, testified at trial. Baird explained DNA and testing procedures, while Crane was the person who performed the analysis. During Crane's testimony, she relied on a chart prepared by Solicitor Bailey that she said she had not recently reviewed. Crane testified based on the tests, "what we found was a mixture of DNA which we could not eliminate Kenneth Simmons' blood as being a contributor to." (TT 1471). Dr. Baird opined that based on the tests "virtually all of the Caucasian population would be excluded as contributing," and "[i]n the Caucasian population it would be one in one billion two hundred eighty million two hundred forty-nine thousand nine hundred and sixteen." His opinion was based on nine different genetic tests done in the case. (TT 1480).

5. Solicitor Bailey in opposition to the defense's motion for directed verdict argued that every single DNA molecule that there is was analyzed and the statistical probabilities are in the millions and millions. Judge Peeples commented "millions for an African-American and billions for a white". (TT 1489).

6. In its closing argument, the State emphasized the nine-for-nine match between Simmons' DNA and the victim's samples, and argued the frequency of occurrence of Simmons' genetic profile in the African-American community. A conviction was rendered.

7. Simmons presented numerous witnesses, reports, and affidavits at the PCR hearings which seriously challenged the DNA evidence presented at the trial. Dr. Steve Lambert was of the opinion that "[t]he frequency in the population from the Caucasian population of selecting an unrelated person off the street who could possibly match that evidence

found on the vaginal swabs from Ms. Boyd was 1 in 172 individuals or for the African-American population, it was 1 in 419 individuals. So, it was much more common in the population than was presented at trial. Much more common than the 1.28 billion or 1 in 8 million that was presented at trial because they only quoted Mr. Simmons' DNA type. They didn't quote the evidence". (TT 4122-23).

8. A joint affidavit of Robin Cotton and Charlotte Word was offered to prove problems with the DNA evidence presented at trial. The 20 page affidavit is a comprehensive analysis of the samples tested, test results, records and reports generated, Lifecodes reports and testimony, Solicitor Bailey's chart, and the controls used in testing. Their conclusions were critical in all respects to the testing, testimony and the DNA results. Some of their opinions were:

   a. The totality of the DNA data in this case that can be used for comparison purposes to assist with the determination of the possible source of the DNA from the vaginal samples that cannot be accounted for by L. Boyd is only 4 alleles. Based on the frequency of these alleles in the population, it is very likely that many other people in the United States (and the world) would share this series of alleles.

   b. The final report from the Lifecodes laboratory stating the failure to exclude Kenneth Simmons as a contributor of DNA while presenting inappropriate statistical frequencies along with the testimony of the DNA expert witnesses was confusing and can only be viewed as misleading to anyone without the whole set of accurately presented data.

c. The table of results presented at trial to the jury and relied upon by the witnesses was fraught with errors that can only be viewed as prejudicial to the defendant.

d. The work performed in the Lifecodes laboratory was not preformed according to generally accepted practices and procedures in crime laboratories.

e. Much of the testing performed on the samples in this case was not documented in a laboratory report at any time, including data that were misrepresented to the jury at trial.

f. Discrepancies in the test results in this case were not addressed in the laboratory notes, reports or testimony. (TT 4559-60).

9. Solicitor Bailey testified at the PCR trial that he produced and created a chart to make the DNA evidence more understandable to the jury based upon information of the DNA material he received from Dr. Baird, Ms. Crane or someone else from Lifeworks. In his creation of the chart, he included three columns at the very end regarding Mr. Simmons' sample. He charted CSF1PO, 10, 11; TPOX, 10, 11; and TH01, 7, 8. He relied on a February 2, 1998 Lifecodes report to create the chart. That report did not conform to the numbers on the chart. Solicitor Bailey also made a typographical error on the blood. The lab reported CSF1PO, 10, 12 not 10, 11. He said he missed the error while proofreading. No one from Lifecodes helped Solicitor Bailey create the chart, and he did not review the chart with the testifying witnesses before they testified. Solicitor Bailey said that they came in too late to meet with them before their testimony. "[W]hat I normally do . . . is I like to sit down face to face with a witness before trial and go over the testimony. I

didn't do that in this case because I thought I would have more time for trial prep between the time they arrived in town from out of state until the time they actually testified". (TT 4657).

10. Subsequent investigation revealed that there was no sample done on TPOX, 10, 11.

Q. And so the TH01, 7, 8 on that sample, that's another typo?

A. I wouldn't characterize it as a typo. I had information at some point in time that these figures belonged in that column. I can't tell you at this point in time whether or not that's from a document that's not in the file anymore or was the results of a telephone conversation from somebody from Lifecodes. I can't – as I said before, I can't recall that at this time where that came from.

Q. And that's despite the fact that the sample did not exist at the time that the CTT tests were done?

A. Yea. I found out yesterday in talking to you that the documentation in there saying the sample did not exist.

Q. Okay.

A. That it didn't exist at the time the tests were run.

Q. So when you characterize it as not a typo you're saying that you got information from somewhere but you don't know what it was?

A. I don't know what the source of information was other than it came from Lifecodes in some form. I can't remember whether that was a telephone conversation or document. To my knowledge there is no document in the file at this time that would indicate that. (TT 4671-72).

There were other errors on the chart used in trial that were revealed at the PCR hearing.

TDRE #6

Q. And then there are several sites that are set off in parentheses throughout the rest of the table.

A. Okay

Q. And did that have any specific indication?

A. Yea, it does now. I see that now. I did not – I don't recall what was in my mind at the time I did the chart.

Q. So the results that you have on this page show an additional allele at the TPOX site and that being a nine?

A. If that's an allele. I don't know what the nine means at this time.

Q. And the 10 and 11 is set off in parentheses?

A. The 10 and 11 is in parentheses. That's correct.

Q. And the next site TH01 –

A. Okay

Q. – for that sample –

A. Yes

Q. – there is an eight by itself; right?

A. Right and a seven.

Q. And a seven off in parentheses?

A. Yea

Q. That's not what you reflected on your chart?

A. No it is not. You're correct.

Q. Okay. The missing nine and the missing parentheses – are those also typos taken off of this page?

A. They're not typos. That information was taken from when we were trying to make this chart conform to be a compilation of some of the other charts that were sent to us in the reports. These two things here – the asterisk which indicates that 1.2 allele may be present and the parentheses indicates allele of less intensity was on the material that we got from Lifecodes; so that was lifted off of that.

Q. Okay. And you decided not to include that in the chart that you prepared?

A. I did not include it. Whether I decided to – not to include it or whether it slipped by or something, I just -- I don't recall at this time.

Q. Well, if somebody like a jury were just to look at your chart which is what you and Ms. Crane went through it would appear that Mr. Simmons' known blood was completely represented in one sample that we know didn't exist and exactly replicated in another sample that you have handwritten notes for from another source to indicate that they're not correct. Is that –

A. Yea. I would agree with you that a jury could become to some extent confused if they were to look at this and rely on this to support Dr. Baird's statistical analysis.

Q. And you repeatedly said with Ms. Crane, you know, he's a match at all nine loci?

A. I don't think I said that. I asked her if that was correct. I think she said it was.

Q. Well, she said that he couldn't be excluded as a possible contributor to a mixture; is that right?

A. If that's what the testimony is, that's what it is. I am not disputing anything that's in the transcript. (TT 4677-79).

11. I find that the chart exhibit used by the state, was in fact, confusing and misleading and contained erroneous data. Mr. Bailey admitted it was confusing. Dr. Baird added to the confusion by misreporting the frequency of occurrence.

Q. And you came to the conclusion that it had a combined frequency of occurrence of one in 81, 103?

A. That's what's stated in the report, yes.

Q. Do you have a calculator?

A. Yes. That's actually off by a factor of 10. It should have been one in 8,110.

Q. Okay. So that number is misreported?

A. That's an incorrect number, yes.

Q. The jury was never told that was an incorrect number?

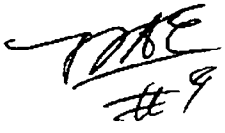
A. No, they were not told that, because, really, when the other testing that was done in this case, the CTT testing was done, a new calculation was performed which corrected that incorrect number that was in the report from January 23rd, 1998. (TT 4720).

The chart was based on Lifecodes testing. Dr. Baird testified:

Q. Does this appear to be a good test to you?

A. Well, it's certainly showing some results from the tests that were performed. With all kind of gel-based systems like this, sometimes you don't get clear, clean, crisp bands. It looks like these are a little bit wavy, but there certainly is some data there that can be interpreted.

Q. Did you rely on this data for your results?



A. This is certainly part of the data that was generated. There's also another run done on the 29th of January, 1998.

Q. Yes, sir.

A. And the combination of the two runs would be what was ultimately used in the analysis.

Q. Okay. On the first column, 56384, with the female sign next to it, do you see that?

A. Yes.

Q. Are there any results in that column?

A. I don't see any at all.

Q. On the – did you ever report out any results for Mrs. Boyd on her known standard?

A. I don't believe so, no. (TT 4725-26)

Lauren M. Crane admitted the chart was not accurate with respect to the report on Kenneth Simmons' blood related to the CTT test. She stated it had an incorrect allele present for the CF1PO allele loci.

Q. Okay. Is the chart accurate with respect to the report on Kenneth Simmons' blood related to the CTT test?

A. No. He has an incorrect allele present for the CF1PO allele loci. It should be 10, 12 not 10, 11.

Q. Okay. Do you know the accuracy of those same allele loci with respect to the vaginal swabs?

#10

A. It looks like it's incorrect for the entire lane where he has entered 10, 11 in each instance.

Q. Okay. And what should those numbers be based upon your analysis?

A. Based on the results from the gel, it should be 10, 12.

Q. So each of those should be 10, 12 rather than 10, 11?

A. Correct. (TT 4799-800).

The data in the chart is further confusing because it left open the possibility that there was more than one perpetrator in the evidentiary sample.

Q. That your report is strictly based on the results of Mr. Simmons' known standard?

A. Correct.

Q. It does not take into account the evidentiary standard –

A. Correct.

Q. Or who may or may not have contributed to the evidentiary sample?

A. Correct.

Q. So you certainly leave open the possibility that there was more than one perpetrator in the evidentiary sample?

A. That's a possibility, correct. (TT 4803).

Ms. Crane testified at the PCR hearing that her testimony at trial was based on an incorrect chart.

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. (TT 4806).

Ms. Crane testified that there was confusion in Baird's interpretation of the test data used on the chart.

Q. You disagree with his interpretation of these results?

A. I don't disagree with his interpretation. I disagree with the fact that he has – he has a typo for the type of scoring here for the CF – CSF1PO loci. It should be 10, 12. And so the vaginal swab labeled 638384, I don't think he meant to put a result there. I think he possibly meant to put a result where the female fraction was. I don't know what he did when he prepared this and what conclusion he made, but, you know, at this time point in time, without having that in front of me as an autoradiograph to review, I make no conclusion. (TT 4822).

Ms. Crane testified that the chart was misleading.

Q. Okay. But the chart's misleading?

A. Correct. I didn't create the chart. I have no idea what the intention there was.

Q. Okay. And you don't agree with the chart's results as to any of the CTT testing.

A. Correct. There's a typo. It should be 10, 12.

Q. And a 12 should exist in the 86 sample?

A. Correct.

Q. And if you were doing it, you would probably have listed the victim's known results, which would be the 89 line at the bottom?

A. Correct.

Q. Because when you are comparing an evidentiary sample to a known victim and a suspect, you need to account for alleles that you don't attribute to the suspect, right?

A. Could you rephrase that?

Q. Sure. When you're comparing an evidentiary sample, like the TPOX results at 86, where you have a 12, 10 and 11 results on the graph, on the radiograph –

A. Correct.

Q. - each person only has the possibility of two alleles?

A. No more than two alleles, correct. In this instance she's homozygous and has one allele.

Q. So you would account for the 12 in that lane as most likely having come from Ms. Boyd, the victim?

A. Correct.

Q. And the way that you would know that it most likely came from her is you would have her known results?

A. Correct.

Q. Without her known results, the evidentiary samples results don't really mean anything?

A. We have her known results, so we can compare it and say that it is possibly attributed from her.

Q. Or it could be attributed to multiple perpetrators?

A. Could be. (TT 4823-25)

12. The DNA testing employed in the trial is outdated by today's standards, which compromised obtaining certain profiles on the victim.

A. Well, the testing that you can do today is, obviously, more sophisticated and more powerful than the tests that were performed in this particular case, and you do have the opportunity to determine more information about the contributors to a mixture with today's technology. You're absolutely right.

Q. And you do that through peak heights and stuff like that?

A. Typically, you do it through peak heights, yes.

Q. You don't have that ability here?

A. Correct. This is a different technology.

Q. Any of this testing, you don't have that ability?

A. Correct. This is a different technology. With a DQ alpha polymarker, this is a reverse dot blot test. You can look at intensities of some of the dots to help determine the amount of one allele versus another. But, again, it's certainly nowhere near as sophisticated as what you can do today with capillary electrophoresis.

Q. So, again, for these evidentiary samples, you said that you were able to determine that it was just two people that contributed to these evidentiary samples?

A. What I said was it was consistent with it being a mixture from that was accounted for by the victim and the suspect.

Q. And that's only at the DQ alpha and polymarker sites because the victim was never – no results were ever reported for her CTT test?

A. Certainly none that I have in front of me for her CTT profile. Again, I – certainly, it was attempted to obtain her profile. I don't know whether it was obtained. If it was, I don't know what her alleles were. (TT 4752-53).

13. Favorable evidence was withheld in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

A. The test was inconclusive based on the run, the gel run.

Q. There are no reliable evidentiary values that you would attribute to this gel?

A. Correct.

Q. The whole thing should be discarded?

A. Correct. Hence there's no reports on CTT.

Q. You did not report that you ran it on the 23rd and came up with inconclusive or unusable results?

A. I don't know that because I don't have my notebooks to show that. We didn't utilize these results, so I don't have any of my original notebooks to refer to. Those pages were probably not copied because those results were not utilized.

Q. So you suspect that what you have in front of you that's attributed to as to Lifecode's file is incomplete?

A. Correct.

Q. That does not include all the information that you had at the time?

A. Most likely correct.

Q. As far as you know, there was no additional information, other than what you have in front of you, sent to the defense?

A. I have no idea. I don't recall. I don't have the original case files or access to any of the original documents that were – you know, that we utilized then. (TT 4810-11).

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

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

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

A. Correct.

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

A. I have no idea what the defense was told. (TT 4832-33).

14. This court finds as fact that evidence was not made available to the defendant, thus violating the principles of *Brady*. Additionally, the DNA evidence was presented to the jury by way of a chart that was confusing, misleading, contained false information, misstated some of the evidence, and failed to include all the test results.

II. LEGAL ANALYSIS.

The PCR 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).

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). Whether or not the State had actual knowledge of the favorable evidence is irrelevant. *See Kyles*, 514 U.S. at 437. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case." *Id.* 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 this 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*. 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.

DEATH #18

- 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).

This 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 statement that police extracted from Simmons (an intellectually disabled 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; *see also, Bies v. Sheldon*, 775 F.3d 386, 398-403 (6th Cir. 2014) (finding evidence withheld was material where Bies confessed to the crime, but noting that Bies was intellectually disabled, the United States Supreme Court has warned intellectually disabled defendants are particularly prone to false confessions, and Bies's confession was "far from overwhelming evidence of his guilt.").

The outcome in this case cannot be deemed "fair" or one in which we can have confidence. *See, e.g., Elmore v. Ozmint*, 661 F.3d 783, 851-55 (4th Cir. 2011) (holding that the State's flawed forensic evidence "had a palpably adverse effect on the defense," and Elmore was prejudiced by his trial counsel's failure to investigate the State's forensic evidence where such an investigation "would have exposed a multitude of questions about its legitimacy and reliability."); *see also id.* at 870.

Finally, even if the State's DNA presentation somehow did not amount to a constitutional violation, the evidence developed during Simmons's 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). He is therefore entitled to relief.

IV. CONCLUSION.

Based upon all of the evidence presented, this Court finds that applicant, Kenneth Simmons, is entitled to a new trial. His convictions are hereby vacated, and this matter is remanded to the Court of General Sessions in Dorchester County for additional proceedings consistent with this order.

AND IT IS SO ORDERED.

Hon. Doyet A. Early, III

August 31, 2016
Bamberg, SC

STATE OF SOUTH CAROLINA COUNTY OF DORCHESTER	)	IN THE COURT OF COMMON PLEAS
KENNETH SIMMONS Applicant,	)	CASE NO.: 2005-CP-18-1368 **ORDER DENYING RESPONDENT'S MOTION TO ALTER OR AMEND THE JUDGMENT**
vs.	)	
STATE OF SOUTH CAROLINA, Respondent.	)	

This matter was remanded by the South Carolina Supreme Court for specific findings regarding Applicant's claims related to the State's DNA trial evidence. *Simmons v. South Carolina*, 416 S.C. 584, 788 S.E.2d 220 (2016). This Court held a status conference in Barnwell, South Carolina, on June 15, 2016. At the hearing, Respondent waived the right to present any additional evidence as well as the right to submit any additional briefing. Applicant agreed that all relevant evidence establishing the unreliability of the DNA evidence had previously been presented at the PCR hearing. This Court requested and received copied of the relevant portions of the record, as well as parties' post-hearing briefs. After careful and thorough review of these materials, the Court issued an order granting post-conviction relief. *See* Order Granting Post-Conviction Relief (hereafter "PCR Order").

Respondent thereafter filed a Motion to Alter or Amend the Judgment (hereafter "Motion to Alter"). This Court convened a second hearing, on October 4, 2016, in Aiken, South Carolina, at which counsel for both parties presented arguments for this Court's consideration. Respondent also submitted additional exhibits for this Court's review. The Court has given careful and thorough consideration to all of the issues raised in the parties' briefs, as well as the oral arguments presented at the October 4 hearing. The Court has pondered over the relevant portions

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of the transcripts and exhibits, reviewed and thoroughly considered the transcripts of the Applicant's statements, and analyzed the law applicable to this matter. The Court is still of the opinion that the presentation of DNA evidence at the Applicant's trial was so tainted that he was severely deprived of his due process rights. Thus, I respectfully deny the Motion to Alter.

The misrepresentation of the strength of the DNA evidence to the jury by the state was so overwhelming that it, in my opinion, deprived the applicant of his due process rights to such an extent that cannot be ignored, notwithstanding the Applicant's confession. The State relied on a chart presented to the jury that contained false information regarding the DNA samples. The Solicitor utilized the chart to emphasize his own incorrect claims about the DNA evidence during closing arguments. The State basically argued that it was impossible for the DNA to have come from anyone other than the Applicant, which is false.

Laura Crane's trial testimony was supported by a chart that contained false information. During her PCR deposition, Ms. Crane admitted the test results, upon closer review, were inconclusive and had no evidentiary value in identifying the Applicant. The presentation of the DNA evidence at trial was confusing, misleading, and inaccurate, which resulted in a complete denial of the Applicant's due process rights.

In this Court's PCR Order, a detailed list of the Applicant's due process violations were fully set out concerning the DNA evidence. Nothing new has been presented in support of this motion, nor have any of the facts changed which would justify the granting of the Respondent's motion.

This Court has considered the statement(s) made by the Applicant during various stages of the proceedings. The Court would have to be clairvoyant to make findings as to what effect the statement(s) had on the jury in reaching their verdict. The Respondent argued, in support of

their motion, the details supported by investigation and knowledge, the lack of police coercion, and the affirmance of guilt, both made pre-trial and during trial make the statement(s) reliable and truthful. The Applicant contends the confession was extracted by the police from him, an intellectually disabled man, after multiple non-recorded interrogations, and that he had falsely confessed to other crimes before confessing to the murder. When determining what weight, if any, the jury gave to this evidence, whether the presentation of the DNA evidence was cumulative to the statement(s), whether they made their decision solely on the confession, or solely on DNA, is a question impossible to now answer.

However, for the Court to rule that the confession justifies the upholding of the verdict in this case, notwithstanding the due process violations, would be compounding the injustice which has occurred.

For these reasons, and the reasons set out in the order granting relief, the Motion to Alter or Amend is denied. The matter is hereby remanded to the Court of General Sessions in Dorchester County for a new trial.

This ruling does not preclude either party from offering DNA evidence, provided it is admissible under the rules of evidence and cases regarding admissibility of expert testimony. Additionally, this order does not preclude statements by the Applicant, if admissible under the rules of evidence, being offered as evidence.

IT IS SO ORDERED.

June 13, 2017

Doyet A. Early III
Circuit Court Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2005CP1801368

Kenneth Simmons		Department of corrections	South carolina state of
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

CERTIFIED COPY
2017 JUN 29 PM 12:44
CLERK OF COURT
DORCHESTER COUNTY

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Doyet A. Early, III — 6/29/2017

Circuit Court Judge | **Judge Code** | **Date**

For Clerk of Court Office Use Only

This judgment was entered on **6/29/2017**, and a copy mailed first class or placed in the appropriate attorney's box on **6/29/2017**, to attorneys of record or to parties (when appearing pro se) as follows:

James M. Morton James M. Morton PO Box 707 Rock Hill, SC 29731
Emily C Paavola Attorney At Law Ctr. Capital Litigation, 900 Elmwood Ave. Suite 101 Columbia, SC 29201

Donald J. Zelenka PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Graham

Court Reporter

Cheryl Graham - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.