

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WESLEY AARON SHAFER, JR., :

4 Petitioner :

5 v. : No. 00-5250

6 SOUTH CAROLINA :

7 - - - - - - - - - - - - - - - - -X

8 Washington, D.C.

9 Tuesday, January 9, 2001

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:15 a.m.

13 APPEARANCES:

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

16 DONALD J. ZELENKA, ESQ., Assistant Deputy Attorney General
17 of South Carolina, Columbia, South Carolina; on
18 behalf of the Respondent.

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P R O C E E D I N G S

(11 : 15 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 00-5250, Shafer v. South Carolina.

5 Mr. Bruck.

ORAL ARGUMENT OF DAVID I. BRUCK

ON BEHALF OF THE PETITIONER

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

10 In this case the State of South Carolina raises
11 three arguments designed to evade this Court's prior
12 decision in Simmons v. South Carolina. First, the South
13 Carolina supreme court cited a -- an extraneous feature of
14 a post-Simmons amendment which, the main thrust of which
15 was to abolish parole in all cases of murder, to hold that
16 Simmons v. South Carolina does not apply to South
17 Carolina.

18 Secondly, the State argues that even though
19 Simmons recognized a due process right to inform the jury
20 that the defendant was ineligible for parole, arguments of
21 counsel and instructions of the court that never did that
22 nevertheless somehow satisfy the due process requirements
23 of Simmons in any event, and finally the State argues,
24 seizing on a single word culled from the opinions in
25 Simmons, the word argue, submits that because counsel

1 rather self-evidently, out a desire to evade and avoid the
2 due process rule in Simmons, declined to drive home in
3 jury argument their future dangerousness case as it had
4 been presented to the jury, therefore the rule in Simmons
5 was not triggered.

6 QUESTION: Well now, the court of appeals
7 decision here did not really reach that issue --

8 MR. BRUCK: No.

9 QUESTION: -- of whether future dangerousness
10 was argued, did it?

11 MR. BRUCK: No, it didn't. I should note that
12 --

13 QUESTION: I think the trial judge thought that
14 the prosecutor had not, in fact, made that --

15 MR. BRUCK: Yes. The trial judge --

16 QUESTION: -- argument.

17 MR. BRUCK: -- focused entirely on this word
18 argue which, of course, came from Simmons, because Simmons
19 was a case where the State presented no evidence in the
20 penalty phase, no new evidence in aggravation, except, I
21 think, for the indictments about Simmons' prior record,
22 but all the facts of his prior conduct had come in in the
23 guilt phase, and what the court did in Simmons was present
24 a veiled metaphorical argument which a majority of the
25 Court found to raise the issue rather indirectly.

1 QUESTION: You said the court presented a veiled
2 metaphorical argument.

3 MR. BRUCK: Excuse me. The prosecutor.

4 QUESTION: The prosecutor -- yes.

5 MR. BRUCK: The prosecutor presented a veiled
6 metaphorical argument that the majority of this Court
7 found raised the specter of future dangerousness in the
8 Simmons case, and therefore on occasion members of this
9 Court in the various opinions in Simmons referred to the
10 rule in Simmons as one involving a triggered-by argument
11 relative to future dangerousness.

12 However, at other points in the opinions the
13 Court also used terms such as, where the prosecution seeks
14 to demonstrate. I think that was the formulation in --

15 QUESTION: Well, Justice O'Connor's opinion in
16 that case, which two of the rest of us joined, does say
17 that one of the conditions of Simmons is the prosecution
18 argued that the defendant will pose a threat to society in
19 the future.

20 MR. BRUCK: Yes. In formulating --

21 QUESTION: Why shouldn't we take that as a
22 holding of the case?

23 MR. BRUCK: Because of the fact that at other
24 points in Justice O'Connor's same opinion she used the
25 term, show future dangerousness, where the State seeks to

1 show that the defendant would be dangerous in the future.

2 It --

3 QUESTION: Well, even if we thought that future
4 dangerousness must be argued or, as you now put it, shown,
5 the supreme court of South Carolina didn't reach that
6 question.

7 MR. BRUCK: That's correct.

8 QUESTION: So what we really are left looking at
9 here, I suppose, is whether this other sentencing option
10 that the trial judge would have if the jury does not find
11 an aggravating circumstance would trigger Simmons.

12 MR. BRUCK: That's correct, and here I think the
13 State court is simply confused about what Simmons
14 required.

15 The South Carolina procedure is that the -- a
16 jury is instructed to determine first whether any
17 statutory aggravating circumstance is shown. This is a
18 Georgia-type nonweighing statute in which the finding of
19 an aggravator is a threshold finding. The jury is
20 instructed, pursuant to the statute, and this jury was
21 instructed that if the jury does not unanimously find the
22 existence of a statutory aggravating factor, it goes no
23 further.

24 It does not sentence. It simply reports its
25 failure to find the aggravator to the judge, and the judge

1 sentences, and at that point the judge has the option, and
2 only under those circumstances the judge has the option of
3 either imposing a 30-calendar-year sentence or life, of
4 course without the possibility of parole.

5 QUESTION: Would I be right to observe -- maybe
6 it's not right. Did the jury know in this case about this
7 third option, or was it instructed to that effect?

8 MR. BRUCK: They were not instructed about the
9 30-year option because it's none of their concern. They
10 were simply told --

11 QUESTION: So far as the jury knew, it was
12 determining just between life imprisonment, however they
13 might define that, and the capital punishment.

14 MR. BRUCK: Well, that's correct, because that's
15 all the jury needs to know. That's the jury's job. Once
16 the jury finds an aggravating factor, then and only then
17 the jury becomes the sentencer. Prior to that time, they
18 don't need to know about parole. They don't need to know
19 about aggravation, mitigation. They don't need to know
20 anything.

21 QUESTION: And the 30-year alternative doesn't
22 exist if aggravating circumstances have been found.

23 MR. BRUCK: That's -- if they have them, that's
24 exactly correct, and so the judge correctly told the jury,
25 if you find aggravation, then you become the sentencer,

1 and there are only two alternatives, the death penalty or
2 life imprisonment.

3 This is exactly the situation in Simmons. It
4 cannot be distinguished. The only difference is that the
5 -- if the jury never acquires sentencing responsibility in
6 the first place, there is another option. There's no
7 reason why the jury should know about that. It's not part
8 of their job. It's not part of their responsibility.

9 The State supreme court just yesterday filed
10 another case which my friend helpfully filed, lodged with
11 the court yesterday, State v. Kelly, in which the court
12 finally explained its rationale -- this is the State
13 supreme court -- for this holding.

14 It said in Kelly that where another sentence
15 other than life without parole was available to the
16 defendant as an alternative to the death penalty -- this
17 is at page 11 of the slip opinion -- then a Simmons charge
18 would actually mislead the jury by representing that the
19 defendant would never be released from prison, when, in
20 fact, a 30-year sentence is a potential sentence for the
21 defendant.

22 Now, it's clear what has happened. This
23 explanation doesn't appear in the Shafer case or in the
24 accompanying Starnes case, but now apparently the South
25 Carolina supreme court is laboring under the misconception

1 that a Simmons instruction is a prediction to the jury as
2 to the defendant's fate, rather than an explanation of the
3 sentencing option of life imprisonment that the jury is
4 given.

5 Of course, the Simmons instruction is the
6 latter. It has nothing to do with a prediction about what
7 is going to happen to the defendant as of this moment,
8 when the jury hasn't yet found aggravation.

9 In any event, none of this really matters.
10 The -- it's quite clear, I think, that Justice Kennedy's
11 plurality opinion in Ramdass, which we quoted in our brief
12 and, indeed, in the question presented in the cert
13 petition, three times stated the holding of Simmons in a
14 way that precisely encompasses this case.

15 He said, the parole eligibility instruction
16 is -- of Simmons is required only when, assuming the jury
17 fixes the sentence at life, the defendant is ineligible
18 for parole under State law. Simmons applies elsewhere in
19 the opinion only to instances where, as a legal matter,
20 there is no possibility of parole if the jury decides the
21 appropriate sentence is life imprisonment, and I can go
22 on.

23 That is the holding of Simmons. That is the
24 holding which was clearly violated in this case and which,
25 according to the South Carolina supreme court, no longer

1 applies in South Carolina. Now, clearly a mistake has
2 been made and we submit that it should be corrected.

3 This leaves the question of what to do with this
4 case. The State asks you to remand the case back to the
5 South Carolina supreme court to perform the rest of the
6 Simmons analysis. We submit that the case has been fully
7 briefed and fully argued as to every aspect of Simmons
8 below. Surely if the South Carolina supreme court thought
9 that future dangerousness had not been placed in issue in
10 this case, they would not have gone to such a
11 constitutionally tenuous attempt to reconsider the first

12 --

13 QUESTION: Well, yesterday's --

14 QUESTION: The -- go ahead.

15 QUESTION: Yesterday's case -- is it
16 Williams? -- or Kelly, the Kelly case does indicate that,
17 to me that the South Carolina supreme court takes a very
18 formal view of the issue of future dangerousness. There
19 it seems to me that the argumentation by the prosecution
20 was really much more geared towards future dangerousness
21 even than yours, and even in that case the supreme court
22 of South Carolina thought that that issue had not been
23 submitted to the jury in a way to trigger the Simmons
24 instruction.

25 MR. BRUCK: Yes, before Kelly I would have said

1 that the South Carolina supreme court required the word
2 dangerousness to actually be used in jury argument. In
3 Kelly they actually used the word dangerousness, and
4 apparently that's still not enough, so I was coming around
5 to saying that while I had thought that South Carolina did
6 not accept the State's argument on the dangerousness prong
7 of Simmons, Kelly does cast that into some light.

8 Certainly, this whole little saga leaves us with
9 the -- I think should leave the Court with some confidence
10 that it's time to decide this case, the whole aspect of
11 it.

12 QUESTION: Do you associate yourself with the
13 position that was taken by a friend on your side that
14 inevitably, in any capital murder case, future
15 dangerousness is present as a factor, so that it isn't a
16 case-by-case thing, that the jury in every case is
17 determining whether it's going to be death rather than
18 life?

19 MR. BRUCK: Well, as a lawyer who tries these
20 cases in the trial court I think there is considerable
21 merit to that view, but I don't endorse it or embrace it
22 on behalf of my client, because there's no need to. The
23 rule in Simmons is workable and is certainly more than
24 enough to warrant relief in this case. When --

25 QUESTION: Mr. Bruck, you said that the State

1 asks us to remand. As I understand their brief, they
2 first ask us to affirm and then say, if the Court decides
3 to reverse it, it should be remanded.

4 MR. BRUCK: I stand corrected. That is what
5 they ask.

6 Now, it is possible to imagine cases which do
7 not raise future dangerousness. We should keep in mind,
8 though, the nature of the South Carolina statute, in which
9 it is especially difficult, I agree, to draw a line.
10 This is a very open-ended statute, in which there is no
11 limitation on the nonstatutory evidence that the jury may
12 consider as weighing on the death side of the question.
13 Once a statutory aggravator is found, in this case the
14 entire penalty phase showing by the State consists of
15 Wesley Shafer's prior convictions for criminal sexual
16 conduct and burglary, his failure as a, quote, high-risk
17 probationer, who is incapable of rehabilitation, according
18 to the State's claims and evidence, who is prone to angry
19 outbursts of explosive behavior even in the highly
20 restrictive confines of the Union County jail, and who
21 exhibits lack of remorse and lack of insight about his
22 prior behavior.

23 Now, this is a classic showing of future
24 dangerousness. This is exactly why --

25 QUESTION: It has to be future dangerousness to

1 the general public. I mean, one assumes that any brutal
2 murderer is going to be dangerous in the prison setting.
3 As I understand Simmons, the only reason it's relevant to
4 the jury to know whether this person will be paroled or
5 not is because the jury is worried that he will be a
6 danger to the general public.

7 He'll be a danger to other inmates in the prison
8 whether he's going to be paroled or not, so don't you have
9 to establish that what has been argued is future
10 dangerousness to the general public?

11 MR. BRUCK: Yes, but the fact that a person is
12 dangerous in prison is ipso facto evidence that if the
13 bars are removed, and the jail door is opened, and he's
14 allowed to go into the far less protected and restrictive
15 environment of society -- I mean, it would be farcical to
16 argue, well, this person will be dangerous in prison, but
17 if you let him out there's no reason to think he won't do
18 just fine.

19 The State supreme court, I submit, has become,
20 with all due respect, confused on this issue as well and
21 in the --

22 QUESTION: So you're saying that a prosecutor
23 cannot argue that, you know, the death penalty is the only
24 adequate remedy here because this person is a brutal
25 murderer. He has killed before in prison. There is no

1 assurance that if we just put him into prison he will not
2 kill again in prison --

3 MR. BRUCK: Certainly --

4 QUESTION: -- and you're saying if the
5 prosecutor makes that argument, Simmons is triggered,
6 because obviously if he's going to be dangerous in prison
7 he's going to be dangerous out of prison, although the
8 prosecutor does not make that point.

9 MR. BRUCK: Yes, and --

10 QUESTION: But you're saying you can't say he's
11 going to be dangerous in prison?

12 MR. BRUCK: He can say it, but the defense is
13 entitled to Simmons instruction, and seven members of this
14 Court joined opinions which said that in Simmons. The --

15 QUESTION: Which said what?

16 MR. BRUCK: Which said that the -- that when a
17 Simmons instruction is given, of course the State may
18 still show -- Justice O'Connor's plurality opinion made
19 this point, as did the -- Justice O'Connor's concurrence,
20 as did the plurality opinion. The State may still show
21 that he will nevertheless be dangerous in prison, but
22 everything must come out.

23 There is no warrant whatsoever for saying that
24 someone is so dangerous that he will kill again in prison
25 and yet pretend as though the jury is not going to draw

1 the inevitable common sense conclusion that if he's that
2 dangerous in prison, with concrete and bars all around
3 him, he will also be dangerous if he's released on parole,
4 and if there's any doubt --

5 QUESTION: Well, but that doesn't necessarily
6 follow so far as I can see. I mean, prison is a much more
7 restrictive environment, and a person who is prone to
8 dangerousness might well confine themselves in prison
9 during -- under constant supervision. He gets out, and he
10 isn't under any supervision, and might behave differently.

11 MR. BRUCK: That is exactly my point, that the
12 fact that even under all this supervision he is
13 explosively angry, and the jailer has to slam the door,
14 the cell door to constrain his rage when his -- the
15 telephone is cut off --

16 QUESTION: This argument proves too much. I
17 mean, it just washes the Simmons requirement that you have
18 argued future dangerousness out.

19 I mean, suppose the prosecution just shows
20 during the course of the trial -- he never argues
21 dangerousness, but he shows this is a person with a mean,
22 nasty temper, uncontrollable, many instances of killing
23 many, many people. You could make the same argument
24 you're making now, it's obvious to the jury that this
25 person's going to be dangerous if we let him out again,

1 and therefore a Simmons instruction has to be given.

2 I don't think that that's what we said in
3 Simmons. I think in Simmons we required that
4 dangerousness be argued. If it's not argued, then, then
5 --

6 MR. BRUCK: Well, if that had been the holding
7 of Simmons, then Simmons would stand for the very strange
8 proposition that the State is entitled to prove future
9 dangerousness, to call witness after witness, and indeed
10 that's what they did here, and the State's own pretrial
11 notice described this evidence as evidence of future
12 dangerousness.

13 QUESTION: I dissented, of course, so I do think
14 it stands for a strange proposition, but --

15 (Laughter.)

16 QUESTION: Can you tell me -- I don't want to
17 take you too far away from this case.

18 MR. BRUCK: That's okay.

19 QUESTION: In other States that do apply Simmons
20 almost as a matter of course, do many of those refrain
21 from giving this instruction of future dangerousness if
22 it's not argued?

23 MR. BRUCK: No. In fact, this is an argument
24 which has almost run its course in the entire Nation. By
25 our count there are 37 States that have a policy, statute,

1 rule or court decision on this issue. 35 of them tell the
2 jury the law about parole release, which in most cases is
3 no parole release.

4 The only States in which Simmons has any
5 application at all, and I include South Carolina here,
6 although the State supreme court says it has almost none,
7 are Pennsylvania and South Carolina, and Pennsylvania, the
8 Pennsylvania supreme court is divided 4 to 3 on whether to
9 give a Simmons instruction in every case, and there is an
10 arguable distinction in Pennsylvania that does not apply
11 in South Carolina, a way of distinguishing the two States,
12 which is that in Pennsylvania aggravation is limited.

13 This Court knows the statute from *Blystone v.*
14 Pennsylvania. Only designated statutory aggravating
15 factors may be considered as reasons to impose the death
16 penalty, and future dangerousness is not one of them, so
17 in theory there is nowhere for the jury to give
18 aggravating weight to the likely dangerous behavior of the
19 defendant. Nevertheless, when the argument is made, the
20 State supreme court has required that a Simmons
21 instruction be given.

22 That is the entire roster of States that don't
23 just tell the jury what's going to happen if they spare
24 this man's life, so as I say, this is an issue, a debate
25 which is really to all intents and purposes virtually

1 over, except in South Carolina.

2 Now, part of -- I think part of the proof
3 that -- and it does not depend on the jury's questions,
4 but the jury's questions really remind us that we really
5 have encountered a pretty serious problem here. The jury,
6 why did they ask? Why would they have asked about parole,
7 if not for the fact, having found an aggravating
8 circumstance and turned to their sentencing
9 responsibility, they were worried about whether he was
10 going to get out or not because he was dangerous. Parole
11 is relevant because of future dangerousness, and that is
12 probably what was happening.

13 The prosecutor's evidence, his case of
14 dangerousness, did resonate with this jury, which is
15 entirely to be expected. As I was getting ready to say,
16 if -- if an actual formal argument or statutory allegation
17 were required to trigger the rule in Simmons, then it
18 would be entirely all right for the prosecution to do
19 everything they could through evidence --

20 QUESTION: Well, Mr. Bruck, suppose -- I take
21 it, does the Governor in South Carolina have the power to
22 pardon?

23 MR. BRUCK: No. No. We are one of only two
24 States in which the Governor has only clemency power over
25 the death sentence. He cannot reduce -- this is as

1 airtight a system as the mind of man can devise. Life
2 without parole in South Carolina means just that. There
3 is a statutory provision which by its terms requires the
4 most extraordinary circumstances. In Simmons, this Court
5 noted --

6 QUESTION: That statute can be amended, I
7 presume, right?

8 MR. BRUCK: Yes, of course.

9 QUESTION: You can't really tell the jury he
10 will never get out of jail.

11 MR. BRUCK: But that's not the instruction we
12 asked for. The instruction we asked for was the statutory
13 language about parole.

14 QUESTION: Well, supposing in a State where the
15 Governor does have the power to pardon, and the court
16 says, we want to give -- we want you to give a Simmons
17 instruction, could the State say, well, in addition to
18 that, please say that the Governor does have the authority
19 to pardon this defendant?

20 MR. BRUCK: Yes. You so decided in California
21 v. Ramos. That's --

22 QUESTION: So that -- okay.

23 QUESTION: In those cases, let's say a Simmons
24 instruction is given, can the prosecution stand up and
25 say, well now, ladies and gentlemen of the jury, it's true

1 that there's life parole, but you know, these legislatures
2 change things, and 10 years from now this defendant may
3 get out. Would that be proper argumentation?

4 MR. BRUCK: No.

5 QUESTION: Has that ever been passed on?

6 MR. BRUCK: It never has been passed on, but
7 that is a -- that is a peculiar problem, because to argue
8 that the law that must guide the jury is like ice, it's
9 likely to melt next summer and can effervesce away, leaves
10 the jury with a rather brutal fact that only death is
11 permanent.

12 QUESTION: That isn't the law that must guide
13 the jury. That law isn't directed to the jury. It's
14 directed to prison authorities, and if the jury really
15 wants to know whether this person is going to be a danger
16 to the general public, it seems to me you have to advise
17 them of that.

18 You know, right now that's how the statute
19 reads, but there's a great anti-capital punishment
20 movement abroad now, and many people we've been too harsh,
21 it may be amended. What's wrong with that if you want the
22 jury to know the real state of affairs?

23 MR. BRUCK: Well, you know, the general
24 proposition is that States enjoy broad discretion under
25 California v. Ramos to tell all sorts of things like this

1 to the jury, and my case does not depend on the exact
2 outer limitation of that.

3 QUESTION: But you're asking for a jury
4 instruction, and a jury instruction is about the law. It
5 is not about politics. Isn't that the point?

6 MR. BRUCK: Well, that's correct. That's
7 correct, and --

8 QUESTION: But couldn't the prosecutor at least
9 argue, if you're going to make your argument, at least
10 argue to the jury, this person is an animal, he will try
11 to get out -- bust out of prison. Maybe there was a
12 history of jail break by this person. Couldn't the
13 prosecutor bring that up?

14 MR. BRUCK: Of course he could. Of course.
15 Simmons is an argument about rebuttal. It is an
16 argument -- we don't allege prosecutorial misconduct. We
17 just allege the right to tell our side of the story, and
18 let the prosecutor tell their side. They've got to tell
19 theirs, and we didn't get the most important fact before
20 the jury, which is that 19-year-old Wesley Shafer is --

21 QUESTION: Do I understand your argument
22 correctly that you think Simmons would apply even if there
23 was no argumentation about future dangerousness so long as
24 the jury posed the question, came in to the judge and
25 said, you know, will he get -- does life in prison mean

1 life in prison.

2 As I understood what you said a little bit
3 earlier, you think that that alone would trigger Simmons,
4 no argumentation about future dangerousness at all?

5 MR. BRUCK: If there was neither argumentation
6 nor evidence presented by the State --

7 QUESTION: There's always evidence that a guy's
8 dangerous. He's killed somebody.

9 MR. BRUCK: Well, there really isn't. You know,
10 the capital case tried before this one, in this very
11 courtroom in Union County, South Carolina was the case of
12 the State of South Carolina v. Susan Smith. Now, that is
13 a paradigmatic example of a case in which future
14 dangerousness was not at issue.

15 QUESTION: She was the one that drove into the
16 lake?

17 MR. BRUCK: And drowned her children, right.
18 Now, there are rare cases, but family murders, for
19 example, situational murders like that, where the
20 circumstances are certain never to recur, do not implicate
21 future dangerousness.

22 QUESTION: All normal murder cases that aren't
23 these family murder cases, you think if the jury asks,
24 you're entitled to a Simmons instruction.

25 MR. BRUCK: If there is --

1 QUESTION: Do you think Simmons said that?

2 MR. BRUCK: No. I think that either -- no, I

3 don't think it's the jury's question. I think that is the

4 question for another day. I think a good argument could

5 be made that you are entitled to it, but it is not an

6 argument that we need to make, because the reason, in this

7 case, the jury probably asked is that the State proved

8 future dangerousness, or at least took a pretty good run

9 at it, as they said they were going to do in their

10 pretrial notice. They were good to their word.

11 QUESTION: Mr. Bruck, you said a moment ago that

12 you didn't have a chance to get your side of the argument

13 to the jury. Certainly the defense counsel could have

14 stated to the jury, he'll never get out of prison because

15 the alternative is life without parole.

16 MR. BRUCK: No, Your Honor. As a matter of

17 fact, counsel requested the right to read that statute to

18 the jury. The State opposed the argument, and the judge

19 ordered him not to do it, and as a result, all he was left

20 with was various metaphors for the term, life

21 imprisonment, which by its terms -- I mean, if you analyze

22 it closely --

23 QUESTION: Well now, are you saying that -- in

24 South Carolina do you have to submit in advance your

25 arguments to the other side?

1 MR. BRUCK: No, you don't, but in the course of
2 argument about the statute, the -- about the jury
3 instructions, defense counsel I think very properly, when
4 the court indicated he wouldn't give the charge, counsel
5 said, well, I would at least like to read to the jury,
6 which of course Simmons says is another way to take care
7 of this problem, this statute, and the prosecution said
8 no, that will educate the jury about parole and you can't
9 do that either, and the judge sustained the State's
10 position, so he said nothing about parole, and the jury
11 clearly noticed the omission.

12 QUESTION: Well, that's a different problem.
13 That's not the problem you're complaining about here. I
14 mean, that may well be a violation not to let counsel
15 argue it. Whether a State has to let counsel argue it is
16 quite a different question from whether a State must
17 require the judge to instruct the jury concerning it.

18 MR. BRUCK: Well, in this Court -- in this case,
19 seven members of this Court said that it was all
20 encompassed within the Simmons rule, and that's the way it
21 was addressed in this case.

22 QUESTION: Was that part of your assignment of
23 error, that counsel was not allowed to read the statute?

24 MR. BRUCK: No. We did not make that a --

25 QUESTION: Okay.

1 MR. BRUCK: -- a separate assignment of error.

2 QUESTION: That might well have been a problem.

3 MR. BRUCK: If I may, Your Honor, I would like
4 to reserve the remainder of my time.

5 QUESTION: Very well, Mr. Bruck.

6 Mr. Zelenka, we'll hear from you.

7 ORAL ARGUMENT OF DONALD J. ZELENKA

8 ON BEHALF OF THE RESPONDENT

9 MR. ZELENKA: Mr. Chief Justice, and may it
10 please the Court:

11 In the 1994 decision of Simmons v. South
12 Carolina, Justice O'Connor in her concurring opinion
13 stated that when the State puts the defendant's future
14 dangerousness in issue and the only alternative sentence
15 to death is life imprisonment without possibility of
16 parole, due process entitles the defendant to inform the
17 capital jury by either argument or instruction that he is
18 parole-ineligible.

19 For three separate reasons, we submit the South
20 Carolina trial judge in 1998 did not violate due process
21 or the mandates of this Court in Simmons in failing to
22 specifically instruct the jury that the petitioner was
23 parole-ineligible.

24 QUESTION: Well, you want us to interpret the
25 concurring opinion in Simmons as a formal submission of an

1 aggravating factor of future dangerousness as the basis
2 for triggering the Simmons requirement. There -- I think
3 there's other language in the concurring opinion that goes
4 somewhat further than that. It says that prosecutors
5 often emphasize the defendant's future dangerousness in
6 their evidence and argumentation at the sentencing phase.
7 That's not a formal -- of future dangerousness in the
8 sense of a statutory aggravating factor.

9 MR. ZELENKA: We're not asserting, and South
10 Carolina does not have a formal statutory aggravating
11 factor of future dangerousness. It allows the admission
12 of evidence concerning the defendant's character as a
13 fact.

14 QUESTION: I understand that, so we're talking
15 about the argumentation that's made at the sentencing
16 phase.

17 MR. ZELENKA: That's correct. Based upon
18 argument or evidence, the issue of future dangerousness to
19 society is what would be necessary in this particular
20 case. For the reasons that we've set forth in our brief,
21 we think that the South Carolina supreme court
22 appropriately followed the mandates of Simmons in making
23 its determinations that Simmons did not apply because
24 there was at the time --

25 QUESTION: Well, the supreme court, as I read

1 the opinion, really rested its holding on this new
2 sentencing option for the trial judge of 30 years in the
3 event the jury did not find an aggravating factor.

4 MR. ZELENKA: That's correct.

5 QUESTION: And it really didn't reach the
6 question of whether future dangerousness was argued or
7 presented.

8 MR. ZELENKA: It did not appear to reach the
9 question of whether future dangerousness --

10 QUESTION: No, so are you going to talk about
11 the ground that the supreme court rested on?

12 MR. ZELENKA: Yes, I am, and --

13 QUESTION: And if you do that, it seemed to me
14 that at the time the jury was instructed and given an
15 instruction about what it could do, that it was told if
16 they found an aggravating circumstance, then its options
17 were life imprisonment or death, right?

18 MR. ZELENKA: That's correct.

19 QUESTION: And the jury is not told about what
20 might happen by sentencing by the trial judge if they
21 don't find an aggravating circumstance.

22 MR. ZELENKA: They were not told in this
23 situation. They were told if they did not find an
24 aggravating factor they should stop.

25 QUESTION: Well, I would think that Simmons

1 would apply to the jury instruction at that stage,
2 assuming future dangerousness is in the case.

3 MR. ZELENKA: We believe that the South Carolina
4 supreme court correctly decided the case because when the
5 jury instructions were given, after the jury arguments
6 were made there was another option that was available for
7 sentencing, and that option was a 30-year sentence --

8 QUESTION: That option was not available to the
9 jury. It had nothing to do with what the jury was told
10 its function was. I just don't understand why Simmons
11 would not apply, assuming future dangerousness was at
12 issue.

13 MR. ZELENKA: Because the question as to whether
14 that statutory aggravating circumstance existed, which was
15 the factor which would make a determination as to whether
16 the 30-year-without-parole option was available, had not
17 been decided by the jury at that particular time, so when
18 it was facing its decision --

19 QUESTION: Well, but that's what the jury had to
20 decide. If it found an aggravating factor, then its
21 options were life imprisonment or death, and the jury sent
22 around questions saying, what does it mean if it's life
23 imprisonment.

24 MR. ZELENKA: That's correct.

25 QUESTION: And I would have thought that Simmons

1 would be triggered there, despite the fact that if they
2 found no aggravating circumstance, then something else
3 would --

4 MR. ZELENKA: Okay, well, we think they were not
5 faced with the false dilemma that this Court was concerned
6 with in Simmons, because there was a potential that he, in
7 fact, would be released from prison.

8 QUESTION: It was not a potential the jury had
9 before it. I just don't understand this argument at all.

10 QUESTION: It was not a potential the jury knew
11 anything about.

12 MR. ZELENKA: The jury did not know anything
13 about it, but it was still faced with the situation that
14 its decision did not create that false dilemma because, in
15 fact, he would be available to be released in society
16 based upon a determination the jury made, that
17 determination, whether in fact an aggravating factor
18 existed.

19 At the time that question was asked, at the time
20 the jury was making its determinations, that aggravating
21 factor had not been found, and in fact he was still
22 available to be sentenced to be released from prison.

23 QUESTION: Mr. Zelenka, just as a matter of
24 curiosity, since this new option came in for the judge
25 alone, not for the jury, in capital murder trials in South

1 Carolina, on how many occasions has the jury failed to
2 find an aggravator so that the judge would be sentencing
3 under the 30-year mandatory minimum?

4 MR. ZELENKA: I'm not aware of that particular
5 number. I apologize for not knowing that, Your Honor.

6 QUESTION: Have there been any?

7 MR. ZELENKA: I could not say that there have
8 not been any. Those cases generally would not have been
9 brought to my particular attention.

10 QUESTION: And how long has it been in force,
11 this judge option of 30 years?

12 MR. ZELENKA: The statute became effective in
13 January 1996.

14 QUESTION: So there would have been some time,
15 if --

16 MR. ZELENKA: There has been some time in that
17 option. The existence of a statutory aggravating factor
18 is, of course, one of fact. Whether the jury finds beyond
19 a reasonable doubt its existence depends upon a matter of
20 proof which goes to the judge.

21 There has been sentencing under that option.
22 Now, whether that was done based upon the jury's failure
23 to find the statutory aggravating factor or another
24 reason, it's unclear to me. It may have been a guilty
25 plea situation where they have sentenced beyond that 30-

1 year mandatory minimum up to a sentence of 40 and 50
2 years. I am aware of those situations.

3 QUESTION: I'm not clear on your answer. Have
4 there been cases, capital murder cases where the jury has
5 failed to find the aggravator --

6 MR. ZELENKA: What I'm --

7 QUESTION: -- that they were charged they could
8 find?

9 MR. ZELENKA: It's -- I do not have a true
10 understanding as to whether the jury did not find those
11 factors, or whether it was a guilty plea situation
12 where --

13 QUESTION: Oh, a guilty plea, yes.

14 MR. ZELENKA: -- the judge did not find those
15 factors --

16 QUESTION: Right.

17 MR. ZELENKA: -- for a bench trial. I do know
18 that there have been sentences above that 30-year
19 mandatory minimum sentence.

20 QUESTION: Which could have come about as a
21 guilty plea?

22 MR. ZELENKA: That's correct.

23 QUESTION: Okay.

24 MR. ZELENKA: It's our position, as we've
25 stated, because the finding of the statutory aggravating

1 factor is not a ministerial act, up until the time the
2 jury enters its verdict, that in fact the potential for
3 release into society is still there, and it was no false
4 dilemma --

5 QUESTION: Well, I think you're right, as a
6 metaphysical matter, for a moment in time this was like
7 Ramdass. There were more than two options open. But from
8 a functional standpoint, the jury didn't know anything
9 about it, and that's what Simmons is directed to.

10 MR. ZELENKA: They did not know anything about
11 it, but if they had been advised as to what the actual
12 answer is particularly to their question, they would have
13 been advised, yes, there is an option that is available
14 for release, a 30-year mandatory minimum sentence, which
15 would cause him to be possibly available for release at
16 that time, while those deliberations were going on.

17 QUESTION: Well, I suppose that you would agree
18 that if there were a trifurcation here, and the jury first
19 found that there was an aggravating factor and then came
20 back, then the Simmons instruction would have to be given
21 if future dangerousness was going to be --

22 MR. ZELENKA: Yes, that would be correct. That
23 would be consistent with this Court's decision in the
24 Simmons case.

25 For the second reason, we submit that future

1 dangerousness was not presented in this case, Simmons was,
2 in fact, not triggered. We agree that --

3 QUESTION: Before we get to that, could a
4 defense attorney say, judge, I want you to bifurcate.
5 First tell the jury, come and say whether or not they find
6 an aggravator, and that would set the defense up to get
7 the Simmons charge.

8 MR. ZELENKA: There's nothing in our particular
9 statute that I see that would have prevented that
10 situation from occurring. I don't know how it would have
11 been set forth. It may require some statutory change, but
12 there's nothing in the statute, necessarily, that would
13 have prevented that situation from occurring. It was not
14 asked for in this case.

15 QUESTION: Has it been asked for in any case?

16 MR. ZELENKA: I'm not aware of it being asked
17 for in any of the cases that have gone up to the South
18 Carolina supreme court, which would be three cases, the
19 Shafer case, the Starnes case, and the Kelly case that was
20 decided yesterday.

21 With respect to the second issue, we submit that
22 while the South Carolina supreme court did not expressly
23 decide future dangerousness as additional sustaining
24 grounds, Simmons did not apply in this situation because
25 future dangerousness was neither presented by the evidence

1 nor argued in this particular situation by the prosecutor
2 from Union County.

3 Particularly, this Court determined that when
4 the State argues future dangerousness, it urges the jury
5 to sentence an individual to death so that he will no
6 longer be a threat to society. That was not the
7 presentation that was made in this particular case by the
8 prosecution. In fact, at the time, prior to the
9 determination of the sentencing instructions, the trial
10 judge conceded that future dangerousness had not been
11 presented in this case.

12 The prosecutor, recognizing the ability in
13 Simmons that it was their option to not argue future
14 dangerousness, which would not bring the parole issue
15 before the jury, chose not to do that, and expressly
16 stated to the court that it was not going to do that.

17 QUESTION: I thought the prosecutor argued that
18 the victim, or somebody in the store had kept saying, they
19 might come back, they might come back, and then he tells
20 the jury, remember, remember, they might come back, they
21 might come back, and he presented quite a lot of evidence
22 that this person had committed other crimes, and that he'd
23 even committed crimes when he was in custody, and that he
24 didn't show any remorse.

25 I mean, what's that telling the jury? It sounds

1 the jury might conclude from that that he's worried
2 about is they might come back, including this man.

3 MR. ZELENKA: I think your -- the petitioner's
4 assertion is taken somewhat out of context. In the
5 phrase, they might come back, that was raised at the time
6 of the crime itself by individuals who came upon the crime
7 scene. It was part of the videotape, and it was
8 describing the crime itself. There was nothing about that
9 particular statement which was directed towards that the
10 defendant is a future threat to society. What the --

11 QUESTION: I thought he repeated that in
12 argument, didn't he?

13 MR. ZELENKA: He repeated it in argument about
14 the circumstances of the crime, when the victims came upon
15 the crime -- when the victims, witnesses came upon the
16 crime scene at that particular situation, but then he
17 followed that up with, in utilizing the phrase, they might
18 come back, that was not directed towards this defendant
19 may come back, but it was directed towards other
20 individuals who may come into the counties of South
21 Carolina.

22 It was an argument not for specific deterrence
23 of this defendant, but for general deterrence for society
24 as a whole to make that determination, that a death
25 sentence in this case, based upon the facts and

1 circumstances of this crime, not the circumstances of the
2 defendant, would be appropriate.

3 QUESTION: Of course, we wouldn't care if they
4 came back if they weren't going to be dangerous when they
5 got back, would we?

6 MR. ZELENKA: Well, that was part of -- I mean,
7 that was what the victims said at the time of the crime.

8 QUESTION: No, I'm addressing --

9 MR. ZELENKA: The emotional trauma --

10 QUESTION: I'm addressing your point about the
11 argument, and you just said that what they were concerned,
12 what the prosecutor was concerned with was that other
13 persons, other than this defendant might come into the
14 county.

15 MR. ZELENKA: That's correct.

16 QUESTION: And my suggestion is that I don't
17 suppose that would have been relevant unless those
18 persons, when they came into the county, would be
19 dangerous, and if that's true, it sounds like a future
20 dangerousness argument that would apply not only to those
21 other people, but to this person. Isn't that so?

22 MR. ZELENKA: No, it was not phrased as that.

23 There was nothing --

24 QUESTION: Well, I know it wasn't phrased like
25 that. What I'm suggesting is that that's the only

1 reasonable tendency of the argument. How else would it
2 have been taken?

3 MR. ZELENKA: As an argument against crime in
4 general. As an argument against allowing an individual or
5 individuals to come into the State of South Carolina and
6 commit these acts and not be fairly punished. That is
7 what that statement was for, and it was an argument for
8 specific -- excuse me, general deterrence against other
9 criminals from coming into that State and not be punished.
10 We think --

11 QUESTION: Well, why did he say -- what is
12 really etched in my mind, what is really etched in my mind
13 is Monica picking up the phone and saying, hurry up, they
14 might come back, they might come back. I just wondered
15 why he said that. It was -- just happened to be a
16 circumstance of --

17 MR. ZELENKA: It was a circumstance of the crime
18 expressing people who came upon that crime scene's
19 immediate fear at what they saw, on the brutal slaying of
20 Mr. Broome. That's what it was an expression of. It was
21 a recognition, almost to some extent that these, in fact,
22 were victims. It was a victims' impact statement in a
23 phrase as to what exact had -- exactly had occurred at the
24 time. They testified about what occurred with them, and
25 we think that that was fair comment. It was not comment

1 upon future dangerousness.

2 Similarly, we submit that the presentation of
3 the evidence that was presented in the penalty phase of
4 the trial concerning his prior records, that does not go
5 to future dangerousness. That goes simply to the
6 character of this defendant.

7 There's nothing that was utilized about those
8 records to show that he, in fact, would have a propensity
9 to commit the crime in the future. There was no
10 representation that those, in fact, suggested that he
11 would be a future threat. What he was asking for was a
12 sentence in retribution that, in fact, this individual,
13 based upon his own unique character, deserved a death
14 sentence. It was not a question --

15 QUESTION: Would it be fair for me to infer from
16 this record and from what I read in the Kelly case that's
17 just been submitted that prosecutors in your State
18 sometimes are a little careful about arguing future
19 dangerousness so that the Simmons instruction will not be
20 triggered?

21 MR. ZELENKA: I think they recognize the
22 language from Justice O'Connor's statement to say if
23 future dangerousness is not argued, then parole
24 eligibility does not become an issue for the jury, so they
25 are cognizant of that particular situation.

1 QUESTION: As a tactical decision.

2 MR. ZELENKA: They're making that as a tactical
3 decision --

4 QUESTION: That seems to me to --

5 MR. ZELENKA: -- realizing the benefits and the
6 concerns that it would have.

7 QUESTION: Well, that seems to me to indicate
8 there's a very strong reason for Simmons instructions to
9 be given, because it does affect what the jury's going to
10 do.

11 MR. ZELENKA: What they're -- what they
12 understand that it's doing is to try to not raise that
13 issue, where there may be some due process concerns.

14 QUESTION: Well, what's the matter with telling
15 the sentencer what the statutory scheme is? Why is that
16 such a problem? Why not just tell them what the statute
17 says?

18 QUESTION: It was just three lines, three or
19 four sentences.

20 QUESTION: I just don't understand that.

21 MR. ZELENKA: Well, I think -- I think first off
22 is we've asserted in the third argument the statute was
23 initially given to them when they were told on three
24 occasions that life imprisonment means until the death of
25 the offender, or life imprisonment means incarceration

1 until the death of the offender. The concern --

2 QUESTION: Well, but they weren't read the one
3 or two sentences that strictly follow that from the
4 statute. It takes 30 seconds to read it, if that.

5 MR. ZELENKA: I understand that, and in the
6 South Carolina supreme court we believe, following this
7 Court's mandate in California v. Ramos, believes that as a
8 policy that, in fact, the jury's attention should be
9 directed towards the characteristics of the defendant and
10 the circumstances of the crime and not other potential
11 release mechanisms which may exist also.

12 QUESTION: It was the prosecutor's decision. I
13 mean, if the prosecutor had given the instruction, the
14 supreme court wasn't going to somehow revoke it. I mean,
15 it was up to the prosecutor, wasn't it, whether to agree
16 to allow the statute to be read?

17 MR. ZELENKA: Well, it's up to the trial judge
18 to make a determination as to what is consistent with the
19 law, and under the decisions of the South Carolina supreme
20 court they have held --

21 QUESTION: But if the prosecutor said, judge,
22 we're perfectly willing to have the statute read, that
23 would be okay, wouldn't it?

24 MR. ZELENKA: The prosecutor could have said
25 that. The judge would not have been bound by the

1 prosecutor's statement. The trial judge would be bound to
2 follow the decisions of the South Carolina supreme court,
3 which consistently have said, parole eligibility is not an
4 appropriate factor for a juror's consideration, in the
5 same way that they have implicitly said the other
6 collateral matters of potential release are not
7 appropriate matters.

8 QUESTION: I suppose if the prosecutor had said,
9 I have no objection to the giving of a Simmons
10 instruction, that would not necessarily have meant it
11 would have been given if the trial judge had felt it was
12 not consistent with the rulings of the South Carolina
13 supreme court or this Court.

14 MR. ZELENKA: That's correct. The prosecutor
15 may have been willing to do it, the defense counsel may
16 have been willing to do it, but the trial judge
17 necessarily would not have had to do it under the decision
18 of the supreme court, which expressly says it's not
19 supposed to be given except when future dangerousness is
20 argued. That was the land of the law --

21 QUESTION: Mr. Zelenka --

22 MR. ZELENKA: -- at that time.

23 QUESTION: -- what other State -- do you know if
24 any other States are relying upon our language in Simmons
25 that said that future dangerousness had to be argued?

1 MR. ZELENKA: Yes.

2 QUESTION: I mean, suppose we changed that in
3 this case and just said, oh, foo, it doesn't matter
4 whether it's argued or not, what State would have their
5 judgments of conviction and death penalty overturned?

6 MR. ZELENKA: Pennsylvania would be directly
7 affected by it. The cases we cite in Pennsylvania look to
8 whether an argument of future dangerousness is given.
9 They've determined arguments or evidence of future
10 dangerousness are not given when they have an aggravating
11 factor, if the defendant has a prior history of violent
12 crimes, when his prior record is presented. They look, in
13 the same way we submit the South Carolina supreme court
14 has been looking, as to whether in fact future
15 dangerousness is there.

16 In fact, I believe the Pennsylvania supreme
17 court says future dangerousness has to be specifically
18 pointed out to the jury for that argument to in fact come
19 in, so Pennsylvania would be also directly affected by
20 whether that future dangerousness --

21 QUESTION: Your opponent tells us that South
22 Carolina and Pennsylvania are the only two States who are
23 sort of the rear guard against giving the Simmons
24 instruction. Just so you have a fair opportunity, would
25 you tell what is the State's interest that's really served

1 by refusing to give the instruction that most States seem
2 to think pretty ordinary?

3 MR. ZELENKA: Well, I think the State interest
4 is basically that the supreme court of South Carolina
5 wants the jurors to focus on the particular
6 characteristics of the defendant and the particular
7 circumstances of the crime, and not be concerned with
8 potential collateral matters such as potential release
9 which may divert the attentions to some speculative issue
10 which may not in fact ever occur, that in fact the life in
11 prison that they would get with the jury sentence, whether
12 it's parole-eligible or not, may, in fact, under the
13 unique characteristics of this defendant, be as much as a
14 life sentence whether there's parole eligibility or not,
15 that he would serve the entire time in prison.

16 Again, addressing one of the questions about the
17 existence of pardon, pardon exists in South Carolina.
18 It's not in the hands of the Governor. It's in the hands
19 of the South Carolina Department of Probation and Parole.
20 They make that determination, so that also does exist as
21 soon as a conviction is entered on any inmate in South
22 Carolina.

23 MR. ZELENKA: I suppose that a State could game
24 the system, couldn't it, by providing for parole
25 eligibility even when there is a life imprisonment

1 sentence but appointing a parole commission that is so
2 tough that it never gives parole. Then the jury would be
3 instructed that unless you condemn this person to death,
4 there's a possibility that he'll be paroled, although in
5 fact the possibility's not very realistic.

6 MR. ZELENKA: I think that's the State interest
7 that is concerned about going into those collateral
8 matters, that in fact those issues may weigh upon the
9 jurors' decision but may not, in fact, be what exactly
10 happens, because the parole board may be such that it
11 would never parole. There may be a parole board that
12 always paroles, but again there's -- they're elected every
13 4 years, essentially, in South Carolina and that may
14 change every 4 years, so we can't predict how that
15 situation would arise any more than pardon, any more than
16 a change of law.

17 We submit that the instructions that were given
18 in this case adequately complied with South Carolina law.
19 Further, if -- we also submit that in fact what occurred
20 in this case should be seen to satisfy Simmons because, as
21 I said, the jury was instructed on three occasions that
22 life imprisonment in fact means until death of the
23 offender, that life imprisonment in fact means
24 incarceration until the death of the offender. That is
25 not the --

1 QUESTION: But when a jury asks -- I mean,
2 obviously this jury thought that was ambiguous because
3 they asked the judge, in effect, what does it mean --

4 MR. ZELENKA: They --

5 QUESTION: And the judge did read the statute up
6 to that point, life imprisonment means until death of the
7 offender, right?

8 MR. ZELENKA: That's correct.

9 QUESTION: And just didn't go on with the rest
10 of the statute, which would have made it plain what that
11 meant.

12 MR. ZELENKA: Well, we take the position that it
13 was plain that life imprisonment means until the death of
14 the offender in fact means imprisonment until the death of
15 the offender. Reasonable juries we think should
16 understand that, and --

17 QUESTION: But when the judge couples that with
18 a statement, now, don't you worry about parole, that's
19 none of your business, the implication is that there is
20 such a thing.

21 MR. ZELENKA: Well, consistent with South
22 Carolina law they said that parole eligibility or
23 ineligibility is not for your consideration, but that
24 followed the language that life imprisonment means until
25 the death of the offender. We think a juror should have

1 understood that to mean, in fact, that he will be in
2 prison forever.

3 QUESTION: But if that's the case it would be
4 just harmless to give me -- it would be harmless to give
5 them the additional sentence, if you're reading is
6 correct. Why not read the other sentence and remove any
7 doubt?

8 MR. ZELENKA: Because under South Carolina law
9 they were required under State v. Southerland to limit the
10 way that answer was made, and the judge was complying with
11 the South Carolina law mandate on that, but also the jury
12 did not appear to be confused because, consistent with
13 this Court's opinion in Weeks v. Angelone, they're
14 presumed to follow their oath and instructions, and they
15 did not come back and ask a further question after they
16 received that information.

17 The defense counsel was not prevented from
18 making his argument that the defendant, in fact, would
19 serve life in prison, in jail. In fact, it's clear that
20 with the information the defense counsel made, they
21 stated, and it's set forth at page 39 and 40 of our brief,
22 that the question is, will the State execute him, or will
23 he just die in prison? We ask that he be able to spend
24 his natural life there. Life in prison until death.
25 Wesley Shafer is going to prison and staying there.

1 QUESTION: But is not the case that the defense
2 attorney asked if he could read the rest of the statute,
3 including, starting with no person sentenced to life in
4 prison is eligible for parole? He was not -- he wanted to
5 read that, and he was not allowed to.

6 MR. ZELENKA: That's correct. He asked that
7 that be read as part of the instruction, and he was not
8 authorized to have that happen. The judge made a
9 determination that that shouldn't be presented, because --

10 QUESTION: Not the judge, and not defense
11 counsel?

12 MR. ZELENKA: That's correct.

13 QUESTION: I had understood from your colleague
14 that not only was the instruction refused, but the effort
15 of the defense counsel to himself read the statute as part
16 of his closing argument was refused.

17 MR. ZELENKA: No, I don't recall that occurring
18 within this particular record. It may have, but my
19 understanding was, what he was seeking to do was to in
20 fact have the judge make that instruction at the time --
21 at the outset of the case, that that language be given.

22 Now, if the judge made that instruction --

23 QUESTION: Can you check the record and tell us
24 if that's the case? Not right now, you have no time left,
25 but advise us subsequently?

1 MR. ZELENKA: Yes, I will. I know that there
2 was an earlier motion in limine made by the prosecution
3 that he not be able to say that there -- the defendant be
4 in prison for the rest of his life.

5 That was removed, based upon the way the
6 instructions ended up coming and, in fact, the defense
7 counsel at page 198 said, when they say give him life,
8 he's not going home, a child spend the rest of his life in
9 prison, send a 19-year-old to prison for the rest of his
10 life, was the argument that he made.

11 We submit that due process in this particular
12 case was satisfied. There was no false dilemma presented
13 by either the facts or circumstances, or the law as
14 defined in this particular case, and we would request that
15 the conviction and death sentence of Wesley Shafer be
16 affirmed.

17 QUESTION: Thank you, Mr. Zelenka.

18 Mr. Bruck, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF DAVID L. BRUCK

20 ON BEHALF OF THE PETITIONER

21 MR. BRUCK: Thank you, Your Honor. Justice
22 O'Connor asked whether the prosecutor or judges had the
23 power to give this instruction whether Simmons is seen to
24 require it or not.

25 In the record of this case that you have here,

1 there is an excerpt from a subsequent case tried by the
2 same trial judge, Judge Hayes, State v. Robertson, which
3 was added to this record in the lower court, in which the
4 same argument by the same prosecutors in an adjoining
5 county was made in which Judge Hayes ruled that he would
6 give the instruction and stated, this has bothered me ever
7 since the Shafer case, so until the Shafer decision from
8 the State supreme court, this was an area of considerable
9 discretion and, in fact, most prosecutors didn't make an
10 issue of it and the instruction was very often given.

11 But now, the South Carolina supreme court has
12 made quite clear that except in very rare cases involving
13 a recidivist statute that's almost never invoked, the
14 life-without-parole section of the statute will never be
15 given unless this Court rules otherwise under the Simmons
16 case.

17 The last thing I want to say is that the
18 near-unanimity of the States on this issue really does
19 demonstrate, I think, a paradigmatic example of a due
20 process violation, where the considered judgments of the
21 American people on this claim, as expressed through their
22 courts and legislatures, is already quite, quite clear.

23 Now, I had thought that Simmons was also clear
24 as to what the Due Process Clause required, but clearly in
25 South Carolina it is not clear enough, so I would hope

1 that this Court will decide all of the issues that are
2 presented by this record whether the South Carolina
3 supreme court reached them or not. I think there's no
4 need for another analysis such as went on in the Kelly
5 case.

6 QUESTION: Mr. Bruck, do you know the answer to
7 the question that was asked about -- I was under the
8 impression that defense counsel had asked to be allowed to
9 say this, or was told he couldn't say it.

10 MR. BRUCK: Your Honor, I was under that
11 impression, too, and I was just looking through the joint
12 appendix right now. I recall Mr. Banks, defense counsel,
13 saying that he wanted to read that to the jury, but I
14 can't put my finger on it right now. If I may, I will
15 file a letter with the Clerk giving the citation if, in
16 fact, my recollection is correct.

17 And for those reasons we hope that the Court
18 will take up all of the issues presented by this case and
19 will reverse the death sentence imposed.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bruck.
21 The case is submitted.

22 (Whereupon, at 12:11 p.m., the case in the
23 above-entitled matter was submitted.)

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