

bronshteinNo. 18-6588

IN THE
SUPREME COURT OF THE UNITED STATES

LESLEY EUGENE WARREN,

Petitioner,

v.

EDWARD THOMAS, Warden, Central Prison,
Raleigh, North Carolina.

Respondent.

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

**RESPONDENT'S BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

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Respondent, Edward Thomas, Warden, Central Prison, Raleigh, North Carolina, by and through his undersigned counsel, Special Deputy Attorney General Sandra Wallace-Smith, respectfully opposes and requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner Lesley Eugene Warren, seeking review of the 10 July 2018, opinion by the United States Court of Appeals for the Fourth Circuit in Warren v. Thomas, 894 F.3d 609 (4th Cir. 2018). (Pet's App. pp. 1a - 14a)

OPINIONS BELOW

STATEMENT OF JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rules 15.2 and 24.2, these items are omitted since Respondent is satisfied with Petitioner's statements of the OPINIONS BELOW, STATEMENT OF JURISDICTION, and CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

STATEMENT OF THE CASE

A. Procedural History

In March 1996, Petitioner was found guilty of first-degree murder in Guilford County Superior Court and was sentenced to death. Petitioner's sentence was based on the aggravating circumstance that he "had been previously convicted of another capital felony." N.C.G.S. § 15A-2000(e)(2). In support of that aggravating circumstance, the State introduced evidence of first-degree murder convictions in Greenville County, South Carolina in 1993 - see State v. Warren, No. 95-MO-255, slip op. (S.C. Aug. 25, 1995) (per curiam) - and Buncombe County, North Carolina in 1995 - see State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997), cert. denied, 523 U.S. 1109 (1998). On direct appeal, the North Carolina Supreme Court held no error, and the United

States Supreme Court denied certiorari. State v. Warren, 348 N.C. 80, 499 S.E.2d 431, cert. denied, 525 U.S. 915 (1998).

On 12 July 1999, Petitioner filed a Motion for Appropriate Relief (MAR) in Guilford County Superior Court. The State filed an answer on 13 September 2001, and the court denied the MAR on 3 July 2002. Petitioner filed a Petition for Writ of Certiorari (PWC) in the North Carolina Supreme Court on 23 October 2002, seeking review of the denial of his MAR. The State responded on 22 November 2002, and the PWC was denied on 3 March 2005. State v. Warren, 359 N.C. 286, 610 S.E.2d 714 (2005).

On 29 April 2005, Petitioner filed a petition for writ of habeas corpus with this Court. Respondent filed an answer on 12 June 2005. Thereafter, Petitioner filed a brief on 20 July 2005; Respondent filed a brief on 31 August 2005; and Petitioner filed a reply brief on 13 September 2005. On 22 September 2005, Petitioner filed a Motion to Hold His Case in Abeyance pending resolution of his post-conviction challenges to the two murder convictions - his Buncombe County conviction and his South Carolina conviction - that served as the basis for the sole aggravating factor in the Guilford County case - that Petitioner "had been previously convicted of another capital felony." N.C.G.S. § 15A-2000(e)(2). On 3 October 2005,

Respondent filed a response opposing the motion. On 17 November 2005, the motion was granted and the case was placed in abeyance.

On 15 May 2015, the U.S. district court lifted the stay and ordered a new motion and re-briefing. Petitioner filed a new motion for a stay-and-abeyance, and the court denied the motion. After extensive supplemental briefing on Petitioner's eighteen claims, the district court, in an 81-page opinion, denied the Petition and denied a certificate of appealability. Petitioner filed a Rule 59(e) motion, and that too was denied.

On 17 February 2017, Petitioner filed a motion for an abeyance in this Court. On 15 November 2017, Petitioner filed his brief, raising two issues, and included a request for a certificate of appealability. On 16 November 2017, this Court denied the motion for an abeyance. On 18 December 2017, the Court granted a certificate of appealability solely as to the Petitioner's Simmons v. South Carolina issue.

The Fourth Circuit heard oral argument on 10 May 2018, and by published opinion entered on 10 July 2018, the Fourth Circuit affirmed federal district court's judgment. Warren v. Thomas, 894 F.3d 609 (4th Cir. 2018). On 18 March 2018, the Fourth Circuit denied Petitioner's petition for rehearing and rehearing en banc. Warren v. Thomas, No. 17-4 (4th Cir. August 7, 2018). (Pet's App. p. 49a)

B. Summary of Facts from Trial

On direct appeal, the North Carolina Supreme Court summarized the evidence at trial as follows:

The State's evidence tended to show the following. On 15 July 1990 Terri Quinby attended the Radisson Hotel employees' picnic held at Cedrow Park in High Point, North Carolina, with her two brothers, her sister, and her children and their children. Defendant went with Ms. Quinby and her family to the picnic. Ms. Quinby introduced the victim, whom she knew when the victim worked part-time in the Radisson gift shop, to defendant at the picnic where they played softball, ate, and drank beer.

After the picnic, around 4:00 p.m., many of the Radisson group, including defendant, went to Applebee's. At Applebee's defendant told Ms. Quinby's brother Freddy he would "have her [the victim] by the end of the night" and that "he would have her [the victim] before the night was over, for us to watch and see." Ms. Quinby and the rest of her family along with defendant and the victim went to the house of Ms. Quinby's sister, Robin, for dinner. The victim rode with defendant on his motorcycle, and Robin drove the victim's car from Applebee's to Robin's house.

At approximately 9:00 p.m. they all went to Ms. Quinby's house. After sitting on the porch for a while, defendant and the victim went for a motorcycle ride. They drove by Ms. Quinby's house around 11:30 p.m. Defendant returned about an hour later to get the victim's car. He said that the victim could not drive it and that they were going to get a room at the Town House Motel.

On the morning of 16 July 1990, defendant was sleeping on Ms. Quinby's couch. He said that he left the victim at the motel and walked back so that she could drive to class that morning. Defendant spent the week at Ms. Quinby's house.

On 20 July 1990 High Point police arrested defendant at the Quinby house on a South Carolina warrant. When he was arrested and searched, the police found a set of keys which defendant claimed were his; the police later discovered that the keys were to the victim's car.

Defendant was transported to Asheville, in Buncombe County, North Carolina, and was questioned about murders in Asheville and South Carolina. Defendant confessed to the victim's murder in High Point and told Asheville police that he had placed the victim's body in the trunk of her car and had parked it in a parking deck near the Radisson. High Point police located the victim's car and found the victim's naked, decaying body in the trunk, with a bra wrapped around her neck. Defendant's fingerprints were found outside the driver's side door, and his right palm print was found on the outside of the trunk. Defendant had further stated that he and the victim had had sex in a soccer field. High Point officers searched the athletic field and found the victim's shoes near an unmown grass embankment.

The autopsy revealed areas of hemorrhage indicating strangulation by pressure to the neck. The pathologist determined that the cause of death was asphyxia due to strangulation. The victim's decomposed body was identified by using dental records.

State v. Warren, 348 N.C. 80, 91-92, 499 S.E.2d 431, 436-37 (1998).

The United States Court of Appeals for the Fourth Circuit summarized the procedural and factual history of this case as follows:

On July 15, 1990, Warren met Katherine Johnson, a 21-year-old college student, at a picnic he was attending with a friend in High Point, North Carolina. Warren and Johnson spent the rest of the day together, first with a group that included Warren's friend and later by themselves. That

night, Warren and Johnson went for a ride on Warren's motorcycle, ending up in the middle of a soccer field. There, Warren choked Johnson to death. After hiding Johnson's body in the trunk of her car and abandoning the car in a parking garage, Warren returned to his friend's house and went to sleep on the couch.

Five days later, police arrested Warren on a South Carolina warrant for the murder of a woman named Velma Gray. When questioned, Warren confessed to killing Gray in South Carolina in 1989. He also confessed to killing Jayme Hurley in North Carolina in May 1990. And finally, he confessed to killing his third victim, Katherine Johnson, just days earlier.

In 1996, Warren was tried and convicted of the first-degree murder of Katherine Johnson. By then, he already had been convicted in South Carolina of the first-degree murder of Velma Gray, for which he received a life sentence. He also had pled guilty to the first-degree murder of Jayme Hurley in North Carolina, for which he was sentenced to death. That death sentence meant that under North Carolina law, Warren could not be paroled if sentenced to life for the murder of Katherine Johnson.

At the sentencing phase of Warren's trial, the government sought the death penalty based on a single aggravating factor: that Warren previously had been convicted of another capital felony, *see* N.C. Gen. Stat. § 15A-2000(e)(2) (1995), in the form of his two prior murder convictions. As a result, that Warren had killed not just one but three women became a focal point of the prosecutor's lengthy closing argument for the death penalty. Using the horrific details of all three murders, along with evidence from the guilt phase of trial, the prosecutor argued that Warren deserved a death sentence.

REASONS THE WRIT SHOULD NOT ISSUE

I. THE FOURTH CIRCUIT COURT OF APPEALS, PROPERLY AFFIRMED THE DISTRICT COURT’S JUDGMENT DENYING WARREN’S SIMMONS CLAIM BECAUSE THE STATE COURT DID NOT UNREASONABLY FIND THAT THE PROSECUTOR DID NOT ARGUE FUTURE DANGEROUSNESS.

A. Applicable Standard of Review

Where, as here, a state court denies a claim on the merits, that “review is constrained by the standards set forth” in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Richmond v. Polk, 375 F.3d 309, 321 (4th Cir. 2004), cert. denied, 543 U.S. 1189 (2005). “AEDPA, by setting forth necessary predicates before state-court judgments may be set aside, ‘erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.’” White v. Wheeler, 136 S. Ct. 456, 460 (2015) (quoting Burt v. Titlow, 134 S. Ct. 10, 16 (2013)). A federal court may grant relief only if the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of facts, in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)-(2). For (d)(1), “clearly established Federal law” “includes only the holdings, as opposed to the dicta, of [the Supreme]

Court's decisions," and an "unreasonable application of those holdings must be objectively unreasonable, not merely wrong." White v. Woodall, 134 S. Ct. 1697, 1702 (2014); see also Harrington v. Richter, 562 U.S. 86, 102 (2011) ("[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable."). Such "review . . . is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

For (d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Titlow, 134 S. Ct. at 15. Rather, "even if reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the [state] court's . . . determination." Merzbacher v. Shearin, 706 F.3d 356, 364 (4th Cir.) (quoting Wood v. Allen, 558 U.S. 290, 301 (2010)), cert. denied, 134 S. Ct. 71 (2013); see also Winston v. Kelly, 592 F.3d 535, 554 (4th Cir. 2010) (noting the factual finding must be "sufficiently against the weight of the evidence," not merely "incorrect). Moreover, "[s]tate-court factual findings . . . are presumed correct" and can only be rebutted "by clear and convincing evidence." Davis v. Ayala, 135 S. Ct. 2187, 2199-200 (2015) (internal quotation marks and citations omitted); see also 28 U.S.C. § 2254(e).

Ultimately, AEDPA's legal and factual standards of review "serve[] important interests of federalism and comity," Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (per curiam), and "reflect[] the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Harrington, 562 U.S. at 102-03 (internal quotation marks and citation omitted). Thus, "[w]hen reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." Woods, 135 S. Ct. at 1376. Stated differently, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Woodall, 134 S. Ct. at 1704 (quoting Harrington, 562 U.S. at 103). "If this standard is difficult to meet – and it is – that is because it was meant to be." Titlow, 134 S. Ct. at 16. Thus, "[w]hen reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." Woods, 135 S. Ct. at 1376.

B. Discussion of Argument

1. Introduction

Warren contends that he was entitled to an instruction under Simmons v. South Carolina, 512 U.S. 154 (1994) which is required when the prosecutor argues for the death penalty on the grounds that a Petitioner would be dangerous to the public in the future. Under the rule in Simmons, “where the State puts the defendant’s future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible.” Id. at 178 (O’Connor, J., concurring); see also Wilson v. Greene, 155 F.3d 396, 408 (4th Cir. 1998) (noting Justice O’Connor’s concurrence expressed the holding of the split Simmons decision).

In the instant case, Warren sought a Simmons instruction, which the state trial court denied on the grounds that the only alternative to a sentence of death in Petitioner’s case was life with parole and, thus, Simmons did not

apply.¹ On direct appeal, the North Carolina Supreme Court noted Simmons only addressed situations in which life without parole was the statutory alternative to a death sentence, and further found that the prosecution did not argue future dangerousness so as to trigger a Simmons instruction. Warren, 348 N.C. at 122-23, 499 S.E.2d at 455. In habeas review, the district court similarly concluded the prosecutor did not argue future dangerousness.

2. Applicable Law

It is well-settled that “[s]tate-court decisions are measured against [the Supreme] Court’s precedents as of the time the state court renders its decision.” Cullen, 563 U.S. at 182 (internal quotation marks and citation omitted). See generally 28 U.S.C. § 2254(d)(1). Here, because the state court’s decision in 1998 in Warren’s direct appeal, adjudicating the Simmons claim on the merits, preceded Simmons’ progeny – Ramdass v. Angelone, 530 U.S. 156 (2000); Shafer v. South Carolina, 532 U.S. 36 (2001); Kelly v. South Carolina, 534 U.S. 246 (2002); Lynch v. Arizona, 136 S. Ct. 1818 (2016) (per curiam) –

¹ It should be noted that because the two sentencing options available to Warren’s jury in the case before this Court were death and life with parole, Simmons did not apply as a matter of law, irrespective of the prosecutor’s arguments. The fact that Warren had a Buncombe County death sentence that would have made him functionally parole ineligible does not implicate Simmons. See Campbell v. Polk, 447 F.3d 270, 287 (4th Cir.) (rejecting “functional” approach to parole eligibility), cert. denied, 549 U.S. 1098 (2006); accord Ramdass, 530 U.S. at 169. This is especially appropriate since Warren’s Buncombe County death sentence was stayed and pending on appeal at the time of the Guilford County trial.

the state court's decision cannot be measured against those decisions. See, e.g., Robinson v. Beard, 762 F.3d 316, 326 (3d Cir. 2014) (declining to apply Kelly to a Simmons claim where it was decided after the state court decision at issue in the habeas petition, particular considering Kelly “arguably broadened” Simmons (internal quotation marks and citations omitted)), cert. denied sub nom. Robinson v. Wetzell, 136 S. Ct. 53 (2015); Rompilla v. Horn, 355 F.3d 233, 267 (3d Cir. 2004) (same). Compare Bronshtein v. Horn, 404 F.3d 700 (3d Cir. 2005) (applying Shafer and Kelly because the state court did not adjudicate the claim on the merits), cert. denied, 546 U.S. 1208 (2006). Thus, the dispositive question before this Court is whether the state court reasonably applied Simmons, not Shafer or, perhaps more significantly, Kelly.

As the Fourth Circuit Court of Appeals and the District Court noted, where the North Carolina Supreme Court denied Warren's Simmons claim on the merits, Warren would only be entitled to relief if that decision was an “unreasonable application of[] clearly established [f]ederal law,” or “based on an unreasonable determination of the facts.” 28 U.S.C. § 2254(d). Warren, 894 F.3d at 614. As the Fourth Circuit noted, 28 U.S.C. § 2254(d)(1) is a high bar to overcome. Id.

Contrary to Warren's claim, the North Carolina Supreme Court did not unreasonably find that the prosecutor did not argue future dangerousness.

When read in context, it demonstrated the prosecutor was arguing that Warren's actions and status as a serial killer merited the death penalty. As such, Simmons was not triggered by the prosecutor's closing argument. Furthermore, under Simmons, a defendant can seek to rebut a prosecutor's argument of future dangerousness either with a trial court instruction or arguments of counsel on his parole ineligibility. Here, Petitioner's trial attorneys made no such argument. Therefore, there can be no Simmons violation.

Moreover, to find there was a Simmons violation would require (a) finding eleven different judges to be unreasonable in their reading of the trial transcript, (b) applying, and even expanding, case law to Warren's case that post-dated his trial and appeal, and (c) ignoring the fact that Warren's trial counsel could have addressed parole eligibility in their closing arguments.

Accordingly, the Fourth Circuit Court of Appeals reasoned opinion should be affirmed and Warren's Petition for Writ of Certiorari should be denied.

3. Factual Determination - "Future Dangerousness"

Warren contends the prosecutor's statements (which, incidentally, were based upon the evidence, including Warren's own mental health expert) that Warren was a sociopath, that he was addicted to killing women, and that he

had done it over and over again, along with his hypothetical questions “How many more chances?” and “What will stop him?,” imparted to the jury that “this defendant will be dangerous in the future, and you, the jury[,] must stop him.” The North Carolina Supreme Court did not see it that way. That court found that “the prosecutor did not argue future dangerousness” but, instead, “argued the evidence that [Warren] had committed three murders to show that [Warren] was a serial killer deserving of the death penalty.” Warren, 348 N.C. at 122-23.

The prosecutor’s closing arguments also stand in stark contrast to the prosecutor’s statements in Simmons, including his statements that Simmons was “a threat” and the jury’s verdict would be “an act of self-defense.” Simmons, 512 U.S. at 157.

First, with respect to Warren’s contention that the state court’s decision was based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2), “a state-court factual determination is not unreasonable merely because [the reviewing federal court] would have reached a different conclusion in the first instance.” Wood, 558 U.S. at 301.

Here, the seven-justice state court, the federal district court judge and three Fourth Circuit Court judges below agreed that the prosecutor did not actually argue future dangerousness so as to implicate Simmons. (J.A. 2124-

29); Warren, 348 N.C. at 122-23, 499 S.E.2d at 455. Although Warren disagrees with that assessment and offers his own interpretation of the transcript that does not mean the state court's interpretation was unreasonable and that reasonable minds cannot disagree. See Gray v. Zook, 806 F.3d 783, 790 (4th Cir. 2015) ("An unreasonable determination of the facts is not merely an incorrect determination, but one sufficiently against the weight of the evidence that it is objectively unreasonable." (internal quotation marks and citation omitted)); Watkins v. Rubenstein, 802 F.3d 637, 651-52 (4th Cir. 2015) (Traxler, C.J., concurring) ("In the end, my interpretation of the state court's explicit finding of fact is irrelevant, for I am not at liberty to pick it apart or rewrite it in the light most favorable to [the petitioner]."); see also 28 U.S.C. § 2254(e)(1) (presumption of correctness for factual findings).

Warren's reliance on Kelly v. South Carolina, 534 U.S. 246, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2002) is misplaced. As the Fourth Circuit properly determined "the Kelly decision, came after the state court's 1998 decision in this case, it is relevant to our analysis under AEDPA only to the extent it is 'illustrative' of the rule laid out in Simmons. See Frazer v. South Carolina, 430 F.3d 696, 716 (4th Cir. 2005) (Motz, J., concurring); see also Wiggins v. Smith, 539 U.S. 510, 522, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). To the extent Kelly expands the contours of the right established in Simmons - an issue on

which we express no opinion - we cannot (and do not) consider it.” Warren, 894 F.3d at 614 n.1.

The district court correctly concluded that “[t]he interpretation of the North Carolina Supreme Court that the prosecutor did not argue future dangerousness was not unreasonable based on a reading of the entire closing argument. The state court placed the arguments identified by [Petitioner] in context and determined that these arguments did not raise future dangerousness.” (J.A. 2128) As the Fourth Circuit Court of Appeals stated:

The statements identified by Warren, the district court found, “constitute only a few words and phrases in an extensive closing argument that was focused on Mr. Warren’s past acts and status as a serial killer.” J.A. 2129 (emphasis added). First, there was the description of Warren’s “habit” of killing women (and later the reference to Warren as “addicted” to killing), coupled with the question, “What will stop him?” J.A. 2126-27. “Read in context,” the court concluded, it was not unreasonable to view those statements, which came “at the end of a lengthy description of [Warren’s] murders,” as emphasizing that Warren was a serial killer who was not stopped until he had killed three times. J.A. 2127. Similarly, the reference to second chances, questioning “[h]ow many more chances do we have to give him?,” reasonably was understood, in context, as “rhetorical emphasis on the three murders Mr. Warren had committed: his three chances.” J.A. 2127-28. The focus of the prosecutor’s argument, the court concluded, was Warren’s prior actions “in committing the three murders of which he was convicted” as a “cowardly serial killer,” with the death penalty the “only way for the three murdered women to achieve some sense of justice and dignity.”

Warren, 894 F.3d at 613. Compare Wharton v. Vaughn, No. 01-6049, 2012 U.S. Dist. LEXIS 115598, at *245-46 (E.D. Pa. Aug. 16, 2012) (rejecting a Simmons claim and finding the State’s closing, which repeatedly urged the jury to “stop” the defendant, “impl[ie]d that the jury should sentence Petitioner to death, not that he is a future danger to society”), aff’d in part and vacated in part on other grounds, No. 13-9002, 2018 U.S. App. LEXIS 699 (3d Cir. Jan. 11, 2018) (per curiam).

In the end, perhaps the district court or this Court would “reach[] a different conclusion in the first instance,” Titlow, 134 S. Ct. at 15, but that is not the standard. A federal court may grant habeas relief only if the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of facts, in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)-(2). As the district court concluded, the state court’s finding “was not so mistaken as to be completely lacking in justification.” (J.A. 2129) None of the prosecutor’s statements implied that the jury should elect to sentence Robinson to death as an act of self-protection. Moreover, the prosecutor’s comment regarding aggravating circumstances - “[t]hat’s a serious thing that we have to

stop” - conveyed the deterrent purposes of aggravating factors in a general sense. Robinson, 762 F.3d at 327-28.

4. The Fourth Circuit’s determination that the prosecutor did not put at issue Warren’s future dangerousness constituted a reasonable application of the Simmons decision, consistent with other Circuit Courts.

Warren argues that the Fourth Circuit’s analysis of Simmons v. South Carolina, 512 U.S. 154 (1994) and its progeny’s “future dangerousness” application to Warren’s case was inconsistent with decisions of other circuits. He is incorrect. Under the Simmons rule “where the State puts the defendant’s future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible.” Id. at 178 (O’Connor, J., concurring); see also Wilson v. Greene, 155 F.3d 396, 408 (4th Cir. 1998).

In support of his position, Warren relies on the Fifth Circuit case Hodges v. Epps, 648 F.3d 283 (5th Cir. 2011) as support for his contention that the prosecutor argued future dangerousness. However, Hodges is clearly distinguishable from the present case. In Hodges the court did not make any factual or legal determination as to Simmons error and, instead, focused its analysis solely on Brecht v. Abrahamson, 507 U.S. 619 (1993) harmlessness

analysis. There was never a legal determination of Simmons error. Hodges, 648 F.3d at 288-90. Warren also argues that the Fourth Circuit's Richmond v. Polk should be controlling. However, unlike in Richmond – in the present case the prosecution did not explicitly argue future dangerousness or use phrasing comparable to the “self-defense” comment in Simmons. But rather, the prosecutor asked the jury to sentence defendant to the death penalty based on his actions as a serial killer. Furthermore, as in Hodges, in Richmond the Fourth Circuit did not make any factual or legal determination as to Simmons error and, instead, focused its analysis solely on Brecht harmlessness and found there was no error. Richmond, 375 F.3d at 335. Richmond is also distinguishable and not applicable to the present case.

In Robinson v. Beard, 762 F.3d 316, 326 (3d Cir. 2014) unlike the prosecutor in Simmons, the prosecutor made no explicit mention of Robinson's ability to conform to society in the future. The prosecutor's statements characterizing Robinson as a “dangerous big city hoodlum,” as well as the evidence regarding Robinson's ownership of guns and his criminal past, conveyed Robinson's specific intent to kill Bass and Hodge. Robinson v. Beard, 762 F.3d at 327-28 (2014). Kelly “arguably broadened” Simmon's holding. Therefore, the Court declined to apply Kelly to a Simmons claim because Kelly was decided after the state court decision at issue in the habeas petition, cert.

denied sub nom. Robinson v. Wetzel, 136 S. Ct. 53 (2015). Finally, Bronshtein v. Horn, 404 F.3d 700 (3d Cir. 2005), expressly applied Simmons' progeny – including Shafer and Kelly – because the state court, unlike the North Carolina Supreme Court in the instant case, did not adjudicate the claim on the merits. See Bronshtein, 404 F.3d at 715. As such, Bronshtein is similarly inapposite.

The record is clear – or at the very least subject to reasonable debate – that the prosecutor did not “specifically rel[y] on a prediction of future dangerousness in asking for the death penalty.” Simmons, 512 U.S. at 175 (O'Connor, J., concurring) (emphasis added) (citation omitted). At most, the prosecutor implied – or, as Warren puts it, “insinuate[d]” future dangerousness, but that would suffice under Kelly, not Simmons itself. See Booker v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1121, 1126 (11th Cir. 2012) (noting Kelly “extended the rule of parole ineligibility to sentencing proceedings in which future dangerousness is implied”), cert. denied sub nom. Booker v. Crews, 133 S. Ct. 1595 (2013); see also Rompilla, 355 F.3d at 270-72. Therefore as the Fourth Circuit stated, “the prosecutor [in Warren's case] relied not on the risk that Warren might in the future be released from prison and endanger the community, but rather on what Warren already had done in the past – namely, his actions and state of mind in committing the three murders of which he was convicted.” Warren, 894 F.3d at 615. The state court's decision on

Warren's Simmons claim was not based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d)(2). As such, the North Carolina Supreme Court's decision was not "contrary to, [nor] involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Concurring with North Carolina Supreme Court, the Fourth Circuit noted that under Simmons "a defendant is entitled to inform the jury when the alternative to a death sentence is life in prison without parole" [and then] only if the prosecutor puts at issue the risk that he will be a danger to society if released from prison." Warren, 894 F.3d at 611. This was not the situation in Warren, where the North Carolina Supreme Court found that Warren's future dangerousness was not argued by the prosecutor. But "rather, the prosecutor argued the evidence that defendant had committed three murders to show that defendant was a serial killer deserving of the death penalty. For this reason we conclude that the trial court's denial of defendant's request was not inconsistent with Simmons." Warren, 348 N.C. at 123, 499 S.E.2d at 455. As the Fourth Circuit reiterated, "[t]he prosecutor concluded by talking again about the three women Warren had murdered, and showing Johnson's picture to the jury. He told the jury that while it could not bring peace to the victims, it could restore their 'dignity.' J.A. 1764. To do '**justice**' for the victims and the

community, the prosecutor finished, the jury should recommend death. J.A. 1765.” Warren, 894 F.3d at 612.

In determining that the Supreme Court of North Carolina reasonably applied Simmons, the Fourth Circuit stated:

As the district court explained, the prosecutor’s argument, read in full, reasonably can be understood as essentially backward-looking. In support of the death penalty, that is, the prosecutor relied not on the risk that Warren might in the future be released from prison and endanger the community, but rather on what Warren already had done in the past - namely, his actions and state of mind in committing the three murders of which he was convicted. See J.A. 2129 (describing prosecutor’s argument as “focused on Mr. Warren’s past acts and status as a serial killer”). That those murder convictions reveal Warren to be a person fairly described as “dangerous” does not by itself trigger Simmons, or virtually all capital proceedings would be governed by that decision. Cf. Simmons, 512 U.S. at 176 (reaffirming that decision whether to inform jury of possibility of parole remains “generally left to the States”). What matters is whether the prosecutor urged the jury to look forward, to the possibility that the defendant eventually would be released from prison if not sentenced to death and hence become a danger to the community. Id. at 177-78.

...

Taken in context, the portions of the argument cited by Warren - “a few words and phrases in an extensive closing argument,” J.A. 2129 - may sensibly be read as commenting on Warren’s past crimes and character, rather than any prospect of his release from prison.

Warren, 894 F.3d at 615.

As the Fourth Circuit Court of Appeals acknowledges it is not the use of trigger words which establishes the need for a Simmons instruction. As the Fourth Circuit stated, that Warren’s murder convictions revealed him “to be a person fairly described as ‘dangerous’ does not by itself trigger Simmons, or virtually all capital proceedings would be governed by that decision. Cf. Simmons, 512 U.S. at 176 (reaffirming that decision whether to inform jury of possibility of parole remains “generally left to the States”). What matters is whether the prosecutor urged the jury to look forward, to the possibility that the defendant eventually would be released from prison if not sentenced to death and hence become a danger to the community. Id. at 177-78.” Warren 894 F.3d at 615.

As the Fourth Circuit stated, “[t]he statements identified by Warren, the district court found, “constitute only a few words and phrases in an extensive closing argument that was focused on Mr. Warren’s past acts and status as a serial killer.” (J.A. 2129). First, there was the description of Warren’s “habit” of killing women (and later the reference to Warren as “addicted” to killing), coupled with the question, “What will stop him?” (J.A. 2126–27) “Read in context,” the court concluded, it was not unreasonable to view those statements, which came “at the end of a lengthy description of [Warren’s] murders,” as emphasizing that Warren was a serial killer who was not stopped

until he had killed three times. (J.A. 2127) Similarly, the reference to second chances, questioning “[h]ow many more chances do we have to give him?” reasonably was understood, in context, as “rhetorical emphasis on the three murders Mr. Warren had committed: his three chances.” (J.A. 2127–28) The focus of the prosecutor’s argument, the court concluded, was Warren’s prior actions “in committing the three murders of which he was convicted” as a “cowardly serial killer,” with the death penalty the “only way for the three murdered women to achieve some sense of justice and dignity.” J.A. 2126–27.”

Warren, 894 F.3d at 613.

In sum, it is not unreasonable to find that these statements, taken separately or together, are different in kind from those in Simmons - statements that “put [Simmons’s] future dangerousness in issue” by “strongly impl[y]ing” that Simmons would “be let out [of prison] eventually if the jury did not recommend a death sentence” and would pose a “continuing threat to the community,” and linking that future threat to the jury’s need to return a verdict in “self-defense.” Simmons, 512 U.S. at 176, 178. Like the district court, we are mindful that our review under AEDPA is highly deferential, and that relief may be granted only if a state court adjudication is “objectively unreasonable.” See White, 134 S. Ct. at 1702. The Supreme Court of North Carolina’s holding that Warren’s prosecutor did not argue “future dangerousness” under Simmons falls well within the bounds of reasonableness.

Warren, 894 F.3d at 616.

CONCLUSION

For the reasons discussed above, Petitioner has failed to raise “an important question of federal law that has not been, but should be, settled by this Court,” or that conflicts with relevant decisions by this Court or other state and federal courts. U.S. Sup. Ct. R. 10. The decision by the Fourth Circuit below does not warrant review on certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted, this 7th day of January, 2019.

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