SUPREME COURT OF THE UNITED STATES

No. 99–7000

BOBBY LEE RAMDASS, PETITIONER *v.* RONALD J. ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 12, 2000]

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join.

Petitioner received a death sentence in the Commonwealth of Virginia for murder in the course of robbery. On review of a decision denying relief in federal habeas corpus, he seeks to set aside the death sentence in reliance on *Simmons* v. *South Carolina*, 512 U. S. 154 (1994). He argues the jury should have been instructed of his parole ineligibility based on prior criminal convictions. We reject his claims and conclude *Simmons* is inapplicable to petitioner since he was not parole ineligible when the jury considered his case, nor would he have been parole ineligible by reason of a conviction in the case then under consideration by the jury. He is not entitled to the relief he seeks.

I

Sometime after midnight on September 2, 1992, Mohammed Kayani was working as a convenience store clerk. Petitioner Bobby Lee Ramdass and his accomplices entered the store and forced the customers to the floor at

gunpoint. While petitioner ordered Kayani to open the store's safe, accomplices took the customers' wallets, money from the cash registers, cigarettes, Kool Aid, and lottery tickets. When Kayani fumbled in an initial attempt to open the safe, petitioner squatted next to him and yelled at him to open the safe. At close range he held the gun to Kayani's head and pulled the trigger. The gun did not fire at first; but petitioner tried again and shot Kayani just above his left ear, killing him. Petitioner stood over the body and laughed. He later inquired of an accomplice why the customers were not killed as well.

The murder of Kayani was no isolated incident. Just four months earlier, after serving time for a 1988 robbery conviction, petitioner had been released on parole and almost at once engaged in a series of violent crimes. In July, petitioner committed a murder in Alexandria, Virginia. On August 25, petitioner and three accomplices committed an armed robbery of a Pizza Hut restaurant, abducting one of the victims. Four days later, petitioner and an accomplice pistol-whipped and robbed a hotel clerk. On the afternoon of August 30, petitioner and two accomplices robbed a taxicab driver, Emanuel Selassie, shot him in the head, and left him for dead. Through major surgery and after weeks of unconsciousness, Selassie survived. The same day as the Selassie shooting, petitioner committed an armed robbery of a Domino's Pizza restaurant.

The crime spree ended with petitioner's arrest on September 11, 1992, nine days after the Kayani shooting. Petitioner faced a series of criminal prosecutions. For reasons we discuss later, the sequence of events in the criminal proceedings is important to the claim petitioner makes in this Court. Under Virginia law, a conviction does not become final in the trial court until two steps have occurred. First, the jury must return a guilty verdict; and, second, some time thereafter, the judge must

enter a final judgment of conviction and pronounce sentence, unless he or she determines to set the verdict aside. On December 15, 1992, a jury returned a guilty verdict based on the Pizza Hut robbery. On January 7, 1993, a jury rendered a guilty verdict for the Domino's robbery; on January 22, the trial court entered a judgment of conviction on the Pizza Hut verdict; on January 30, the sentencing phase of the Kayani murder trial was completed, with the jury recommending that petitioner be sentenced to death for that crime; and on February 18, the trial court entered judgment on the Domino's verdict. After his capital trial for the Kayani killing, petitioner pleaded guilty to the July murder in Alexandria and to the shooting of Selassie. Thus, at the time of the capital sentencing trial, a final judgment of conviction had been entered for the Pizza Hut crime; a jury had found petitioner guilty of the Domino's crime, but the trial court had not entered a final judgment of conviction; and charges in the Alexandria murder had not yet been filed, and indeed petitioner had denied any role in the crime until sometime after the sentencing phase in the instant case.

At the sentencing phase of the capital murder trial for Kayani's murder, the Commonwealth submitted the case to the jury using the future dangerousness aggravating circumstance, arguing that the death penalty should be imposed because Ramdass "would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code Ann. §19.2–264.4(C) (1993). Petitioner countered by arguing that he would never be released from jail, even if the jury refused to sentence him to death. For this proposition, Ramdass relied on the sentences he would receive for the crimes detailed above, including those which had yet to go to trial and those (such as the Domino's crime) for which no judgment had been entered and no sentence had been pronounced. Counsel argued petitioner "is going to jail for the rest of

his life. . . . I ask you to give him life. Life, he will never see the light of day . . . .' " App. 85. At another point, counsel argued: " 'Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison.' " 187 F. 3d 396, 400 (CA4 1999). These arguments drew no objection from the Commonwealth.

The prosecution's case at sentencing consisted of an account of some of Ramdass' prior crimes, including crimes for which Ramdass had not yet been charged or tried, such as the shooting of Selassie and the assault of the hotel clerk. Investigators of Ramdass' crimes, an accomplice, and two victims provided narrative descriptions of the crime spree preceding the murder, and their evidence of those crimes was the basis for the prosecution's case in the sentencing hearing. Evidence of the crime spree did not depend on formal convictions for its admission. The prosecutor, moreover, did not mention the Domino's crime in his opening statement and did not introduce evidence of the crime during the Commonwealth's case in chief. App. 8-47. Ramdass himself first injected the Domino's crime into the sentencing proceeding, testifying in response to his own lawyer's questions about his involvement in the crime. In closing, the prosecutor argued that Ramdass could not live by the rules of society "either here or in prison." *Id.*, at 86.

During the juror deliberations, the jury sent a note to the judge asking: "[I]f the Defendant is given life, is there a possibility of parole at some time before his natural death?" *Id.*, at 88. Petitioner's counsel suggested the following response: " 'You must not concern yourself with matters that will occur after you impose your sentence, but you may impose *[sic]* that your sentence will be the legal sentence imposed in the case.' " *Id.*, at 89. The trial judge refused the instruction, relying on the then-settled Virginia law that parole is not an appropriate factor for

the jury to consider, and informed the jury that they "'are not to concern [them]selves with what may happen afterwards.'" *Id.*, at 91. The next day the jury returned its verdict recommending the death sentence.

Virginia law permitted the judge to give a life sentence despite the jury's recommendation; and two months later the trial court conducted a hearing to decide whether the jury's recommended sentence would be imposed. During the interval between the jury trial and the court's sentencing hearing, final judgment had been entered on the Domino's conviction. At the court's sentencing hearing, Ramdass' counsel argued for the first time that his prior convictions rendered him ineligible for parole under Virginia's three-strikes law, which denies parole to a person convicted of three separate felony offenses of murder, rape, or armed robbery, which were not part of a common act, transaction, or scheme. Va. Code Ann. §53.1–151(B1) (1993). Petitioner's counsel also stated that three jurors contacted by petitioner's counsel after the verdict expressed the opinion that a life sentence would have been imposed had they known Ramdass would not be eligible for parole. These jurors were not identified by name, were not produced for testimony, and provided no formal or sworn statements supporting defense counsel's representations. App. 95. Rejecting petitioner's arguments for a life sentence, the trial court sentenced petitioner to death.

Ramdass appealed, arguing that his parole ineligibility, as he characterized it, should have been disclosed to the jury. The Virginia Supreme Court rejected the claim, applying its settled law "that a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." *Ramdass* v. *Commonwealth*, 246 Va. 413, 426, 437 S. E. 2d 566, 573 (1993). The court did not address whether Ramdass had waived the claim by failing to mention the three-strikes law at trial or by not objecting to the instructions

that were given. Other Virginia capital defendants in Ramdass' position had been raising the issue at trial, despite existing Virginia law to the contrary. *E.g.*, *Mickens* v. *Commonwealth*, 249 Va. 423, 424, 457 S. E. 2d 9, 10 (1995); *O'Dell* v. *Thompson*, 502 U. S. 995, 996, n. 3 (1991) (Blackmun, J., respecting denial of certiorari); *Mueller* v. *Commonwealth*, 244 Va. 386, 408–409, 422 S. E. 2d 380, 394 (1992); *Eaton* v. *Commonwealth*, 240 Va. 236, 244, 397 S. E. 2d 385, 390 (1990).

From the State Supreme Court's denial of his claims on direct review, Ramdass filed a petition for a writ of certiorari in this Court. One of his arguments was that the judge should have instructed the jury that he was ineligible for parole. While the petition was pending, we decided *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), which held that where a defendant was parole ineligible under state law at the time of the jury's death penalty deliberations, the jury should have been informed of that fact. We granted Ramdass' petition for certiorari and remanded the case for reconsideration in light of *Simmons*. *Ramdass* v. *Virginia*, 512 U. S. 1217 (1994).

On remand, the Virginia Supreme Court affirmed Ramdass' death sentence, concluding that *Simmons* applied only if Ramdass was ineligible for parole when the jury was considering his sentence. *Ramdass* v. *Commonwealth*, 248 Va. 518, 450 S. E. 2d 360 (1994). The court held that Ramdass was not parole ineligible when the jury considered his sentence because the Kayani murder conviction was not his third conviction for purposes of the three-strikes law. In a conclusion not challenged here, the court did not count the 1988 robbery conviction as one which qualified under the three-strikes provision. (It appears the crime did not involve use of a weapon.) The court also held the Domino's robbery did not count as a conviction because no final judgment had been entered on the verdict. Thus, the only conviction prior to the Kayani

murder verdict counting as a strike at the time of the sentencing trial was for the Pizza Hut robbery. Unless the three-strikes law was operative, Ramdass was eligible for parole because, at the time of his trial, murder convicts became eligible for parole in 25 years. Va. Code Ann. §53.1–151(C) (1993). Under state law, then, Ramdass was not parole ineligible at the time of sentencing; and the Virginia Supreme Court declined to apply *Simmons* to reverse Ramdass's sentence.

Ramdass filed a petition for a writ of certiorari contending that the Virginia Supreme Court misapplied *Simmons*, and we again denied certiorari. *Ramdass* v. *Virginia*, 514 U. S. 1085 (1995). After an unsuccessful round of postconviction proceedings in Virginia courts, Ramdass sought habeas corpus relief in federal court. He argued once more that the Virginia Supreme Court erred in not applying *Simmons*. The District Court granted relief. 28 F. Supp. 2d 343 (ED Va. 1998). The Court of Appeals reversed. 187 F. 3d, at 407. When Ramdass filed a third petition for a writ of certiorari, we stayed his execution, 528 U. S. 1015 (1999), and granted certiorari, 528 U. S. 1068 (2000). Ramdass contends he was entitled to a jury instruction of parole ineligibility under the Virginia three-strikes law. Rejecting the contention, we now affirm.

II

Petitioner bases his request for habeas corpus relief on *Simmons*, *supra*. The premise of the *Simmons* case was that, under South Carolina law, the capital defendant would be ineligible for parole if the jury were to vote for a life sentence. Future dangerousness being at issue, the plurality opinion concluded that due process entitled the defendant to inform the jury of parole ineligibility, either by a jury instruction or in arguments by counsel. In our later decision in *O'Dell* v. *Netherland*, 521 U. S. 151, 166

(1997), we held that *Simmons* created a new rule for purposes of *Teague* v. *Lane*, 489 U. S. 288 (1989). *O'Dell* reaffirmed that the States have some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case, subject to the rule of *Simmons*. We have not extended *Simmons* to cases where parole ineligibility has not been established as a matter of state law at the time of the jury's future dangerousness deliberations in a capital case.

Whether Ramdass may obtain relief under *Simmons* is governed by the habeas corpus statute, 28 U. S. C. §2254(d)(1) (1994 ed., Supp. III), which forbids relief unless the state-court adjudication of a federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." As explained in JUSTICE O'CONNOR's opinion for the Court in *Williams* v. *Taylor*, 529 U. S. ___, ___ (2000) (slip op., at 15), a state court acts contrary to clearly established federal law if it applies a legal rule that contradicts our prior holdings or if it reaches a different result from one of our cases despite confronting indistinguishable facts. The statute also authorizes federal habeas corpus relief if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case. A state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled. The Virginia Supreme Court's ruling in the case before us was neither contrary to *Simmons* nor an unreasonable application of its rationale.

Petitioner contends his case is indistinguishable from *Simmons*, making the Virginia Supreme Court's refusal to

grant relief contrary to that case. In his view the Pizza Hut conviction and the Domino's guilty verdict classified him, like the *Simmons* petitioner, as ineligible for parole when the jury deliberated his sentence. He makes this argument even though the Virginia Supreme Court declared that he was not parole ineligible at the time of the sentencing trial because no judgment of conviction had been entered for the Domino's crime.

Simmons created a workable rule. The parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law. 512 U. S., at 156 (plurality opinion) (limiting holding to situations where "state law prohibits the defendant's release on parole"); *id.*, at 165, n. 5 (relying on fact that Simmons was "ineligible for parole under state law"); *id.*, at 176 (O'CONNOR, J., concurring) (citing state statutes to demonstrate that for Simmons "the only available alternative sentence to death . . . was life imprisonment without [the] possibility of parole"). The instruction was required in *Simmons* because it was agreed that "an instruction informing the jury that petitioner is ineligible for parole is legally accurate." *Id.*, at 166.

In this case, a *Simmons* instruction would not have been accurate under the law; for the authoritative determination of the Virginia Supreme Court is that petitioner was not ineligible for parole when the jury considered his sentence. In *Simmons* the defendant had "conclusively established" his parole ineligibility at the time of sentencing. *Id.*, at 158. Ramdass had not. In *Simmons*, a sentence had been imposed for the defendant's prior conviction and he pleaded guilty. Ramdass' Domino's case was tried to a jury and no sentence had been imposed. While a South Carolina defendant might challenge a guilty plea, the grounds for doing so are limited, see *Rivers* v. *Strickland*, 264 S. C. 121, 124, 213 S. E. 2d 97, 98,

(1975) ("The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea"); see also *Whetsell* v. *South Carolina*, 276 S. C. 295, 296, 277 S. E. 2d 891, 892, (1981), and, in all events, such a motion cannot seek to set aside a jury verdict or be considered a post-trial motion, for there was no trial or jury verdict in the case. 512 U. S., at 156. *Simmons* further does not indicate that South Carolina law considered a guilty plea and sentence insufficient to render the defendant parole ineligible upon conviction of another crime. Material differences exist between this case and *Simmons*, and the Virginia Supreme Court's decision is not contrary to the rule *Simmons* announced.

Ramdass makes two arguments to equate his own case with *Simmons*. Neither contention refutes the critical point that he was not ineligible for parole as a matter of state law at the time of his sentencing trial. First he contends that the *Simmons* petitioner was not parole ineligible at the time of his sentencing trial. According to Ramdass, a South Carolina prisoner is not parole ineligible until the State Board of Probation makes a formal determination of parole ineligibility and the state board had not done so when the capital sentencing jury fixed Simmons' penalty. This argument is without merit. Virginia does not argue that Ramdass was parole eligible because a parole board had not acted. It argues Ramdass was still parole eligible at the time of the sentencing trial by reason of his then criminal record as it stood under state law. We further note that Ramdass bases his argument on briefs and the record filed in *Simmons*. A failure by a state court to glean information from the record of a controlling decision here and to refine further holdings accordingly does not necessarily render the state-court ruling "contrary to, or . . . an unreasonable application of,

clearly established Federal law as determined by the Supreme Court of the United States." §2254(d)(1). On review of state decisions in habeas corpus, state courts are responsible for a faithful application of the principles set out in the controlling opinion of the Court.

Second, Ramdass argues *Simmons* allowed a prisoner to obtain a parole-ineligibility instruction even though "hypothetical future events" (such as escape, pardon, or a change in the law) might mean the prisoner would, at some point, be released from prison. This argument is likewise of no assistance to Ramdass. The *Simmons* petitioner was, as a matter of state law, ineligible for parole at the time of the sentencing trial. The State was left to argue that future events might change this status or otherwise permit Simmons to reenter society. *Id.*, at 166. Ramdass' situation is just the opposite. He was eligible for parole at the time of his sentencing trial and is forced to argue that a hypothetical future event (the entry of judgment on the Domino's convictions) would render him parole ineligible under state law, despite his current parole-eligible status. This case is not parallel to *Simmons* on the critical point. The differences between the cases foreclose the conclusion that the Virginia Supreme Court's decision denying Ramdass relief was contrary to *Simmons*.

Ramdass contends the Virginia Supreme Court nevertheless was bound to extend *Simmons* to cover his circumstances. He urges us to ignore the legal rules dictating his parole eligibility under state law in favor of what he calls a functional approach, under which, it seems, a court evaluates whether it looks like the defendant will turn out to be parole ineligible. We do not agree that the extension of *Simmons* is either necessary or workable; and we are confident in saying that the Virginia Supreme Court was not unreasonable in refusing the requested extension.

Simmons applies only to instances where, as a legal

matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison. Petitioner's proposed rule would require courts to evaluate the probability of future events in cases where a three-strikes law is the issue. Among other matters, a court will have to consider whether a trial court in an unrelated proceeding will grant postverdict relief, whether a conviction will be reversed on appeal, or whether the defendant will be prosecuted for fully investigated yet uncharged crimes. If the inquiry is to include whether a defendant will, at some point, be released from prison, even the age or health of a prisoner facing a long period of incarceration would seem relevant. The possibilities are many, the certainties few. If the *Simmons* rule is extended beyond when a defendant is, as a matter of state law, parole ineligible at the time of his trial, the State might well conclude that the jury would be distracted from the other vital issues in the case. The States are entitled to some latitude in this field, for the admissibility of evidence at capital sentencing was, and remains, an issue left to the States, subject of course to federal requirements, especially, as relevant here, those related to the admission of mitigating evidence. *Id.*, at 168; *California* v. *Ramos*, 463 U. S. 992 (1983).

By eliminating *Simmons'* well-understood rule, petitioner's approach would give rise to litigation on a peripheral point. Parole eligibility may be unrelated to the circumstances of the crime the jury is considering or the character of the defendant, except in an indirect way. Evidence of potential parole ineligibility is of uncertain materiality, as it can be overcome if a jury concludes that even if the defendant might not be paroled, he may escape to murder again, see *Garner* v. *Jones*, 529 U. S. ___ (2000); he may be pardoned; he may benefit from a change in parole laws; some other change in the law might operate to invalidate a conviction once thought beyond review, see *Bousley* v. *United States*, 523 U. S. 614 (1998); or he may

be no less a risk to society in prison, see *United States* v. *Battle*, 173 F. 3d 1343 (CA11 1999), cert. denied, 529 U. S. ___ (2000). The Virginia Supreme Court had good reason not to extend *Simmons* beyond the circumstances of that case, which included conclusive proof of parole ineligibility under state law at the time of sentencing.

A jury evaluating future dangerousness under Virginia law considers all of the defendant's recent criminal history, without being confined to convictions. As we have pointed out, the Domino's Pizza conviction was not even a part of the prosecution's main case in the sentencing proceedings. Parole ineligibility, on the other hand, does relate to formal criminal proceedings. The State is entitled to some deference, in the context of its own parole laws, in determining the best reference point for making the ineligibility determination. Given the damaging testimony of the criminal acts in the spree Ramdass embarked upon in the weeks before the Kayani murder, it is difficult to say just what weight a jury would or should have given to the possibility of parole; and it was not error for the State to insist upon an accurate assessment of the parole rules by using a trial court judgment as the measuring point.

As we have explained, the dispositive fact in *Simmons* was that the defendant conclusively established his parole ineligibility under state law at the time of his trial. Ramdass did not because of the judicial determination Virginia uses to establish a conviction's finality under its parole law. We note that Virginia's rule using judgment in the Domino's case to determine parole ineligibility is not arbitrary by virtue of Virginia's also allowing evidence of the defendant's prior criminal history. To demonstrate Ramdass' evil character and his propensity to commit violent acts in the future, the prosecutor used Ramdass' prior criminal conduct, supported in some cases (although not in the Domino's case) by evidence in the form of the

resulting jury verdicts. Virginia law did not require a guilty verdict, a criminal judgment, or the exhaustion of an appeal before prior criminal conduct could be introduced at trial. Virginia law instead permitted unadjudicated prior bad acts to be introduced as evidence at trial. See *Watkins* v. *Commonwealth*, 229 Va. 469, 487, 331 S. E. 2d 422, 435 (1985). For example, the prosecutor was permitted to use the shooting of Selassie in aggravation, even though no verdict had been rendered in that case. The prosecutor likewise asked Ramdass about the July murder in Alexandria. App. 64. (Despite Ramdass's sworn denial, he pleaded guilty to the crime after being sentenced to death in this case.) The guilty verdict of the jury in the Domino's case, therefore, was not a necessary prerequisite to the admissibility of the conduct underlying the Domino's crime. Ramdass, furthermore, could not object to the Commonwealth's use of the Domino's crime at sentencing, for it was he who introduced the evidence. The Commonwealth did not mention the crime in its opening statement and did not present evidence of the crime in its case in chief. Ramdass used the Domino's crime to argue he would never be out of jail; and he overused the crime even for that purpose. Counsel advised the jury the Domino's crime would result in "at least another life sentence," when in fact the sentence imposed was for 18 years. *Id.*, at 50.

The various public opinion polls to which we are pointed cast no doubt upon the rule adopted by the State. We are referred, for example, to a poll whose result is reported in Paduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Colum. Human Rights L. Rev. 211 (1987). The poll is said to permit the conclusion that 67% of potential jurors would be more likely to give a life sentence instead of death if they knew the defendant had to serve at least 25 years in prison before being parole eligible.

The poll is not a proper consideration in this Court. Mere citation of a law review to a court does not suffice to introduce into evidence the truth of the hearsay or the so-called scientific conclusions contained within it. Had the creators of the poll taken the stand in support of the poll's application to Ramdass' case, the poll likely would have been demonstrated to be inadmissible. The poll's reporters concede the poll was limited in scope, surveying 40 individuals eligible for jury service. *Id.*, at 221. The poll was limited to jurors in one Georgia county, jurors who would never serve on a Fairfax County, Virginia, jury. The poll was supervised by the Southern Prisoners' Defense Committee, a group having an interest in obtaining life sentences for the inmates it represents. The poll was conducted in the context of ongoing litigation of a particular defendant's death sentence. The article makes no reference to any independent source confirming the propriety of the sampling methodology. The poll asked but four questions. It failed to ask those who were surveyed why they held the views that they did or to ascertain their reaction to evidence supplied by the prosecution designed to counter the parole information. No data indicates the questions were framed using methodology employed by reliable pollsters. No indication exists regarding the amount of time participants were given to answer. The reporters of the poll contend other similar, limited studies support the results, yet those studies were conducted over the telephone "by defense attorneys in connection with motions for new trials." These, and other, deficiencies have been relied upon by courts with factfinding powers to exclude or minimize survey evidence. *E.g.*, *Amstar Corp.* v. *Domino's Pizza, Inc.*, 615 F. 2d 252, 264 (CA5 1980) (inadequate survey universe); *Dreyfus Fund, Inc.* v. *Royal Bank of Canada*, 525 F. Supp. 1108, 1116 (SDNY 1981) (unreliable sampling technique); *General Motors Corp.* v. *Cadillac Marine & Boat Co.*, 226 F. Supp. 716, 737 (WD

Mich. 1964 (only 150 people surveyed); *Kingsford Products Co.* v. *Kingsfords, Inc.*, 715 F. Supp. 1013, 1016 (Kan. 1989) (sample drawn from wrong area); *Conagra, Inc.* v. *Geo. A. Hormel & Co.*, 784 F. Supp. 700, 726 (Neb. 1992) (survey failed to ask the reasons why the participant provided the answer he selected); *Sterling Drug, Inc.* v. *Bayer AG*, 792 F. Supp. 1357, 1373 (SDNY 1992) (questions not properly drafted); *American Home Products Corp.* v. *Proctor & Gamble Co.*, 871 F. Supp. 739, 761 (NJ 1994) (respondents given extended time to answer); *Gucci* v. *Gucci Shops, Inc.*, 688 F. Supp. 916, 926 (SDNY 1988) (surveys should be conducted by recognized independent experts); *Schering Corp.* v. *Schering Aktiengesellschaft*, 667 F. Supp 175, 189 (NJ 1987) (attorney contact and interference invalidates poll); see generally *Toys "R" Us, Inc.* v. *Canarsie Kiddie Shop, Inc.*, 559 F. Supp 1189 (EDNY 1983) (listing factors to consider in determining whether a survey is reliable). The poll reported in the Columbia Human Rights Law Review should not be considered by this Court. See *Stanford* v. *Kentucky*, 492 U. S. 361, 377 (1989) (plurality opinion). It is the Virginia Supreme Court's decision rejecting Ramdass' claims that is under review in this habeas proceeding. It was not required to consult public opinion polls.

Ramdass' claim is based on the contention that it is inevitable that a judgment of conviction would be entered for his Domino's crime. He calls the entry of judgment following a jury verdict a "ministerial act whose performance was foreseeable, imminent, and inexorable." Brief for Petitioner 21, 36. Petitioner cites no authority for the proposition that a judicial officer's determination that final judgment should be entered (as opposed to the clerk's noting of the final judgment in the record) is a ministerial act. We are not surprised. We doubt most lawyers would consider a criminal case concluded in the trial court before judgment is entered, for it is judgment which signals that

the case has become final and is about to end or reach another stage of proceedings. See Va. Sup. Ct. Rule 1:1, 5A:6 (1999) (requiring notice of appeal to be filed "within 30 days after entry of final judgment").

Post-trial motions are an essential part of Virginia criminal law practice, as discussed in leading treatises such as J. Costello, Virginia Criminal Law and Procedure 829 (2d ed. 1995), and R. Bacigal, Virginia Criminal Procedure 337 (2d ed. 1989). Under Virginia Supreme Court Rule 3A:15(b) (1999), a verdict of guilty may be set aside "for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction." A few examples from the reports of Virginia decisions demonstrate it to be well-established procedure in Virginia for trial courts to consider and grant motions to set aside jury verdicts. *E.g.*, *Floyd* v. *Commonwealth*, 219 Va. 575, 576–577, 249 S. E. 2d 171, 172 (1978); *Payne* v. *Commonwealth*, 220 Va. 601, 602–603, 260 S. E. 2d 247, 248 (1979); *Johnson* v. *Commonwealth*, 20 Va. App. 547, 553, 458 S. E. 2d 599, 601 (1995); *Walker* v. *Commonwealth*, 4 Va. App. 286, 291, 356 S. E. 2d 853, 856 (1987); *Gorham* v. *Commonwealth*, 15 Va. App. 673, 674, 426 S. E. 2d 493, 494 (1993); *Carter* v. *Commonwealth*, 10 Va. App. 507, 509, 393 S. E. 2d 639, 640 (1990); *Cullen* v. *Commonwealth*, 13 Va. App. 182, 184, 409 S. E. 2d 487, 488 (1991).

The motion to set aside may be filed and resolved before judgment is entered, *e.g.*, *Walker*, *supra*, at 291, 356 S. E. 2d, at 856, and trial courts may conduct hearings or allow evidence to be introduced on these motions. Postverdict motions may be granted despite the denial of a motion to strike the evidence made during trial, *e.g.*, *Gorham*, *supra*, at 674, 426 S. E. 2d, at 494, or after denial of a pretrial motion to dismiss, *Cullen*, *supra*, at 184, 409 S. E. 2d, at 488. Federal judges familiar with Virginia practice have held that postverdict motions give a defendant a full and fair opportunity to raise claims of trial error, *Di Paola* v.

Riddle, 581 F. 2d 1111, 1113 (CA4 1978). In contexts beyond the three-strikes statute, Virginia courts have held that the possibility of postverdict relief renders a jury verdict uncertain and unreliable until judgment is entered. *E.g.*, *Dowel* v. *Commonwealth*, 12 Va. App. 1145, 408 S. E. 2d 263, 265 (1991); see also *Smith* v. *Commonwealth*, 134 Va. 589, 113 S. E. 707 (1922); *Blair* v. *Commonwealth*, 66 Va. 850, 858, 861 (1874) (availability of postverdict motions mean it is at the defendant's option whether to "let judgment be entered in regular order"). In one recent case, the Virginia Court of Appeals relied on Rule 3A:15 to hold, contrary to petitioner's contention here, that it is an "incorrect statement of the law" to say that the trial court has no concern with the proceedings after the jury's verdict. *Davis* v. *Commonwealth*, 2960–98–2, 2000 WL 135148, *4, n. 1 (Va. App., Feb. 8, 2000).

The time for Ramdass to file a motion to set aside the Domino's verdict had not expired when the jury was deliberating on the sentence for Kayani's murder; and he concedes he could have filed post-verdict motions. The Domino's case was pending in a different county from the Kayani murder trial and the record contains no indication that Ramdass' counsel advised the judge in the Kayani case that he would not pursue postverdict relief in the Domino's case. The Virginia Supreme Court was reasonable to reject a parole ineligibility instruction for a defendant who would become ineligible only in the event a trial judge in a different county entered final judgment in an unrelated criminal case.

Ramdass complains that the Virginia Supreme Court's selection of the entry of judgment rather than the jury verdict is arbitrary. He points out that a trial court may set the judgment aside within 21 days after its entry. Va. Sup. Ct. Rule 1:1 (1999). Appeal is also permitted. We agree with Ramdass that the availability of postjudgment relief in the trial court or on appeal renders uncertain the

finality and reliability of even a judgment in the trial court. Our own jurisprudence under *Teague* v. *Lane*, for example, does not consider a Virginia-state-court conviction final until the direct review process is completed. *O'Dell* v. *Netherland*, 521 U. S., at 157. States may take different approaches and we see no support for a rule that would require a State to declare a conviction final for purposes of a three-strikes statute once a verdict has been rendered. Verdicts may be overturned by the state trial court, by a state appellate court, by the state supreme court, by a state court on collateral attack, by a federal court in habeas corpus, or by this Court on review of any of these proceedings. Virginia's approach, which would permit a *Simmons* instruction despite the availability of postjudgment relief that might, the day after the jury is instructed that the defendant is parole ineligible, undo one of the strikes supporting the instruction, provided Ramdass sufficient protection. A judgment, not a verdict, is the usual measure for finality in the trial court.

Our conclusion is confirmed by a review of petitioner's conduct in this litigation. The current claim that it was certain at the time of trial that Ramdass would never be released on parole in the event the jury sentenced him to life is belied by the testimony his counsel elicited from him at sentencing. Ramdass' counsel asked him, "Are you going to spend the rest of your life in prison?" Despite the claim advanced now that parole would be impossible, the answer counsel elicited from Ramdass at trial was, "I don't know." We think Ramdass' answer at trial is an accurate assessment of the uncertainties that surrounded his parole and custody status at the time of trial. In like manner, before the Virginia Supreme Court's decision now challenged as unreasonable, petitioner had not argued that his parole eligibility should have been determined based on the date of the Domino's verdict (January 7, 1993) rather than the date the judgment was entered

(February 18, 1993). He did not mention the three-strikes law at trial, although the Domino's verdict had already been returned. Petitioner's brief to the Virginia Supreme Court on remand from this Court conceded that the appropriate date to consider for the Domino's crime was the date of judgment. His brief states Ramdass "was convicted . . . on 18 February 1993 of armed robbery" and that "[o]f course, the . . . 18 February convictio[n] occurred after the jury findings in this case." App. 123–124. Thus the Virginia Supreme Court treated the Domino's conviction in the manner urged by petitioner. Petitioner's change of heart on the controlling date appears based on a belated realization that the 1988 robbery conviction did not qualify as a strike, meaning that he needed the Domino's conviction to count. To accomplish the task, petitioner began arguing that the date of the jury verdict controlled. His original position, however, is the one in accord with Virginia law.

State trial judges and appellate courts remain free, of course, to experiment by adopting rules that go beyond the minimum requirements of the Constitution. In this regard, we note that the jury was not informed that Ramdass, at the time of trial, was eligible for parole in 25 years, that the trial judge had the power to override a recommended death sentence, or that Ramdass' prior convictions were subject to being set aside by the trial court or on appeal. Each statement would have been accurate as a matter of law, but each statement might also have made it more probable that the jury would have recommended a death sentence. We further note Virginia has expanded *Simmons* by allowing a defendant to obtain a *Simmons* instruction even where the defendant's future dangerousness is not at issue. *Yarbrough* v. *Commonwealth*, 258 Va. 347, 519 S. E. 2d 602 (1999). Likewise, Virginia has, after Ramdass' conviction, eliminated parole for capital defendants sentenced to life in prison. The

combination of *Yarbrough* and the elimination of parole means that all capital defendants in Virginia now receive a *Simmons* instruction if they so desire. In circumstances like those presented here, even if some instruction had been given on the subject addressed by *Simmons*, the extent to which the trial court should have addressed the contingencies that could affect finality of the other convictions is not altogether clear. A full elaboration of the various ways to set a conviction aside or grant a new trial might not have been favorable to the petitioner. In all events the Constitution does not require the instruction that Ramdass now requests. The sentencing proceeding was not invalid by reason of its omission.

III

The Virginia Supreme Court's decision to deny petitioner relief was neither contrary to, nor an unreasonable application of, *Simmons*. The United States Court of Appeals for the Fourth Circuit was required to deny him relief under 28 U. S. C. §2254 (1994 ed. and Supp. III), and we affirm the judgment.

It is so ordered.