IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM ARTHUR KELLY, :

Petitioner :

v. : No. 00-9280

SOUTH CAROLINA. :

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Washington, D.C.

Monday, November 26, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

DAVID I. BRUCK, ESQ., Columbia, South Carolina; on behalf of the Petitioner.

S. CREIGHTON WATERS, ESQ., Assistant Attorney General, Columbia, South Carolina; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-9280, William Arthur Kelly v. South Carolina.

Mr. Bruck.

ORAL ARGUMENT OF DAVID I. BRUCK

ON BEHALF OF THE PETITIONER

MR. BRUCK: Mr. Chief Justice, and may it please the Court:

For the second time this year, the Court considers today South Carolina's compliance with your decision in Simmons v. South Carolina. The issue this time is -- is the interpretation, if you will, the South Carolina Supreme Court has placed upon the future dangerousness requirement of the Simmons decision, specifically whether, as the South Carolina Supreme Court put it, future dangerousness was neither a logical inference from the evidence nor was it injected into this case through the State's closing argument.

QUESTION: Well, in -- in some sense -- and this is what concerns me about your argument -- I -- I suppose at some level future dangerousness is -- is always inferable from the fact of -- of a horrible crime.

MR. BRUCK: I -- I think it is true that -- that

when a person is convicted beyond a reasonable doubt of an aggravated, death-eligible murder, it is -- it does not take very much more to put the issue of future dangerousness at issue. You can conceive of crimes -- I particularly suggest the example of an intrafamilial -- that is, the murder of children by their mother where the person with no prior record and no likelihood that the situation will recur, where future dangerousness simply does not sound from the evidence.

However, in -- there are also --

QUESTION: We -- we are the ones that -- that gave you this -- this category of future dangerousness. And it either makes sense or it doesn't. If -- if there's something defensible about the category, it -- it seems to me that there would be a significant number of cases in which it doesn't apply. I -- I just don't see that from your argument. Now, maybe the category is unworkable. That's another point.

MR. BRUCK: Well, I should say that future dangerousness is not likely to be at issue in -- in cases where State law does not provide the jury the freedom to consider it. If aggravation was clearly limited in a weighing statute in which the jury has clearly said these are the -- or is clearly told, these are the factors that go on death side of the scale and nothing more -- only you

can think of a way in which the prosecution could try a case in a way that clearly conveyed the message to the jury that --

QUESTION: Well, how many States that use the death penalty allow future dangerousness as a factor in sentencing?

MR. BRUCK: You know, I don't have an exact number. My sense is that a small minority have it as a statutory aggravating factor, such as Texas, Virginia, and Oregon, and a much larger number like Georgia, South Carolina allow it along with a myriad of other sentencing factors without it ever needing to be explicitly mentioned. These are the so-called non-weighing States. I would guess --

QUESTION: Well, that is the concern, of course, is if -- whether this concept is something that is going to have to be applied in every capital sentencing case or whether there's some limitation.

MR. BRUCK: Well --

QUESTION: And it's hard to know from your argument the answer to that. Can you draw a line?

MR. BRUCK: Yes. I would say where the evidence does not sound in future dangerousness and where the prosecution does not advance the jury's consideration of future dangerousness. For example, in this case, you

know, on these facts, of course, none of this is implicated. This is simply Simmons. This is within Simmons. Even if we were to limit Simmons to its facts, it would include this case because you have an onslaught of future dangerousness argument. You have an onslaught of classic future dangerousness evidence presented --

QUESTION: Wait, wait, wait, wait, wait. You say evidence sounds in future dangerousness. What -- what evidence that -- that is introduced at -- you know, at the -- at the sentencing phase that this is a horrible person would -- would not sound in future dangerousness? You're trying to show that this is a horrible person, that he deserves the death penalty. What kind of evidence wouldn't sound in future dangerousness?

MR. BRUCK: Well, for example, the prosecutor here took on the issue of the fact that this young man was only 17 years old, and his -- and had no prior record, both very substantial mitigating factors. And the response was that actually the very fact that he had no prior record, the prosecutor said, makes him more frightening than a serial killer, more frightening than a career criminal, which is all future dangerousness rhetoric. Frightening means looking toward the future. One is not frightened by things that have already happened, but things that might happen in the future.

QUESTION: Now -- now, you're relying on the statement of -- of the prosecutor --

MR. BRUCK: Yes, in part.

QUESTION: -- on his use of the word frightening. And in another place, he does use the term dangerousness.

MR. BRUCK: Yes, he does.

QUESTION: Now, that's one thing if you want to -- and -- and we -- we can discuss that. But -- but I'm more concerned about your broader point that when the evidence, as you put it, sounds -- I'm not sure it's the proper use of sounds, but when the evidence, as you put it, sounds in future dangerousness, we have to -- it -- it is constitutionally required that you -- you have the instruction about no parole.

MR. BRUCK: Well, I mean, we should recall that -- that -- I mean, one can say, well, these are just the facts of the crime. The State has enormous discretion about what evidence it wants to present, and when it presents evidence that is reasonably likely or, in this case, virtually certain to cause the jury to consider the -- the elemental sentencing issue that a judge considers in almost every case, will he do it again, then --

QUESTION: That will always be the case. You -- you are asking for a rule that -- that will cover every

capital case. I cannot imagine a capital case where -- where the prosecution does not, at the sentencing phase, put in evidence that makes this look like a horrible person, hence, a dangerous person. And -- and I -- you know, I just don't know that we're prepared to go that far.

Which leads me to what words -- what are the magic words that you want the prosecution not to be able to use. Frightening is one magic word. Right? Dangerous is another magic word.

MR. BRUCK: It most certainly is.

QUESTION: Okay. I mean, we can just have a list of magic words that prosecutors shouldn't use from now on.

MR. BRUCK: I think there would be no harm, although this case provides absolutely no occasion to consider the issue, in dispensing with the future dangerousness requirement for precisely that reason, that when -- that it is -- there are so few cases in which the jury is not likely, in the privacy of the jury room, to ask the question, what if he gets out and does it again? This comes up in case after case. And there's a -- in weighing the -- the State -- I mean, is there a danger that the Simmons rule might then be applied in cases where it truly does not rebut something that the jury --

occasionally in the rare case, yes.

But in considering the equities, I think it's worth keeping in mind that there is unfairness not only on the issue of future dangerousness from this situation. There is also unfairness in the retributive function that the jury must suffer, and this is not in this case. It may be more of an Eighth Amendment claim, but I think in weighing the risk of unfairness to the two sides, it's worth keeping in mind that life without parole is a much more severe punishment. It is much more retributive than is life with parole. And it is -- it is more severe from the moment it is imposed, not only 30 or 40 years hence. And the reason is that life without parole means life without hope.

And anyone -- I -- I try these cases and -- and negotiate plea bargains in these cases at the trial level, and I can tell you that there is nothing that cuts the ice faster with the victim's family, with the prosecutor in settling a case than life without parole not because of the dangerousness, but because of its retributive effect. And there's something terribly unfair at -- when everyone in the courtroom knows how crushing this penalty is, this penalty of life without hope, except the jury, and they are left to think that their option is to let this man hope that some day he'll be out raising a family and

working at a job and -- and pretending to be a respectable member of the community when it isn't so.

QUESTION: You're asking us to overrule Simmons.

MR. BRUCK: No, by no means. This case -- all I am saying is that if it is true, as my friend claims, that our category of cases in these non-weighing jurisdictions, where the jury is given free rein to consider everything, that our category of non-dangerousness cases is actually so small as to be nonexistent, then in those States at least I think it would be fair. And there is no harm in saying --

QUESTION: But that isn't the question you presented in your petition. All you presented in your petition was, was the ruling of the Supreme Court of South Carolina in this case contrary to Simmons?

MR. BRUCK: Well, that's right because I represent a client and all my client requires is that Simmons be applied. We have something that I think can fairly be described as something approaching defiance of your -- of your decision in Simmons when a record like this is -- is found not to raise future dangerousness. The only thing that State can come up with that they didn't do is to call Dr. Grigson, some psychiatrist, to say --

QUESTION: Well, for the reasons that we've

indicated in our questions, I -- I don't think it's defiance. I -- I do think the prosecution is being pretty careful not to raise future dangerous explicitly because it doesn't want the jury to know this.

MR. BRUCK: Yes.

QUESTION: And it makes it a little troublesome

But given the state of our law, future dangerousness has to be put in issue, and as we -- as we've indicated, I -- I think under -- under your rule that would be an issue in almost every case.

Let me ask you this. You've heard me ask it here before. I -- I take it that if this instruction were given, either the trial judge relented or future dangerousness was at issue, it's perfectly open to the State to say, now -- now, you may think this prisoner has no hope, but the legislature can change this tomorrow morning. Tomorrow morning the legislature can change the parole rule, and this prisoner -- this defendant can be out in the community, once again a danger.

MR. BRUCK: Well, I think that --

QUESTION: I take it that would be a fair argument?

MR. BRUCK: I don't think it would be for a separate reason, which is it invites the -- the jury to treat the law under which this person is being sentenced

as in effect nonexistent. The only thing that's real is death because that can't be changed.

QUESTION: Yes, but -- but the certainty that life without parole will confine him indefinitely is much less than that execution will kill him.

MR. BRUCK: That's true. That's true. But when -- when a court -- I mean, a jury doesn't need to be told that all manmade law is subject to being changed by man. That is something that we all know. Jurors know that, that this law was enacted by the legislature and can be changed --

QUESTION: Well, would you allow the prosecutor to argue it if you were the trial judge?

MR. BRUCK: No, I would not because to invite the jury to --

QUESTION: So, you're saying that the jury doesn't need to be told what it already knows, but that's inconsistent with your whole position.

MR. BRUCK: No. All I'm -- all I'm saying is that the jury should not be invited to speculate that all the law that it is being told to apply will melt away and cannot be relied on and thus should be ignored. And then the jury ceases really to become a jury that applies the law of the State and becomes just a pack of --

QUESTION: I thought your position -- I thought

your position was that this -- that the judge or the lawyer reads the text of what it says in the South Carolina law.

MR. BRUCK: Exactly.

QUESTION: Reads word for word what the legislature enacted.

MR. BRUCK: That is exactly correct.

QUESTION: And that's all you're asking.

MR. BRUCK: That's all we're asking. And, you know, my -- my submission --

QUESTION: Wait. Whether -- whether we should allow that to happen depends on, you know, how fair it is to the prosecution and why shouldn't the prosecution be able to point out the reality that that's what the legislature has said today and it can change that tomorrow? So, if you really want future dangerousness to be -- to be treated openly and honestly, I don't see how you can just -- just say put in the one side and not the other.

MR. BRUCK: Well, I have to say my case does not turn on the answer to that question. That could be decided either way, as this case is reversed, because that's not an issue in this case. It certainly would become the stuff of future appeals to this Court from the only two States that see any issue left here, Pennsylvania

and South Carolina.

QUESTION: In all the other States, in -- in every other State that has capital punishment --

MR. BRUCK: Yes.

QUESTION: -- this instruction is given as a matter of course?

MR. BRUCK: Regardless of any absence or presence or alleged absence of future dangerousness. In other words, every State but South Carolina and Pennsylvania already go beyond Simmons, and these are the only two outliers in which the record is combed for whether or not future dangerousness is at issue.

Now, as I say --

QUESTION: When you say it's outliers, but once again that's the -- that's the dichotomy that this Court set forth in -- in Simmons and in our past opinions.

MR. BRUCK: Well, yes. The -- it's true that -- that Simmons set a constitutional minimum rule and it required future dangerousness to be at issue. And there are a great many -- in a -- in a non-weighing jurisdiction, there are a great many ways of putting future dangerousness at issue. It can be done, as the Court has held in Simmons itself, by argument. It can be done, as is never done in South Carolina, by instruction to the Court, because it's not a statutory factor. Or it

can -- as the State agrees and as the South Carolina Supreme Court acknowledges, it can be done solely by evidence without argument by the solicitor.

QUESTION: But what about the argument that everything that goes to future dangerousness also goes to something else? The prosecutor said, yes, I showed that this was a terrible person because he had no prior record, and I used the Billy the Kid remark because -- to rebut the age. So, I can give you a reason, other than future dangerousness, for everything that I put in.

MR. BRUCK: Well, it's -- it's -- there's very little evidence of future dangerousness and very little argument that cannot also be given a retributive interpretation, which is what the State has labored to do in their brief.

And if all that -- it's striking that the State is not at all satisfied with the test stated by the South Carolina Supreme Court, which is whether the issue was argued or whether future dangerousness is a logical inference from the evidence. The State's test for whether evidence is -- raises an issue of future dangerousness is that the evidence must only raise future dangerousness and must raise nothing but future dangerousness.

Now, it's rather hard. The only example, as I say, they can think of is a psychiatric opinion that the

man will kill again. Apparently that's the only evidence that triggers Simmons under the Attorney General's view.

QUESTION: So what? What's so -- what's so absurd about that?

MR. BRUCK: Because it ain't so.

QUESTION: What is so absurd about that? If Simmons meant anything, it seems to me that's what Simmons meant, or otherwise it -- it -- you know, it's virtually worthless.

MR. BRUCK: Well, there was no psychiatric opinion introduced by the State in Simmons itself. There was nothing but a metaphorical argument that two members of the Court didn't think raised future dangerousness at all.

But it was this idea of self-defense in response to someone who was a threat. That -- that was also an argument about retribution, and as the dissenting opinion in -- in Simmons pointed out, that -- you could certainly see the retributive meaning, significance, that the prosecutor meant there.

But it also -- it also raised the issue of future dangerousness, and that was all in Simmons. And that was enough. And that's why I say that to affirm this case would require -- would require reversing Simmons.

One has to weigh, too -- I mean, you know, the

State argues this issue as if we are keeping them from introducing evidence, and we are doing something unfair or we're saying they can't do this, they can't do that. We don't say the State can't do anything. All we say is that when they make an argument like they made in this case -- he's quick-witted, doesn't that make someone a little more dangerous, calling the defendant Billy the Kid, Bloody Billy, the Butcher of Batesburg, and on and on and on and on and on -- that we be able to answer it by saying how the legislature has defined life imprisonment for the people of South Carolina.

These jurors are the same voters that demanded that life imprisonment be -- be enacted, and now that it has been enacted, what can be fair about keeping the defendant from telling the jury, even if all this that the prosecutor says about me is true, I will never be released again?

Now, the -- the State also acknowledges, both the State Supreme Court and the Attorney General, that future dangerousness was raised in this case. They make no bones about that. But they say, well, we raised it in a special way that does not implicate Simmons. What we did was we introduced evidence that not even the Lexington County jail could keep this man from being nonviolent, and that is future dangerousness. And that's why the

instruction that we offered, telling the jury that future dangerousness was not in the case, was denied.

But the -- but the State says, in defiance of all common sense, that evidence that this young man would be dangerous, even behind bars and concrete and steel, did not implicate the notion that if you notion that if you let him out, he would be even more dangerous. That is why the State says that prison dangerousness does not --

QUESTION: He just didn't like being confined.

MR. BRUCK: I'm sorry?

QUESTION: Maybe he just didn't like being confined. I mean, you can imagine a situation like that.

MR. BRUCK: Well, Mr. Chief Justice, anything is possible, but that does not commend itself to our common sense. I think what the jury is much more likely to infer from that is that if even jail and prison can't keep this guy from being dangerous, if he ever gets let out, let out on parole, Katie, bar the door. He's going to be a disaster.

QUESTION: Well, I'm not sure about that inference. If I were a juror and I heard about this evidence, I'd say my principal focus would be on the safety of the guards and the inmates. I'd say this man is dangerous in prison and that's the reason for capital punishment. It seems to me perfectly logical.

MR. BRUCK: That -- as I say, the -- the evidence has two meanings and that is one of them. We don't quarrel with that. But at the same time, if -- if he is --

QUESTION: Well, then you can't say it defies all logic, et cetera, et cetera. It seems to me that that's the -- the most direct conclusion that -- that should follow from the prosecution's evidence on this point. He's dangerous in prison.

MR. BRUCK: Even if it is the most direct, how can we say that it does not also prove that if you let him out on parole, he'll be even more dangerous?

QUESTION: But that isn't what Simmons said. I thought the rule of Simmons was -- was a rule of fairness. Look, prosecution, if you're going to argue that this man should be executed because it -- he will be dangerous to society if he's -- if he's let out, then, for Pete's sake, you have to let the jury know that he won't be let out. It's an unfair argument for the prosecution to say he'll be dangerous to society unless you execute him, when the prosecution knows that he'll never get out.

MR. BRUCK: Right.

QUESTION: But this is far beyond that. This has nothing to do with such an unfair argument by the prosecution. He's not saying don't let this person go

because he'll be praying on society. There's -- there's nothing approaching that argument.

MR. BRUCK: Well, I think it -- it -- what we have here is a prosecutor who has Simmons and who knows that if he wants to hide from the jury -- you see, the prosecution agrees with us about -- and this is, in a way, what is most disturbing and troubling about this case. If the prosecution did not believe, based on their evidence and their argument, that this jury was thinking about future dangerousness to society, why would they care? What possible harm could there be from a Simmons instruction?

I think the prosecution entirely agrees with us on the importance of this and on the dynamics of jury deliberation in a case where a -- where the -- where the State's evidence and the argument is of this nature. They know perfectly well what any practicing lawyer who tries these cases on either side knows, which is that this jury goes back in the jury room, after having seen and heard all of this, and thinks one thing for sure: We got to make sure he doesn't do it again. And it is a constitutional fact, established by the Simmons case, that's -- that part of that is parole, the jury's misconception about parole, because we've had parole for so many generations and life without parole is a new

phenomenon in this country.

QUESTION: But this -- this is not a case, is it, in -- where the trial judge put any limitation on the defense attorney's arguing this point or where the jury came back with a question. This is not one of those cases.

MR. BRUCK: Right. For all we know, the jury knew there was parole, wrongly. And no limitation.

But I have to say -- and the State has not claimed that in the face of this argument on instructions, that the lawyer -- the defense attorney should have picked up a statute book and read to the jury the instruction that the judge had just refused to give. She would have had her head handed to her on a plate if she had done that. That is not permitted in South Carolina. When a legal principle has been ruled out of a case, a lawyer cannot then attempt to charge the jury anyway. And that is not an argument you'll find in the State's case.

They do say that her -- her rhetorical claim or -- or co-counsel's claim that you'll never see the light of day should be deemed as the equivalent of a no-parole instruction, but you dealt with that and disposed of that argument in Shafer, where a much more explicit argument was held not to be the equivalent of an instruction on -- on State law concerning parole. So, I think that -- that

argument has absolutely nothing to commend it and is -- is directly controlled, I would submit, by -- by Shafer.

QUESTION: But Shafer was explicit that counsel would not be allowed to read the statute, which is what I think counsel wanted to do.

MR. BRUCK: Well, that's right. But you know, it -- a lawyer doesn't, under South Carolina practice, need to ask the court whether an instruction that has been ruled out of the case -- whether it's okay for her to read it to the jury. We know that that is not permissible.

I should add, too, that -- that the trial judge instructed the jury in this case that he is the sole instructor on the facts. At page 618 of the record, he said, as -- I am as judge the sole -- made the sole and only instructor in the law. And so -- and that's, you know, how trials in South Carolina are conducted. Lawyers do not instruct.

I realize as a matter of constitutional law, if it were -- if there were a way for defense counsel to have done that, despite the -- the court's ruling, it would have sufficed under Simmons, but there was no such way, and that's why the State makes no such argument in their -- in their brief. This is not where an opportunity was passed up by defense counsel to instruct on the law. This -- there wasn't any such -- any such opportunity, and

that's why the -- the argument is so vague and so unsatisfactory under -- under Shafer v. -- v. South Carolina.

If this is enough to get around Simmons and to allow prosecutors to keep juries from knowing what the South Carolina legislature has done with respect to the abolition of parole, then you will see, as you already are seeing, case after case from South Carolina in which the envelope is constantly being pushed further and further back in what, I have to submit, is a somewhat manipulative effort to get the advantage of the jury's misconceptions, to get the advantage of the false dilemma that Simmons correctly identified in order to get more death sentences than are actually merited by the law and the evidence in each case.

As I say, this is the second time that -- that South Carolina has -- South Carolina's compliance with Simmons has been before this Court in this calendar year. There probably won't be another one this calendar year, but there will be a continuing procession. And, indeed, the first case in line will be Shafer v. South Carolina, which was remanded for reconsideration of the -- for consideration -- for a ruling on the issue of future dangerousness. If --

QUESTION: Well, perhaps -- you suggested in

your brief that for the future the South Carolina legislature is going to require that the jury be informed.

MR. BRUCK: Prospectively, yes. It will -- it will do no good for -- for people like Shafer and -- and the petitioner in this case whose cases have already been tried. But, yes, the House of Representatives has already voted overwhelmingly to, in effect, require a Simmons instruction in every case. That bill is now before the Senate and it could be by this time next year, this will be of only historical interest in South Carolina, except to the petitioner --

QUESTION: May I ask, as a matter of historical interest, when did the requirement that the -- I mean, when did -- when did the sentence of life without parole first authorized by the South Carolina --

MR. BRUCK: The very first time came in -- in 1986.

QUESTION: 1986.

MR. BRUCK: And thereafter, the South Carolina Supreme Court first handed down a truth-in-sentencing rule and then reversed itself just before Simmons, and Simmons was the first case tried under the new regime.

If there are no further questions, I'd like to reserve my time for rebuttal.

QUESTION: Very well, Mr. Bruck.

Mr. Waters, we'll hear from you.

ORAL ARGUMENT OF S. CREIGHTON WATERS

ON BEHALF OF THE RESPONDENT

MR. WATERS: Mr. Chief Justice, and may it please the Court:

In Simmons v. South Carolina, a limited due process exception was crafted to the general rule in California v. Ramos that it was for the States to decide whether to inform the juries on matters of parole or other early release. And the issue in this case is what argument and evidentiary submissions are sufficient to -- for the prosecution to have been deemed to raise future dangerousness such that due process overcomes that State law rule.

And petitioner in this case contends that future dangerousness can be raised simply by the gruesome facts of the crime, by misbehavior in jail, by a prior criminal record. And, of course, that would create, as has already been discussed, a virtually standardless test and would conflict with this Court's statements of the Simmons rule, as well as the subsequent interpretation of the rule by many other courts. And that is, of course, that a prosecutor must specifically rely on future dangerousness to society as a basis for death.

And, of course, that -- the reason for that is

the rationale of Simmons itself, which is a due process right of rebuttal. Future dangerousness -- a future dangerousness requirement is necessary to that due process right of rebuttal, and obviously, in order to have the right to rebut something, the other party must have first done something to affirmatively raise that issue.

Now, admittedly some --

QUESTION: Mr. Waters, in -- in your view has any South Carolina prosecutor since Simmons used words that would invoke that case?

MR. WATERS: Invoke Simmons itself?

QUESTION: Yes. It seems to me that any prosecutor, if your argument is right, can easily get around Simmons simply by not using the words future dangerousness and saying, well, this is relevant to something else.

MR. WATERS: Well, I think, you know, our State Supreme Court has on two occasions ruled that Simmons was violated, and in that case, the -- the prosecutor argued that, you know, he's shown that he cannot live inside or outside of prison. So, clearly that crosses the line.

I think, you know, the -- the fundamental --

QUESTION: I thought your position was if he couldn't live in prison, then Simmons was out.

MR. WATERS: Well, in that particular case, he

said both outside of society and inside prison in that particular case. That's State v. Timothy Rogers, a State court case. So, our court has on -- on a couple of occasions ruled that. I mean, obviously --

QUESTION: You -- you then concede that if the -- if the argument that counsel for the -- the prosecutor makes is this man is dangerous in or out of prison, in that case a Simmons instruction is warranted.

MR. WATERS: I think that by incorporating the outside society aspect of the argument, our State Supreme Court has already ruled that and I'm not here to -- to challenge that.

QUESTION: I understood Justice Ginsburg's question -- and I'm interested in it too -- as can you tell us, as a matter of practice, are there instances in where the Simmons rule is followed in South Carolina and the jury is instructed about parole because of future dangerous being an issue, or as Justice Ginsburg suggested, is it the common pattern and practice for prosecution -- for the prosecutor to stay away from this?

MR. WATERS: No. There are plenty of instances where -- where solicitors argue future dangerousness to society, and a life without parole instruction is given. There -- it -- it ultimately boils down to what the prosecutor does in his argument and how the trial judge

rules on -- on what was raised in -- in that trial. But it does happen.

QUESTION: Don't you have that here? I mean, the argument here was not only the -- the Bloody Billy, the Butcher of whatever it was, but the words dangerous were used I think -- I think twice to describe him in the argument, once at least. And -- and the argument included the -- the statement to the jurors, I hope you never have to be in the position again of being 30 -- 30 feet away from this kind of -- of a killer. Well, the jurors aren't going to be spending time in prison, and I -- I don't know why that argument means anything other than I hope this guy is not going to be out where you are going to be and find you as close to him again. So, hasn't -- hasn't he raised it even on -- on your criteria?

MR. WATERS: I don't believe so in this case. I think if you focus on the prosecutor's argument as a whole, it's clear that the majority of his argument was retributive. And we would assert --

QUESTION: Well, I'm not talking about -- I mean, you -- the majority of the argument isn't even the criterion that you are arguing for. You said, look, he's got to raise it on my theory. He's got to raise it as an argument that this person will be dangerous on the outside. And I assume if he does that once, that's

sufficient on your theory. And my question is, didn't -- even on your theory, didn't he do it here?

MR. WATERS: Well, with regard to the dangerous comment, what the solicitor said in that particular case was -- he said, well, the evidence here is that he's quick-witted, he's not retarded. And of course, the evidence in this case also was that petitioner was a close friend of -- or the petitioner's family was a close friend of this victim. He used to work with the victim, and that he used that familiarity with the victim to make her more vulnerable.

QUESTION: Well, what -- what about the 30 feet? I hope you're never in this position again. What about that argument? I mean, isn't that an argument that makes no sense except on the assumption that this person might -- the defendant might be outside?

MR. WATERS: That -- that particular argument was -- was made at -- at the beginning of the sentencing phase in opening statement. It was a brief reference. I don't think that that --

QUESTION: I mean, it was made to the jurors. They heard it, didn't they?

MR. WATERS: They did hear that, but I think if you read it in context, it was more of the case of you just committed -- convicted this guy of a horrible crime.

You have a tough job ahead of you, and I hope you never have to do this again. I -- I think that -- that brief, isolated passage, when read in the context of what the solicitor was saying there, would not have such -- been such as to necessarily flag the future dangerousness issue in the mind.

QUESTION: So, if -- if the prosecutor had closed his argument with that, that would have sufficed.

MR. WATERS: I'm not -- I don't know if I would say that much. I just point out that it was very early and it was just a brief reference in opening statement, and I don't think that that -- that can be pointed to as to have crossed that line because I don't really think he used it for that inference, that you know, this -- you know, this guy is going to be dangerous to you. He was more saying, you know, you just convicted this guy of the most horrible, bloodiest crime you can imagine, and he's a horrible person, and now you've got one more tough job to do. And I hope you never have to go through this again. I think that was the point of his argument, not that this guy --

QUESTION: He didn't -- my -- my -- you correct me if I'm wrong, because I don't have the transcript in front of me, but my recollection is he didn't say, I hope you don't have to go through this again. He said, I hope

you're -- you know, you're not in this position of being 30 feet away from this kind of a person again, which is I think quite different.

MR. WATERS: Well, he -- he did not say, I hope you don't have to go through that, but I think if you read his argument, that was the point of it, and I think in context, that's the obvious point of it rather than future dangerousness.

QUESTION: May I ask this? You gave us a couple of examples of the South Carolina Supreme Court itself setting aside the conviction -- or executions because they had failed to give the instruction. And you -- you've just quoted the example he mentioned both inside and outside prison.

Now, did they consider the -- your argument that if read in the context of the entire argument, it -- it was a featured part of the argument, or did they -- could the -- could one reasonably think that from those opinions, just that mere mention was enough?

MR. WATERS: In that -- in that particular case, the solicitor focused much of his argument on that. He said, this -- this defendant has shown by his prior record, because the defendant had had prior incarcerations and prior releases -- he's shown by his prior record that he cannot exist safely both inside prison and outside

society. So, I would concede that crosses the line. I think it was focused on in that case, and it was a direct statement of outside society.

And I -- I don't want to get into magic words, but I think when you say outside society, when he clearly focuses, that -- that would be a magic word triggering Simmons.

QUESTION: But you would draw a line depending in part on how much the issue was emphasized in the argument. Not just an isolated comment, for example, would not be enough.

MR. WATERS: What I'm saying is that if there's an isolated comment in the context of an -- of an argument that focuses on retribution, that -- it's kind of a Donnelly v. DeChristoforo principle, that you shouldn't assume that the prosecutor intended to worst meaning from that, and you shouldn't assume that the jury necessarily took the worst meaning from that. And -- and so, I'm not saying -- I'm just saying that the context does matter, and -- and that's essentially what we have here.

In Simmons, you know, we had a -- the more egregious situation. We had the prosecutor say, jury, you know, the death penalty is going to be society's response to a threat, society's response. The prosecutor said, jury, you know, this will be your act of self-defense to

this particular defendant. The death penalty will be an act of self-defense. The prosecutor even went on -- so far as to say his own expert calls him dangerous and had brought that out in cross examination. There's none of that here. All they can do in this case is -- is go through a technical parsing of the argument.

QUESTION: Well, why shouldn't -- why shouldn't it be? Why isn't it fundamentally unfair in every capital case, after all, not to give the instruction that the alternative is life without parole? After all, you have a jury who knows it has a murderer in front of it. It's trying to decide among all alternative punishments. Death is the worst, and then the State won't tell them what the alternative is. Apparently every State but two have decided that is unfair. And why, to go back to basics, isn't it as unfair a thing just about as one can imagine to tell the jury you have to give life or something else and then not tell them what the something else is, particularly when they're likely to think he'll be out after a few years?

MR. WATERS: Well, I think the jury in this case -- you know, they are told life imprisonment, and they're never told that there's any possibility of --

QUESTION: But sitting -- in your experience, wouldn't you say most jurors are sitting there thinking

that life doesn't mean life?

MR. WATERS: Well, I -- I'm not sure that that's necessarily true. I mean, in State v. Patterson, which was a 1986 case in South Carolina, there was a voir dire of the jury on that, and most of the jurors said, we thought it meant, you know, he'll never get out. So, I mean, there's conflicting evidence on that. I know this Court has repeatedly referred to the fact that it -- it is new event and many jurors may not know, but I don't know if that's necessarily the case.

As a matter of fundamental fairness, we're still talking about, to some degree, deference to the States. And -- and so --

QUESTION: What does deference to the State got to do with fundamental fairness? It seems to me that's an entirely different argument.

The fundamental fairness question that Justice Breyer is raising is in a context in which it may or may not be debated as to whether jurors know instinctively that life really means life, doesn't fundamental fairness require that they be instructed unequivocally so that they know the terms within which they must act in coming to a verdict. That's the fundamental fairness question.

MR. WATERS: Well, I think that the -- the ineligibility of parole, as this Court held in Simmons, is

only directly relevant to future dangerousness to society argument, and that, of course, was the due process rationale followed in Simmons.

As far as whether under an Eighth Amendment context or even under a due process that life without parole is an effective rebuttal to retribution arguments and that sort of thing, that's not presented by this case. But I -- I think that the -- the relevance, again, of -- of ineligibility for parole is to rebut future dangerousness to society. That's what --

QUESTION: Well, in -- in Simmons, there's no question that the future dangerousness issue, together with the jury's question and so on, presented an egregious case of -- of a need for instruction.

MR. WATERS: Yes.

QUESTION: But let's -- let's assume -- and I don't believe this is this case, even remotely, but let's assume we had a case in which somehow future dangerousness were not an issue. And let's assume we -- we had a -- a straight retribution case. Given the fact that there is enough history to put in -- in doubt, to put into question what really is meant by life imprisonment, in the absence of a further instruction, why doesn't fundamental fairness require that the jury know for sure what the terms mean, which it must select from in sentencing this person?

MR. WATERS: Well, again, the jury is told we're dealing with death or life imprisonment.

QUESTION: No, but that simply begs the question. That -- that is changing my question to you. My question to you says we're operating in a context in which historical practice leads one to -- to question whether jurors really do understand that life means life in this case in this State now. On that assumption, why doesn't fundamental fairness require that the juries be given a clear instruction so that they're not sitting there wondering what it means if they come back with a life sentence?

MR. WATERS: I think that that depends that -- that be all to end all is the without parole context of life. I mean, life is still a very severe penalty, and -- and in order to get to your point, I think that you have to assume that adding without parole to it makes it so far --

QUESTION: You bet I assume that. There is a big difference between life imprisonment, in which a person never walks out of the prison, and life imprisonment in which the person walks out 15 years later. Yes, I make that assumption and I want you to make that assumption in answering my question. Why doesn't fundamental fairness require that the juries understand

that?

MR. WATERS: Well, again, I would have to fall back to the fact of is the only aspect of the State's case that it rebuts is future dangerousness to society. And -- and so that --

QUESTION: And my question to you is let's assume a case in which that is not the issue, a case in which we're talking about retribution. I want to narrow the issue down here. Why doesn't fundamental fairness require that the jurors understand what the words mean?

MR. WATERS: Because if it is a purely retributive case and -- and future dangerousness was not an issue, then there is nothing fundamentally unfair. The State has not made any arguments that the defendant did not have an opportunity to rebut. And -- and that's the holding of Simmons.

QUESTION: Yes, but the -- the argument to the contrary would be if you were sitting there thinking that this terrible murderer is in front of you and you are asked what is the appropriate punishment, and on the one hand you were told it's death, and on the other hand you were told -- well, you're not told because a person who wants to retribute, wants vengeance, would surely like to know that the alternative to death, which is surely vengeance, is life in prison forever, not just life in

prison for 10 or 15 years. I mean, can you think -- in a death case punishment stage, surely that would be on anyone's list of top five of the relevant factors.

MR. WATERS: I don't know if you can necessarily assume that's the case when the jury hears evidence and they're instructed on what to consider and the focus of the evidence is his adaptability in prison, which is the case in this case and many other cases.

And I think with regard to life without parole being a response to purely retributive arguments, it's not such an obvious be all and end all response to -- to retribution that due process steps in, as opposed to the situation in Simmons where future dangerousness to society does respond to that. I think that there is still a distinction there that -- that retribution is not necessarily directly responded to by a life without parole sentence, and so --

QUESTION: I assume that the reason for these rules were just -- just State principles that the law says what it says, and we don't want to get into the refinements of -- of how long a life sentence may be. In those States that do allow the fact that a life sentence does mean a life sentence to be introduced, do those jurisdictions also permit or do other jurisdictions permit the prosecution to show that a life sentence does not mean

a life sentence?

MR. WATERS: There -- there are a number of -- of jurisdictions that have wrestled with that. I think California v. Ramos is an example of that. Illinois has had -- has wrestled with that. So, some do allow charges on the possibility of commutation, on the possibility of pardon, on the possibility of change in the law and -- and add argument on that as well.

And, of course, South Carolina's policy has always been that we want a simple either/or choice, death or life, and -- and we don't want to bring in these collateral concerns. Now, whether the members of this Court disagree with that as a matter of policy, this Court, of course, has stated in many contexts that, you know, the -- the wisdom of policy decisions, as long as they have a certain modicum of -- of reasonableness, are for the States.

QUESTION: Is the prosecution allowed to argue in South Carolina when -- when the choice is -- is life or death, is the prosecution allowed to argue the possibility of commutation?

MR. WATERS: No, no. Parole and early release is off-limits on both sides of the coin, and there's never been a State case yet to rule that, well, to be fair, the prosecution needs to have that, at least as --

QUESTION: Well, that's not really very fair, is it? When -- when the jury, you know -- if you instruct the jury that life means life, it really doesn't mean life. You'd have to let the prosecution come in and say it could be commuted.

MR. WATERS: Absolutely, absolutely, and I would agree with that.

QUESTION: Or the -- all the law can be changed?

MR. WATERS: Or it could be changed.

QUESTION: The South Carolina Supreme Court hasn't dealt with that issue, though, has it? Because -- because Simmons is relatively new. Has there been a case where the prosecutor says, okay, judge, I said future dangerousness, but I want to tell them that the law can change, that there's a pardon, that there's a clemency power? That hasn't come up, has it?

MR. WATERS: Not of which I'm aware. In fact, this rule developed initially when there was parole eligibility, and it was really a rule initially created to -- to benefit defendants, frankly, in -- in that they didn't want the jury to know -- the defense didn't want the jury to know that there was parole eligibility. So, the South Carolina Supreme Court said, okay, we're going to charge life. Life means life imprisonment. That's what it means.

QUESTION: Well, then the South Carolina Supreme Court itself changed its rule on that?

MR. WATERS: It had. There was a period of time where their -- they did sanction charging on parole eligibility. This was prior to life without parole on -- on either 20- or 30-year parole eligibility, depending on the jury's finding of aggravators. That existed, I believe, for about 4 years, and was overturned in 1991 I think. So, there was a period of time.

But the policy -- the rule has always stayed the same, though, and that is that we don't want the jury to be legislating a plan of punishment. We don't want to be -- them to be concerned about these possible future events. We want them to make an either/or choice.

And South Carolina will remain true to Simmons, but beyond that, unless the policy is considered to be so unreasonable as to not pass the laugh test, then I think that they can potentially -- they can have that policy.

And I want to bring up another point, especially with regard to this and -- and what the prosecution did in this case. I don't think the -- the Court should -- or I don't -- I don't think it would be wise to -- to assume that prosecutors are going to be dishonest or to assume that the State court is going to be dishonest and is going to circumvent this rule.

And in fact, what the prosecution was doing in this case, yes, he was trying to avoid Simmons, but he was doing that to obey the law. And -- and clearly in -- in Justice O'Connor's concurrence, it said that if the prosecution does not argue future dangerousness, then the charge does not have to be given, and -- and that's what the prosecutor was doing here. So, he wasn't trying to circumvent the law. He wasn't trying to be sneaky. He was trying to obey the law, and -- and --

QUESTION: Yes, but he was trying to get the -- prevent the jury from getting this information.

MR. WATERS: That's true. That's true. He made a tactical decision that he -- and I don't know if it's necessarily tactical -- he was not going to rely on future dangerousness, and since that would not trigger Simmons, then the State law rule would apply. And that's --

QUESTION: And -- and he also kind of snuck in the word dangerousness there in the -- in the 30-foot example, but they don't count because they weren't prominent in his argument.

MR. WATERS: Well, I'd -- I'd like to -- to address that specifically. At that point in the argument, he was talking about the particular crime in this --

QUESTION: What -- what passage are we -- are we talking about a passage? I don't have it in my -- where

the -- the prosecutor expressly says future dangerous?

MR. WATERS: No, not at all.

QUESTION: I thought perhaps from his question that's what we were talking about.

MR. WATERS: What he -- what he was doing was he said, okay, this defendant is quick-witted. This defendant -- the evidence says this defendant is not retarded. Now, doesn't that make him more dangerous for Shirley Shealy, for this crime on this January the 5th, for this particular lady? And what he was saying, if -- if you read his argument in context, was again that the petitioner in this case was a close family friend of the victim and also used to work at that very same Kentucky Fried Chicken.

QUESTION: Mr. Waters, it wasn't quite like that. He said dangerousness, and then counsel for the defense stopped him at that point, and then he came back with, well, I meant dangerous for her.

MR. WATERS: Well, I don't know if you can necessarily read that that was at a protracted period. It may have been he just cut off before he finished his sentence. But what he was trying to say was is that he was more dangerous for her because she would have trusted him. She would not have expect to be cut to ribbons by this person because he was her friend. And that's what

the prosecution was saying. He was saying that makes this crime more aggravated. It's more premeditated. It's more callous. He preyed on the vulnerability of the victim.

QUESTION: And she was outside prison when this happened.

MR. WATERS: She was outside prison, but this is retribution. This is, you know, jury, sentence this defendant to death for all the bad things that he has done culminating in this capital crime. This was such a horrible crime. And if you read the prosecution, there's at least five or six examples where he says, what's the punishment that fits the crime? It doesn't matter if he doesn't have a prior record. This case is bad enough on its own. This is a case for the death penalty. And that was a recurrent theme from the beginning, the middle, and the end of his argument, from start to finish.

So, I would assert then that, you know, when read as a whole -- and -- and again, if you look at the evidence of dangerousness -- and there's been some raised of whether -- the issue raised of whether dangerousness within prison counts. And obviously, as a matter of logic, it doesn't because, you know, whether or not the defendant is going to get out of prison has nothing to do with whether he will be a danger inside.

But more -- more --

QUESTION: But if he is a danger inside, it follows that he will be a danger outside if he gets out. Isn't that the kind of common sense inference that anyone would draw?

MR. WATERS: I -- I don't think the link is -- is so readily made. I mean, it's common knowledge that -- that prison --

QUESTION: Well, the -- the evidence of -- of his dangerousness included things that he used to like to torture small animals, psychiatric evidence to the effect that he wants to -- to take action, homicidal action, against anybody who annoys him. The -- the word was a little bit more flamboyant in the psychiatrist's testimony, but that was the point. These -- these don't go to conditions that would only come into play inside of a prison.

MR. WATERS: Well, in that particular instance, number one, the prosecution never used any of that in his closing argument. But I don't --

QUESTION: Well, it brought out in its cross examination.

MR. WATERS: Absolutely.

But -- but number two, if you -- that there was their adaptability expert, and all of this went to focus on what the jury had before it, which was adaptability to

prison, and that's the issue that they were focused upon. And -- and what -- and the expert said, well, you know --

QUESTION: Let's -- let's assume that. Let's assume that was the -- was the point. The fact is the evidence came out, and there's -- there's no common sense basis that I can think of to say that this evidence would not indicate that if the individual got out of prison, he would be very dangerous to the people he came in contact with. And I thought you were arguing that you couldn't make such an inference.

MR. WATERS: I think that that -- that evidence is very close, but I would -- I would assert that -- that the way it was used in this particular case to respond to adaptability, which is dangerousness within prison, which was the specific issue that was focused before this jury. If the prosecution --

QUESTION: But what started all of this, I thought, was -- was the point that you were making that the evidence that went to dangerousness in prison did not ground in inference of dangerousness outside. Maybe I misunderstood your point.

MR. WATERS: No. I -- I agree that that particular -- those particular instances are a bit broader than the majority of evidence of dangerousness within prison, but I think that the -- his expert said, look,

he's not a violent person. He hasn't had a violent past. He -- he's -- he's not mentally ill. He's -- he's going to be great in prison. He's not the type of individual that poses a risk in prison. He's not a predatorial, institutional violent individual, which their witnesses were noting a distinction between society in prison and society outside of prison.

And I think all the State was doing was cross examining on that, saying, wait a minute. You're saying he's going to be adaptable? Well, he says, you know, he has violent fantasies. Well, that was brought out on direct by the defense. They -- they brought that out, of these violent fantasies, and the State was merely cross examining on a point that already had been made by the defense and saying, your opinion here is that he's adaptable. Well, what about this -- this violent fantasy?

So, it was only used in the context of -- even though it -- I agree, it has a broader context -- a broader -- you know, it wasn't just his misbehavior in prison, but it was only used by the State here to challenge the adaptability prison in -- or the adaptability issue of -- of what he would do in -- within prison.

QUESTION: And it is important to the State, I suppose, to show that he will be dangerous in prison.

MR. WATERS: Oh, absolutely. This is the --

QUESTION: The jury presumably would not want to give a life sentence to someone who's going to continue to kill in prison.

MR. WATERS: Absolutely. And this is -- this, of course, is the state of -- of Skipper, and -- and it's an inevitability that -- that you're going to see an adaptability case. But --

QUESTION: The argument is made whenever the State makes that point, that perfectly valid point, to the jury. It automatically triggers Simmons.

MR. WATERS: I'm sorry? The -- the point?

QUESTION: The argument made is that when the State makes that perfectly valid point about dangerousness in prison, it automatically triggers Simmons. And you say it should not unless -- unless the prosecutor specifically argues violence, dangerousness outside of prison.

MR. WATERS: Correct. As a matter of logic that --

QUESTION: But that really doesn't help you here because here you further had evidence of his escape risk.

MR. WATERS: And --

QUESTION: So that this wasn't a guy who was just going to sit quietly and -- and enjoy his time in prison. This is someone who presented an escape risk and

hence raised a risk of -- of acting out his dangerous propensity if he succeeds in escaping.

MR. WATERS: And I think that that's -- I would agree with that wholeheartedly. I think the majority of the -- of the prosecution's dangerousness within prison evidence went to him being an escape risk, and -- but the fact of the matter is, is whether or not you buy there's a distinction between -- or accept there's a distinction between inside prison and outside society, whether or not -- whatever you think about Simmons, the fact of the matter is that ineligibility for parole does absolutely nothing to respond to the fact that he's an escape risk. He's saying he's going to bust out. It -- the fact that he can't get parole does nothing to respond that he's going to bust out -- that he might bust out of prison.

QUESTION: So, you should have been happy with the instruction is what that proves.

MR. WATERS: I'm sorry?

QUESTION: You should have been happy with the instruction.

MR. WATERS: With the?

QUESTION: Because you're concentrating on what would happen in prison. So, the instruction wouldn't help you -- it wouldn't hurt you. It would actually help you.

MR. WATERS: What? The --

QUESTION: This fellow is going to be kept where he'll be the most dangerous. Therefore, you should kill him. That's your argument.

MR. WATERS: No. That's -- that's not necessarily my argument. I think the argument, again, goes to adaptability. I certainly -- certainly wouldn't -- wouldn't assert that.

But, you know, as far as to his contention that, well, why does the State care, you know, about giving this charge if they're saying they're not raising future dangerousness, again it raises these collateral concerns down the road of pardon, which he's eligible for pardon. It raises the -- the issues of change in the law, and -- and the State seeks to avoid those. And so, that's why it cares. It doesn't want to have to get into that.

And if that issue is given, I don't know if a trial judge, without direction from the Supreme Court, the State Supreme Court, would allow a prosecutor to then respond with -- with, you know, arguments about change in the law. And -- and I guess, you know, depending on -- on what happens, we'll have to see guidance on that.

QUESTION: Mr. Waters, you didn't really mean -- your brief could be read to say that -- that the lawyer was effectively allowed to tell the jury that life means life. You said something in your -- the jury -- that

because the line was about defendant would never see the light of day.

MR. WATERS: Right.

QUESTION: It's no different than -- from what it was in Shafer in that respect.

MR. WATERS: I -- I fully understand what Shafer held, and my only point with that was, was that the reasons that -- that this Court relied upon in Shafer were not present in this case, to why those were not sufficient, and that was, number one, the jury asked. So, obviously, it didn't work. And number two, that the judge told the jury, well, parole eligibility is not for your consideration, which raised the concern in Simmons that, well, parole is available but for some --

QUESTION: But you -- but you don't dispute that if the -- if the lawyer then -- if she had tried to say in open court, now, jurors, I'm going to read you from the South Carolina, that she would have her head cut off by the judge.

MR. WATERS: I think it's very unlikely the trial judge would have allowed her to do that. Absolutely.

And -- and we would just assert, though, that -- that this is a case -- there's no indication whatsoever that the jury was confused or concerned with his possible

release. They didn't ask the question. They weren't -- it wasn't interjected by the trial judge. And so, all I'm saying is -- is that makes this case materially different from what happened in Shafer when it said that that was insufficient.

And this -- this lawyer argued natural life in prison -- imprisonment extensively, said, you have two choices, jury. You have death, a quick, painless death, or you have a long, slow death, and that a wife -- and he asserted earlier, that well, you know, the -- but the jury might think he's going to get out of prison and have a wife and a car. Well, no. The defense argued in this case just the opposite. They -- they argued that a wife is never ever going to happen for Billy Kelly. A car is never ever going to happen for Billy Kelly, and -- and concluded by saying, I think life imprisonment is the right punishment in this case because he'll never see the daylight -- the light of daylight again. So, I think it was clearly made to the jury, and there's no indication that there was confused -- they were confused. There's no indication of a fundamental unfairness in this case.

Finally, I think again this Court has stated in -- thank you very much.

QUESTION: Thank you, Mr. Waters.

Mr. Bruck, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DAVID I. BRUCK

ON BEHALF OF THE PETITIONER

MR. BRUCK: Thank you, Your Honor.

The question has come up again concerning the history of South Carolina's handling of this matter. I should say that a very detailed accounting of the whole history, legislative and judicial, is provided in the cert petition in Simmons itself, and it's not a very edifying tale. It really shows that the legislature, when they first considered a limited life without parole, was deadlocked because of a fear that it would reduce the number of death sentences, and the legislative compromise that finally came out was we can go ahead and have life without parole because you don't have to tell the jury anyway. So, it won't have any effect. And that was the --

QUESTION: The Supreme Court of South Carolina, I gather from your opponent, shifted its position too.

MR. BRUCK: Yes, it did.

QUESTION: And what was the reason for that?

MR. BRUCK: It's not entirely clear. The membership of the court changed, and indeed, the -- the legislative leader of this proposal to stop telling the jury or not to tell the jury about parole joined the court, and then the membership -- and then the court's

position changed. If there was a connection, I don't know. But it -- it -- it's an odd history.

The -- my friend says that, well, South Carolina doesn't want the jury to know about commutation. For a very good reason. There is no such thing as commutation of a life sentence under South Carolina law. We're one of only two life without parole jurisdictions that do not allow the Governor to commute a life without parole or any prison sentence. The commutation power only extends to the death penalty. So, there is a pardon power which --

QUESTION: When you say commutation, that's all synonymous with --

MR. BRUCK: Clemency.

QUESTION: -- clemency?

MR. BRUCK: That's right.

There is a pardon power which, according to the record in Simmons, has never been exercised, and by its terms requires a showing of the most extraordinary circumstances.

And there -- so, South Carolina's life without parole is as locked down as any State's. The idea that, well, there's lots of play is simply not so, and -- and so there's very little that the State could come back with.

But as a constitutional matter, if there was any play at the joints, absolutely, if the jury is told the

truth that there's no parole, the jury can also be told the truth about any possibility of release that might exist. We don't deny that for a moment. But the State recognizes that the -- that the real issue is the unavailability of parole, and that's why they fight this tooth and nail.

Justice Ginsburg inquired about prior cases in which the State Supreme Court has reversed under Simmons. And it's important to keep in mind there are only two, and they both involved cases that were tried before Simmons came down. And that is why in one case the verbatim same argument about what to do with him when he is in our midst was made by the prosecutor because they didn't have Simmons as the script about what not to say.

But since Simmons came down and since prosecutors who are of a mind to defeat the rule in Simmons have had the -- the facts of Simmons to go by, not one case by the South Carolina -- the South Carolina Supreme Court has not reversed under Simmons in a single case, in every instance.

Now, it's true that occasionally trial judges have given a life without parole instruction under Simmons. Oftentimes it's because a prosecutor, out of a basic sense of fairness, does not take the position that the prosecutor took in this case. We're really dealing

with a due process rule where you sort of feel it in your heart that there's something wrong, and that applies to prosecutors and judges too. But when a prosecutor decides to -- to use the Simmons script, they've had very good success in having this instruction not given.

And I should say that if this -- if these facts are now held by this high Court to be not to trigger the rule in Simmons, you will see that as being -- as being the rule. Now, it's possible that the legislature will step in. It's equally possible, after such a large loophole in Simmons, a loophole that will swallow the entire case, is decided by this Court --

QUESTION: Thank you, Mr. Bruck.

MR. BRUCK: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)