

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-185
TITLE CHRIS SIMOPOULOS, Appellant,
v.
VIRGINIA
PLACE Washington, D. C.
DATE November 30, 1982
PAGES 1 thru 57



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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in 81-185, Simopoulos against
4 Virginia.

5 Mr. Lucas, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF ROY LUCAS, ESQ.,
8 ON BEHALF OF THE APPELLANT

9 MR. LUCAS: Mr. Chief Justice, and may it
10 please the Court, this appeal from the Supreme Court of
11 Virginia dates back three years and one day ago, when a
12 team of Falls Church police arrived at the American
13 Women's Clinic in that city. Dr. Simopoulos, a
14 gynecologist, was inside with his staff and numerous
15 patients. He practices there as well as in a Woodbridge
16 office and at four hospitals in Northern Virginia where
17 he has staff privileges as a board certified
18 obstetrician/gynecologist.

19 The police seized the clinic, secured it.
20 They arrested Dr. Simopoulos, searched the premises,
21 photographed the area, including the operating room, the
22 laboratory, and the various pieces of equipment that he
23 had there. They in particular had a search warrant and
24 seized the medical records of one young woman who has
25 gone by initials during the course of this case, and I

1 will continue to do so. They also seized the sign-in
2 sheet that had the names of all of the patients who were
3 there on that particular day. Dr. Simopoulos was --

4 QUESTION: Why are these factors relevant to
5 the basic issue presented?

6 MR. LUCAS: These are basic background facts,
7 Your Honor. That is all. I was getting to the charge
8 now.

9 QUESTION: I fail to see what they have to do
10 with the case.

11 MR. LUCAS: They are just background about the
12 fact that he was then arrested, he was then charged
13 under the particular Virginia statute, the Virginia Code
14 18.2-71. The statute defines as a felony any abortion
15 "except as provided" in the other sections that are
16 within the particular article. The statute is in its
17 language remarkably like the statutes from 1848, the
18 first statute up through 1970, except the earlier
19 statutes were included in one paragraph, whereas -- and
20 this was significant to the Virginia Supreme Court --
21 the current statute is in several different statutory
22 sections.

23 The indictment, which is set out in the
24 jurisdictional statement, Pages 3 through 4, charged
25 only the violation of the one statute, the -71 statute,

1 which on its face declares all abortions illegal except
2 as provided in the other statutory sections.

3 The indictment did negate two of the separate
4 sections, the section pertaining to the length of
5 pregnancy and that the indictment alleged, and it was
6 not contested, that pregnancy was in the second
7 trimester. The indictment also negated the question of
8 whether the abortion had been performed in a hospital or
9 somewhere else.

10 The indictment did not negate, however, the
11 74-1 section on medical necessity. The prosecution
12 theory, as expressed in the indictment and in the
13 various arguments, particularly the closing argument at
14 449 of the Joint Appendix, was that the Commonwealth had
15 only to prove some act by the doctor with intent to
16 cause an abortion, and that that constituted the
17 sufficiency of the crime.

18 According to the prosecution theory, the crime
19 was essentially complete when P.M. left Dr. Simopoulos's
20 American Women's Clinic, provided that she later
21 somewhere aborted, and provided that the prosecution was
22 able to connect up the saline installation procedure
23 with either the demise of the fetus or the abortion of
24 the fetus.

25 There was a bench trial in this case rather

1 than a jury trial, at which numerous arguments were
2 made, of which three have remained in our presentation
3 to the Court here. In pretrial hearings that lasted
4 about a day and a half, the defendant put on evidence to
5 challenge the constitutionality of the statute and to
6 challenge the arguments to challenge the defects in the
7 indictment and the definition of the offense.

8 We called various expert witnesses to deal
9 with the question of whether there was any health or
10 other basis for the statute. We had three gynecologists
11 from Northern Virginia experienced with second trimester
12 abortions, as well as one particular gynecologist who
13 had conducted an extensive study on out-patient saline
14 abortions.

15 QUESTION: Mr. Lucas --

16 MR. LUCAS: Yes, Mr. Justice.

17 QUESTION: -- it would help me if you would
18 describe the type of clinic, tell me whether it is
19 licensed under Virginia law as an out-patient hospital.

20 MR. LUCAS: Your Honor, the clinic does not
21 have a license as an out-patient hospital. We submitted
22 in our reply brief -- the Commonwealth raised for the
23 first time in this Court the question of whether the
24 out-patient hospital requirements would apply. There
25 are two types of out-patient hospital licenses in the

1 state, and --

2 QUESTION: Was the clinic licensed under the
3 laws of Virginia?

4 MR. LUCAS: It was not licensed under the laws
5 of Virginia. Dr. Simopoulos sent a letter inquiring
6 about licensure on February the 13th, 1980, which
7 appears as an appendix to our reply brief.

8 QUESTION: Well, that was after all these
9 events had occurred, though, was it not?

10 MR. LUCAS: That's correct.

11 QUESTION: But he never applied before?

12 MR. LUCAS: He never applied. He was advised
13 in the response from the Commonwealth that his office
14 could not become licensed as --

15 QUESTION: Well, yes, again but this was after
16 the events that led to his indictment.

17 MR. LUCAS: That's correct. I presume the
18 interpretation would have been the same.

19 QUESTION: But getting to my brother Powell's
20 question to you, could he have applied for certification
21 as an out-patient surgical hospital?

22 MR. LUCAS: I would think that the
23 interpretation the Attorney General offered in denying
24 him later would have applied earlier. The fact of the
25 prosecution --

1 QUESTION: That wasn't my question. Could he
2 have applied?

3 MR. LUCAS: He could have theoretically --

4 QUESTION: To whom? To whom?

5 MR. LUCAS: He could have applied to the State
6 Department of Health, the same people that license
7 hospitals in general. The Attorney General told him he
8 had to build a hospital, however.

9 QUESTION: Has anyone tried to get
10 certification as an out-patient surgical hospital?

11 MR. LUCAS: As first -- There are some
12 out-patient abortion hospitals in the Commonwealth that
13 are licensed to do first trimesters. It is very
14 unclear, and certainly --

15 QUESTION: Well, he did -- Dr. Simopoulos also
16 did first trimester abortions, did he not?

17 MR. LUCAS: That's correct.

18 QUESTION: But he never sought first
19 certification?

20 MR. LUCAS: He did not attempt to apply for
21 that, and the state has never required him to. The
22 state has treated him as a physician's office where
23 first trimester abortions might definitely be performed
24 without question under Virginia law. The state has
25 never taken the position in any way that he was required

1 to --

2 QUESTION: Well, what I am really getting to,
3 are there -- of the -- I gather there are several
4 clinics rather than hospitals, abortion clinics, are
5 there not, in Virginia?

6 MR. LUCAS: The record is quite silent on
7 that, but I am certain there are.

8 QUESTION: All right. And the record doesn't
9 tell us how many, if any, of them have obtained
10 certification?

11 MR. LUCAS: There is no evidence that a
12 facility performing second trimester abortions could
13 even obtain certification. There is no evidence in the
14 record whatsoever of that. The analysis of the
15 different out-patient licensing regulations might even
16 suggest that they are not applicable.

17 The Virginia Supreme Court at one point in its
18 opinion interpreted the abortion law to require
19 abortions at every stage to be inside the hospital.
20 That would seem to exclude any out-patient facility,
21 because the out-patient facility by definition sends the
22 patients home at the end of the surgical procedure in
23 the afternoon.

24 QUESTION: The out-patient surgical hospitals
25 are described as hospitals under the Virginia

1 regulations.

2 MR. LUCAS: They are indeed, but they are
3 prescribed as hospitals that are for day type surgery,
4 where the patients do not stay overnight, and --

5 QUESTION: But only for -- second trimester
6 abortions are different from the first trimester
7 abortions that can be performed in a different type
8 surgical hospital.

9 MR. LUCAS: I don't believe I understood your
10 question. I think --

11 QUESTION: Well, there is a category under the
12 Virginia regulations of out-patient surgical hospitals,
13 and I assumed that they were the places that under
14 Virginia law second trimester abortions normally would
15 be performed.

16 MR. LUCAS: There is absolutely nothing in the
17 record or any of the health department reports or
18 anything to support that. I have no knowledge or basis
19 in the record to think that a second trimester abortion
20 has ever been performed in an out-patient surgical
21 hospital, and that is something that was never even
22 mentioned until this level. The Virginia Supreme Court
23 had no opportunity to interpret it, to even determine
24 whether the out-patient surgical hospital question -- I
25 would anticipate that if we ever had an opportunity to

1 respond to that issue raised at this point by the
2 Virginia Attorney General, that we would be able to show
3 that there are very few facilities licensed as
4 out-patient surgical hospitals.

5 We would show that according to the Attorney
6 General, they would not let Dr. Simopoulos obtain the
7 type of license for second trimester abortions he had
8 requested, because the Assistant Attorney General in the
9 letter in the reply brief told him he would have to
10 build a hospital. And I would submit to the Court that
11 as far as this record shows, the only places where
12 second trimester abortions are done, certainly in
13 Northern Virginia, are in the two hospitals, the Fairfax
14 Hospital and the Alexandria Hospital. That is out of
15 well over 20 hospitals in the Northern Virginia area.
16 There are 95 in the state. Which shows the sharp
17 restrictive impact, certainly, of the statute. And the
18 --

19 QUESTION: May I ask you, Mr. Lucas, one other
20 question on the Virginia regulations, just to be sure I
21 understand it correctly? Part 3 deals with "hospitals"
22 that are abortion clinics in which only first trimester
23 abortions may be performed. Am I correct in
24 understanding that your client did not even have that
25 kind of license?

1 MR. LUCAS: That is correct. He was never
2 required to apply for one. I would presume that applies
3 to non-physician owned type facilities. This was a
4 physician's office that happened to be extremely well
5 equipped. The Commonwealth never required him to apply
6 for it, and since it would be a misdemeanor for him not
7 to if it was required, presumably he was operating a
8 perfectly lawful place.

9 The evidence certainly in the record about Dr.
10 Simopoulos's clinic would show that he had all of the
11 facilities that would have met the requirements of the
12 first trimester abortion clinic if there had been any
13 reason for him to apply for it.

14 Certainly the testimony of the expert
15 witnesses, I believe three of them actually went and
16 viewed his clinic before they testified in order to be
17 able to compare the type of facility that he had with
18 the type of facility that they utilized at the Fairfax
19 Hospital, and each of them testified that he had far
20 more extensive equipment. He had the highest
21 qualifications one could have, not only the training in
22 GYN but the training in emergency medicine that he had,
23 and he had the extra equipment that would be necessary
24 that he preferred to have, equipment which was not at
25 all present in the hospital context.

1 The requirement that abortions be done within
2 the hospital stops at that point, and as the record in
3 this case shows, the hospital simply used a standard
4 treatment room with no special equipment in it
5 whatsoever.

6 One of the documents submitted by the
7 Commonwealth in their submissions, in the Virginia
8 addendum at Page 80, is the American College of OB/GYN
9 Technical Bulletin from 1976, which points out that
10 saline installation abortions can safely be done in a
11 standard treatment room, and I would submit that shows
12 to us that the facility that he had was far -- in far
13 better condition. It also points out the low mortality
14 rate from the saline installation procedure, and that it
15 could even be cut in half using the various advanced
16 techniques which there was testimony that Dr. Simopoulos
17 was utilizing.

18 And that goes strongly in favor of cutting
19 against any health interests which the state has
20 offered, and the state has only made that contention
21 pertaining to the health interest.

22 The Commonwealth at the pretrial hearing
23 submitted no evidence whatsoever. They did not call a
24 single expert witness in support of what burden they
25 would have to show a health interest of the state. They

1 didn't call anyone. They didn't call any witness of any
2 kind. And they simply did not make any attempt, and the
3 Virginia Supreme Court in its opinion ruled what I
4 believe is a clearly erroneous standard of review under
5 the decisions from this Court that the burden entirely
6 of showing the statute to be unconstitutional was on the
7 defendant, on the physician.

8 The decisions of this Court have certainly
9 indicated that, from Roe v. Wade onward, that the
10 Commonwealth would have some burden of showing a
11 maternal health interest, showing a compelling interest,
12 showing that their regulations were narrowly tailored,
13 that they were reasonably related to maternal health,
14 and the Commonwealth in this case made no attempt
15 whatsoever to meet that burden.

16 QUESTION: Do you get any guidance from the
17 cases in this Court about the constitutionality of
18 requiring second trimester abortions to be performed in
19 a hospital?

20 MR. LUCAS: There have been mentions from time
21 to time in the Court's opinion from Roe and onward.
22 Most of the mentions I have seen in the opinions have
23 indicated in the second trimester regulations reasonably
24 related to maternal health may be valid. Roe used that
25 terminology. Roe indicated there were various types of

1 reasonably related health regulations which the state
2 might attempt to apply.

3 QUESTION: And one of them was what, a
4 hospital requirement?

5 MR. LUCAS: Roe did refer to the possibility
6 of a hospital requirement. Roe did not squarely
7 indicate that the hospital requirement would be
8 considered valid. At the time, as pointed out in the
9 American Medical Association brief, there was very
10 little evidence about the safety of second trimester
11 hospital procedures. Abortion had been illegal in this
12 country. There was no record, no evidence in that
13 case. And the issue was certainly never addressed by
14 anyone, and it was considered to be, I would think, a
15 guideline from the Court as one of the possible types of
16 regulations, as opposed to a definitive holding, since
17 the second trimester hospital requirement was not at
18 issue.

19 Subsequently, in the Danforth case and the
20 Colautti case, this Court has certainly carefully
21 scrutinized the basis of restrictions and prohibitions
22 in the second trimester abortion area. In the Danforth
23 case, where the Court had the question of an attempt by
24 the state of Missouri to outlaw saline abortions, the
25 Court carefully examined the basis for that attempted

1 prohibition, and pointed out on the evidence in that
2 case, as later in Colautti, that the saline installation
3 technique was one of the primary techniques, if not the
4 primary technique for that 15 percent or so of patients
5 who find themselves in the second trimester, and that
6 Danforth specifically pointed out that on that record at
7 that time, the saline installation procedure had a lower
8 mortality rate than that of childbirth, which was one of
9 the important factors considered in the Danforth case.

10 Now, that was on a 1974 record. There have
11 been eight years of medical technology developments
12 since that time, which would only enhance the position
13 of the defendant in challenging the absence of any
14 maternal health basis for the statute at present.

15 We argued in our first primary point with one
16 of the criminal procedure questions, since the
17 underlying statute need not be reached if the Point One
18 or Point Two is persuasive to the Court. The statute
19 under which the doctor was charged criminalizes all
20 abortions as construed by the Supreme Court of
21 Virginia. It would allow the indictment of any
22 physician for performing any abortion. The physician
23 would then at least have to evoke and perhaps come
24 forward with more in the way of proof that the abortion
25 was justified under that particular subsequent statute.

1 This approach to the case, the Virginia
2 Supreme Court did to avoid the other problems of United
3 States v. Vuitch. The United States v. Vuitch statute
4 is so similar to the Virginia statute in many ways,
5 except it is all incorporated into one paragraph. The
6 Virginia Supreme Court construed its statute as being
7 different statutory sections, and therefore reaching a
8 different result.

9 As it was construed, however, the Virginia
10 Supreme Court then ran immediately into questions that
11 did not deal with the question of are you violating the
12 constitutional rights of a physician and a patient when
13 you allow a physician to be indicted under a statute
14 simply for performing an abortion. If it is a first
15 trimester abortion, it falls right in the language of
16 that --

17 QUESTION: Why can your client complain about
18 that aspect of the statute since I understand he was
19 involved with a second trimester abortion?

20 MR. LUCAS: Well, he is primarily complaining
21 about the second trimester. I am just illustrating how
22 the statute is construed. The statute as construed
23 would outlaw all second trimester abortions also.

24 QUESTION: Yes, but outside the field of free
25 speech and so forth, haven't we adopted the position in

1 that kind of a challenge that you can challenge the
2 parts of the statute that apply to your conduct, but not
3 parts of the statute that apply to other people's
4 conduct?

5 MR. LUCAS: We cited cases in our reply brief,
6 such as Eisenstadt v. Baird, Broderick v. Oklahoma,
7 which have applied the standing concept in a broader way
8 when the right of privacy is concerned, and the Court
9 has certainly --

10 QUESTION: You think Broderick versus Oklahoma
11 supports your position?

12 MR. LUCAS: On the standing question, yes.

13 QUESTION: On the merits, do you think it
14 supports it?

15 MR. LUCAS: And on the merits, it is a First
16 Amendment case, so I don't think it would be
17 applicable. We didn't examine it on the merits, but it
18 does rely on Eisenstadt v. Baird, which was a criminal
19 prosecution under the anti-contraceptive law, in which
20 the Court gave broad standing to Mr. Baird to raise and
21 assert the rights, and here you've got a situation of
22 physicians treating patients at all kinds of different
23 stages of pregnancy.

24 In this particular situation, you've got --
25 you'll have physicians treating patients at 13 weeks, 15

1 weeks, 17 weeks, 19 weeks, treating patients by three or
2 four different types of second trimester procedures, and
3 the concepts of standing the Court has enunciated would
4 certainly support the view that the physician should
5 have standing to raise the interests of his entire range
6 of second trimester practice and the entire range of
7 patients, that he should not be confined to 22.0 weeks,
8 and then there be another case in this Court three years
9 later on 23.0 weeks or 19.0 weeks.

10 We have attempted to deal with that
11 extensively in our brief. Both the majority and the
12 dissenting opinions in Singleton v. Wulff discuss
13 standing questions involving access to abortion in a way
14 which we have discussed in our brief and we believe is
15 strongly supportive of allowing the doctor full standing
16 to challenge the statute in its full scope.

17 The trial court did not make any findings
18 whatsoever or address the question of this burden of
19 production in the medical necessity question, and we
20 would suggest to the Court that cases such as Sandstrom
21 and Patterson v. New York would apply in a way which is
22 helpful to the defendant in that when one looks at the
23 facts of what actually happened in this case in the
24 transcript, it is crystal clear that the prosecution
25 made no attempt to disprove medical necessity.

1 It is crystal clear that the trial court never
2 made any instruction to itself or to discuss with
3 counsel or -- in any way as to where that burden would
4 lie. The trial court completely disregarded the medical
5 necessity question. It is clear that under those
6 circumstances, in a case such as Sandstrom and the other
7 cases we have cited, that medical necessity would be not
8 only a statutory defense, it would be a constitutional
9 defense, and that if medical necessity --

10 QUESTION: If it is a statutory defense, I
11 presume that the trial court is thought to have
12 considered it, and that the Supreme Court of Virginia
13 would have considered it, if it thought it was a
14 statutory defense.

15 MR. LUCAS: Well, the trial --

16 QUESTION: So aren't you basically just asking
17 us to reweigh evidence that has been already addressed
18 by two other courts?

19 MR. LUCAS: Not at all. There is no
20 indication that the trial court -- the trial court did
21 anything other than put the full burden of persuasion on
22 the physician on medical necessity.

23 QUESTION: How about the Supreme Court of
24 Virginia?

25 MR. LUCAS: The Supreme Court of Virginia said

1 that the burden of persuasion was on the prosecution,
2 but that is simply not what happened at the trial.

3 QUESTION: Well, but we take the basic factual
4 issues pretty much as we get them from lower courts, and
5 unless you are asking us to simply reweigh facts, or
6 reweigh the burden of proof or the weight of the
7 evidence.

8 MR. LUCAS: In the cases such as Sandstrom,
9 the Court has looked at the transcript to see what
10 happened, and the Virginia Supreme Court --

11 QUESTION: Well, that was an instruction to a
12 jury in a jury -- in a case tried by a jury.

13 MR. LUCAS: Well, Jackson v. Virginia
14 indicates that in a bench trial the same standards would
15 apply, that you would -- that the trial judge in a bench
16 trial is presumed to instruct himself or herself.

17 QUESTION: Yes, and that is why I was asking,
18 are you asking us to reweigh the evidence in the case
19 under a kind of a Jackson versus Virginia theory?

20 MR. LUCAS: That is certainly part of our
21 argument. Under Jackson --

22 QUESTION: Do you cite Jackson against
23 Virginia in your brief?

24 MR. LUCAS: Extensively, yes, and we cited
25 Sandstrom also, and Patterson also, and we attempted to

1 show that in this case, that because the burden of
2 production on that question involves a constitutional
3 defense, that in that limited area, which would apply in
4 this case, in that limited area, that the burden of
5 production and persuasion should be entirely on the
6 Commonwealth. Otherwise, the Commonwealth can come in
7 and indict people for constitutionally protected conduct
8 in this area, in the First Amendment area, or any other
9 area, and that that is one of the biggest problems with
10 the criminal procedure issues in the case, is that this
11 is not a collateral issue like -- as in Patterson, the
12 emotional disturbance question. This is something very
13 central.

14 If the abortion was necessary for the
15 patient's life or health, then the abortion was
16 constitutionally protected, and the Commonwealth would
17 have the obligation to allege that in the indictment and
18 to come forward with proof on that particular question.

19 QUESTION: Suppose -- suppose it was not
20 necessary for the state to allege it in the indictment.

21 MR. LUCAS: Then the state would, under U.S.
22 v. Vuitch, we would suggest that it is, but if the --
23 under the interpretation that the Commonwealth -- the
24 Virginia Supreme Court offered --

25 QUESTION: Do you think it would be

1 unconstitutional to require that the defendant in such
2 case plead medical necessity?

3 MR. LUCAS: I think that would be a close
4 question, since it is constitutionally protected
5 conduct.

6 QUESTION: What did the Virginia Supreme Court
7 hold in this case?

8 MR. LUCAS: They squarely held that it was not
9 unconstitutional to require him to invoke the question.
10 That is all he had to do --

11 QUESTION: And they also held that he didn't,
12 didn't they?

13 MR. LUCAS: No, they didn't. They addressed
14 the question pretty thoroughly. The Commonwealth has
15 argued that he did not invoke it, but he invoked it very
16 clearly and it is raised in the Joint Appendix, 194
17 through 197.

18 QUESTION: No, but does he just have to say, I
19 invoke the defense? Is that all he has to do? Or does
20 he have to give some credible basis for it?

21 MR. LUCAS: There is no procedure under the
22 Virginia criminal procedure for invoking a particular
23 defense of this nature. There is for insanity and alibi
24 and things of that nature, but there is no special
25 procedure. The invocation in this case was done by

1 counsel's argument concerning U.S. v. Vuitch and the
2 argument that the Commonwealth had the burden of proving
3 all of the elements of the crime, and that appears at
4 194 through 197 of the Joint Appendix.

5 QUESTION: You don't think that in order to
6 invoke the defense, there has to be testimony at the
7 trial supporting the defense at all?

8 MR. LUCAS: That would occur in the case of
9 the defendant's case. And we contended at the motion to
10 strike, at the pages that I cited, that the Commonwealth
11 had the obligation of putting on some of the evidence to
12 refute that constitutional defense.

13 QUESTION: On its side of the case.

14 MR. LUCAS: Pardon me?

15 QUESTION: On its side of the case.

16 MR. LUCAS: Yes. By all means. That the
17 Commonwealth would have to prove that the conduct was
18 not constitutionally protected.

19 QUESTION: Before -- How does the state know
20 what defense the defendant is going to offer?

21 MR. LUCAS: The arguments based on U.S. v.
22 Vuitch, I think, clearly alerted the Commonwealth to the
23 medical necessity question. We made no attempt to hide
24 the question. We raised U.S. v. Vuitch. That is all
25 about medical necessity, and --

1 QUESTION: Do you think that is all the
2 raising that has to go on?

3 MR. LUCAS: I would think so, yes. If the
4 Commonwealth didn't understand at that point, then I
5 would think we have no role, we can't call witnesses
6 during the Commonwealth's case.

7 QUESTION: May I be clear about this, Mr.
8 Lucas? You never have taken the position, have you,
9 that the absence of medical necessity was an element of
10 the offense for the state to prove?

11 MR. LUCAS: I believe we have taken that
12 position throughout.

13 QUESTION: You have? But you are not taking
14 that here today?

15 MR. LUCAS: Oh, yes, I am.

16 QUESTION: Well, I don't understand. Are you
17 taking the position that medical necessity is a matter
18 of defense which then shifts the burden of going forward
19 to the state, or are you taking the position that as
20 part of the state's case it had to prove no medical
21 necessity?

22 MR. LUCAS: The latter.

23 QUESTION: The latter?

24 MR. LUCAS: Yes, Your Honor.

25 QUESTION: Suppose you are wrong on that.

1 MR. LUCAS: Then there are other approaches to
2 it. If the burden is then on the -- it depends on the
3 question then of burden of production. Is the burden of
4 production entirely on the defendant? In this
5 particular case, we would contend that when you get to
6 cases such as Sandstrom --

7 QUESTION: Do you think the Virginia Supreme
8 Court approached -- construed the statute to indicate
9 that the absence of medical necessity was an element of
10 the crime?

11 MR. LUCAS: No, they did not. They construed
12 the statute so that there was only one element of a
13 crime, namely, an abortion being done, that everything
14 else was something that had to be invoked by the
15 defendant.

16 QUESTION: Well, aren't we -- must we not
17 accept that construction of the Virginia statute, and
18 then the question is, is it constitutional as so
19 construed?

20 MR. LUCAS: Yes, accepting that construction
21 of the Virginia statute then takes you immediately into
22 the Roe v. Wade question of whether they can indict
23 people for every abortion in the Commonwealth, and that
24 is the central thrust of our first argument.

25 QUESTION: I know, but suppose, though, it is

1 recognized that medical necessity is a defense, it is
2 not an element of the crime, but it is a defense, which
3 -- the Virginia Supreme Court seemed to recognize it as
4 a defense.

5 MR. LUCAS: They treated it as a defense, yes.

6 QUESTION: Yes. And is it constitutional to
7 treat it as a defense?

8 MR. LUCAS: I would think not.

9 QUESTION: Well, you say it is not.

10 MR. LUCAS: We have argued strenuously that it
11 is not.

12 QUESTION: I know. I know, but that is where
13 we are in this case, isn't it, on this issue, is whether
14 or not treating it as a defense, but with -- and
15 requiring the defendant to come forward with some
16 evidence about it, is constitutional?

17 MR. LUCAS: That is certainly where we are,
18 yes.

19 QUESTION: Mr. Lucas, self-defense to a
20 murder, is the government obliged to reach that in its
21 case?

22 MR. LUCAS: Well, this Court I don't believe
23 has decided that, but addressed it in the --

24 QUESTION: Do you know of any other case like
25 that?

1 MR. LUCAS: Not in this Court, sir. There is
2 a split of circuits, I think, on the question. The
3 Court talked about that in Engle v. Isaac.

4 QUESTION: And you have that the government in
5 the self-defense case has to put on evidence to rebut
6 the self-defense point in the case in chief.

7 MR. LUCAS: Representing a defendant, I would
8 argue that the government does have that obligation.

9 QUESTION: Do you have anything to back you up
10 other than you?

11 MR. LUCAS: Only the decisions at a lower
12 level than this Court, and the discussion that that is
13 at least a substantial --

14 QUESTION: Any in Virginia?

15 MR. LUCAS: In Virginia, Virginia goes the
16 other way. Virginia squarely went the other way.

17 I will save the rest of my time for rebuttal.
18 Thank you, Your Honors.

19 CHIEF JUSTICE BURGER: Very well.

20 Mr. Broaddus.

21 ORAL ARGUMENT OF WILLIAM G. BROADDUS, ESQ.,

22 ON BEHALF OF THE APPELLEE

23 MR. BROADDUS: Mr. Chief Justice, and may it
24 please the Court, Virginia respectfully submits that
25 this Court may, and indeed that this Court should affirm

1 the judgment of the Supreme Court of Virginia based upon
2 the law and the facts of this case. Only by
3 substantially enlarging the Roe v. Wade right and
4 restricting the state's legitimate interest may the
5 Court have a basis for reaching a contrary result.

6 Because the Virginia statute under attack in
7 this case is drawn directly from the description in Roe
8 of legitimate and permissible state regulation, we
9 respectfully urge affirmance.

10 As Mr. Justice Rehnquist has indicated, there
11 are some difficulties with respect to standing in this
12 matter, and we respectfully urge the Court to focus only
13 on those factual situations in which Dr. Simopoulos has
14 a personal interest at stake, and not to permit him to
15 assert hypothetical bases for invalidating or alleging
16 the invalidity of Virginia statutes.

17 I believe that that is certainly consistent
18 with this Court's opinions in Harris v. McRae and in the
19 general line of cases. Eisenstadt v. Baird would, we
20 believe, not be on point in this particular situation,
21 because that case involved a situation in which the
22 defendant in a criminal trial was permitted to assert
23 the rights of distributees of contraceptives. Those
24 persons who were receiving the product were not subject
25 to criminal prosecution, and would not have a forum to

1 assert their rights. So, that took that particular
2 situation out of the general standing proposition.

3 Turning to the major issue in this case,
4 Virginia law imposes with respect to second trimester
5 abortions only three conditions: first, that it be
6 performed after the patient has given her informed
7 written consent; second, that it be performed by a
8 physician; and third, that it be performed in a
9 hospital.

10 Clearly, this scheme is not --

11 QUESTION: Mr. Broaddus --

12 MR. BROADDUS: Yes, ma'am.

13 QUESTION: -- could the clinic have been
14 licensed as a hospital?

15 MR. BROADDUS: We factually do not know
16 whether Dr. Simopoulos's clinic could have been so
17 licensed.

18 QUESTION: Have other clinics been licensed --

19 MR. BROADDUS: Yes, ma'am, they certainly
20 have. There are four, in the most recent compilation
21 that I am aware of, in which out-patient surgical
22 hospitals have been licensed by the Commonwealth to
23 perform surgical procedures in accordance with --

24 QUESTION: Can you briefly state, Mr.
25 Broaddus, what the procedure is for doing that?

1 MR. BROADDUS: Mr. Justice Brennan, that is
2 set forth in the Commonwealth's addendum. It involves
3 filing an application which satisfies the requirements
4 in that -- that are specified by the State Board of
5 Health. Among other things, there has to be certain
6 equipment present within the facility. The doctor has
7 to in writing define certain procedures which he will
8 follow when he performs surgical operations. There have
9 to be certain arrangements for transporting the patient
10 to a general acute care hospital in the event of
11 complications which cannot be handled there in the
12 hospital. There have to be certain arrangements for
13 anesthesiologists, certain arrangements for infection
14 control, and things of this nature.

15 QUESTION: And if Dr. Simopoulos had done all
16 those things, he might have made an application to what
17 agency?

18 MR. BROADDUS: To the State Board of Health,
19 sir.

20 QUESTION: And it might have granted him such
21 a certificate?

22 MR. BROADDUS: Certainly, sir.

23 QUESTION: For this very clinic?

24 MR. BROADDUS: Yes, sir.

25 QUESTION: And for second trimester?

1 MR. BROADDUS: Yes, sir. Now, with respect to
2 the letter, as you observed, that letter was written
3 after the facts, but I think it is also important to
4 note that it was written in response to an inquiry about
5 a certificate of need, which is an entirely different
6 procedure from certification as an out-patient hospital,
7 and also it was based upon the assumption, stated in
8 that letter, that Dr. Simopoulos was simply operating a
9 doctor's office, not a general surgical facility.

10 Now, six weeks after that letter was written,
11 at trial, Dr. Simopoulos was asked the question as to
12 whether he had applied for an out-patient hospital
13 license, and at the time of the events, he had not, but
14 he said at trial that he was then in the process of
15 applying. So certainly he knew at that time that it was
16 possible.

17 The Virginia Supreme Court in its opinion did
18 not focus specifically on out-patient hospital
19 facilities, but it did refer to the broad licensing
20 provisions in Title 32.1 of our code, and --

21 QUESTION: Mr. Broaddus, may I interrupt --

22 MR. BROADDUS: Certainly.

23 QUESTION: -- just to be sure you completed
24 your answer to Justice O'Connor? You said there were
25 four facilities that had been licensed as clinics. Is

1 that pursuant to Part 2 of the regulations that relate
2 not to the abortion clinics but to out-patient clinics?

3 MR. BROADDUS: That's correct, sir.

4 QUESTION: And are they licensed -- and you
5 say -- those four facilities are licensed to perform
6 second trimester abortions?

7 MR. BROADDUS: The Part 2 does not limit the
8 type of surgical procedure which could be provided
9 within that facility. There are four which are licensed
10 as Part 2 facilities.

11 QUESTION: May they lawfully perform second
12 trimester abortions?

13 MR. BROADDUS: Yes, sir. Indeed, the
14 regulations under Part 2 in at least four places
15 specifically refer to the provision of abortion services
16 without limitation within those Part 2 facilities.

17 QUESTION: I see.

18 MR. BROADDUS: Now, they are also --

19 QUESTION: But without limitation as to
20 trimester? I want to get that down very, very securely.

21 MR. BROADDUS: That is correct, sir. Without
22 limitation as to trimester.

23 QUESTION: You are making that representation?

24 MR. BROADDUS: Yes, sir.

25 QUESTION: Mr. Attorney General, when you said

1 that one of the requirements was that these second
2 trimester abortions be performed in hospitals, I take it
3 from what you have subsequently said that you are
4 talking about the out-patient surgical type hospitals
5 described in Part 2 of the regulations?

6 MR. BROADDUS: The Virginia abortion statute
7 does not define hospital. As you noted earlier in a
8 question, that is defined elsewhere, and it includes
9 out-patient surgical facilities. So, the abortion
10 requirement which requires hospitalization would be
11 satisfied by performing the abortion in a general
12 hospital, an acute care hospital, or in an out-patient
13 surgical facility, which is also a hospital by
14 definition under the code.

15 QUESTION: But as long as it -- it has to be
16 licensed. Is that --

17 MR. BROADDUS: Yes, sir, licensed by the
18 Commonwealth, meeting those regulations prescribed by
19 the Commonwealth.

20 QUESTION: It would seem to me that if you
21 read the statute literally, it even would not have been
22 violated if he had had a license under Part 3 of the
23 regulations, because it is still a hospital, but it is
24 not presented by this case.

25 MR. BROADDUS: Except, sir, that in Part 3 of

1 the regulations, by virtue of the regulations
2 themselves, the surgical procedure there is limited --

3 QUESTION: It might have violated those
4 regulations.

5 MR. BROADDUS: Yes, sir.

6 QUESTION: But I am not sure he would have
7 violated the statute under which --

8 MR. BROADDUS: Quite possibly you are correct,
9 sir.

10 QUESTION: Mr. Broaddus, have the Virginia
11 courts interpreted the licensing statute in other cases,
12 to your knowledge?

13 MR. BROADDUS: I am not aware of any decisions
14 which do that, Justice O'Connor. Not to my knowledge.

15 Now, in Roe v. Wade, this Court noted the
16 statistics fully support the conclusion that the state's
17 interest becomes compelling at the end of the first
18 trimester. That is, its interest in protecting maternal
19 health. We respectfully submit that for three reasons
20 the state's interest today is just as compelling as it
21 was in Roe v. Wade.

22 First, the mortality rates for abortion in
23 second trimester is certainly at least equal to, if not
24 greater than mortality rates for natural childbirth.

25 QUESTION: You make that as a flat statement

1 now. There is disagreement, is there not?

2 MR. BROADDUS: Based upon the Table 2 in Dr.
3 Simopoulos's addendum and Table 20 in our addendum, I
4 believe that an analysis of all of the abortions and
5 natural childbirths over the same span of years would
6 yield that result, that it is at least equal to, if not
7 greater than.

8 QUESTION: Well, as I read the briefs, there
9 certainly is disagreement on that proposition.

10 MR. BROADDUS: When one includes all abortions
11 performed in the first trimester, then certainly the
12 mortality rate will be lower, because that is 90 percent
13 of all the abortions, and the mortality rate there is
14 only one. As one goes into the second trimester, there
15 are certain procedures which may have lower mortality
16 rates than natural childbirth, but considering all of
17 the second trimester procedures together, the rate is at
18 least equal to, if not greater than.

19 QUESTION: When was this statute passed?

20 MR. BROADDUS: In 1975, sir.

21 QUESTION: And has it been amended since, or
22 not?

23 MR. BROADDUS: No, sir.

24 QUESTION: And had it been proposed before?

25 MR. BROADDUS: It was -- the revision which is

1 present law was proposed in 1974, when the General
2 Assembly convened following this Court's decision in Roe
3 v. Wade. It was not adopted at that time.

4 QUESTION: Does Virginia have any sort of
5 legislative history behind statutes? Are there
6 committee reports, or hearings that there is any record
7 of?

8 MR. BROADDUS: In this particular situation,
9 no, sir, and as a general proposition there is no
10 legislative history. On occasions where there are study
11 committees and things of that nature, there would be
12 some, but in this particular situation there was none.

13 QUESTION: Were the regulations adopted in
14 June, 1977, in effect at all times relevant to this
15 case?

16 MR. BROADDUS: Yes, sir. They have been
17 subsequently amended in 1980, and I believe again in
18 '81. I don't believe that the amendments are material
19 in terms of the substantive requirements.

20 QUESTION: Who issues the regulations?

21 MR. BROADDUS: The State Board of Health, sir.

22 QUESTION: Is there an administrative law
23 procedure in Virginia for --

24 MR. BROADDUS: Yes, sir, it requires public
25 hearings, advertisement. People have an opportunity for

1 input and consideration.

2 QUESTION: Were these regulations adopted
3 after such a procedure? They must have been.

4 MR. BROADDUS: I can only assume that they --

5 QUESTION: Is there a record kept of that?

6 MR. BROADDUS: Of the proceeding itself?

7 QUESTION: Yes.

8 MR. BROADDUS: I don't know in this particular
9 case whether there was a record kept or not.

10 QUESTION: There is a notice. Is there a
11 proposal sent out?

12 MR. BROADDUS: Yes, sir. There is
13 advertisement, and there are also various means of
14 dissemination of information of proposed hearings on
15 subjects.

16 QUESTION: Well, do you know whether the
17 proceeding generated any interest in the community and
18 that there were responses? Was there public hearing?
19 Was there a public hearing?

20 MR. BROADDUS: With respect to the adoption of
21 the --

22 QUESTION: Of the regulations.

23 MR. BROADDUS: -- of the regulations? Justice
24 White, I cannot answer that question. I simply do not
25 know how extensive the public interest was in those

1 regulations.

2 QUESTION: The regulations recite there was a
3 public hearing on January 26th, 1977.

4 MR. BROADDUS: Yes, sir. I am unable to
5 advise the Court as to how many people attended, the
6 nature of the discussion --

7 QUESTION: But you don't know whether there
8 was a record of it?

9 MR. BROADDUS: No, sir, I do not.

10 QUESTION: Or what the factual basis for the
11 regulation was?

12 MR. BROADDUS: Well, the basis would be in the
13 code of Virginia, which provides that hospitals may be
14 or would include out-patient hospitals under regulations
15 authorized and promulgated by the State Board of Health,
16 meeting certain specified requirements in the code.
17 That's the basis for it.

18 QUESTION: Well, did the statute require that
19 hospitals be licensed?

20 MR. BROADDUS: Yes, sir.

21 QUESTION: Did it require that every second
22 trimester abortion be performed in a licensed hospital?

23 MR. BROADDUS: The criminal code of Virginia
24 does. Yes, sir.

25 Now, as one goes into procedures such as

1 saline amniocentesis, which is the procedure that was
2 used in this particular case, the mortality rate is
3 substantially higher than the mortality rate for live
4 birth, and as one considers the mortality rate for
5 second trimester abortions in relation to the mortality
6 rate for first trimester abortions, the mortality rate
7 for second trimester abortions is much higher. It is at
8 least five times higher for even the safest second
9 trimester procedure, and 17 times higher for the
10 procedure which was utilized in this particular case.

11 QUESTION: When you say hospital, when you
12 said hospital in response to that last question, that
13 includes any clinic like the petitioner's, the
14 appellant's clinic here if he had secured a license as
15 an out-patient hospital.

16 MR. BROADDUS: Yes, sir. That's correct.

17 QUESTION: So it doesn't mean -- the statute
18 does not -- is not limited to a hospital in the
19 traditional sense that we think of hospitals.

20 MR. BROADDUS: That is exactly right, sir.
21 Exactly right.

22 QUESTION: Perhaps I should ask my question
23 another way. Then I will leave you alone.

24 Could the board or whoever issues licenses,
25 whoever issued these regulations, could -- did they have

1 the authority under the statute to permit second
2 trimester abortions to be performed in a facility such
3 as the doctor was running without a license?

4 MR. BROADDUS: Not without a license.

5 QUESTION: So it had no authority whatsoever
6 to exempt him from the licensing requirement.

7 MR. BROADDUS: That's correct, sir. It did
8 not.

9 Now, the American College of Obstetricians and
10 Gynecologists only this year changed its position from
11 that which was referred to in Roe v. Wade, and they have
12 suggested that there are certain limited procedures
13 within a certain limited time in the early part of the
14 second trimester of pregnancy which in their opinion may
15 be safely performed outside of general acute care
16 hospitals.

17 But they say that even those procedures should
18 be performed in out-patient facilities meeting the
19 requirements for surgical out-patient facilities as
20 prescribed by the states, and that they should be
21 licensed by the states.

22 Virginia law requires no more than that
23 organization recommends.

24 QUESTION: Are those standards in evidence in
25 this appendix?

1 MR. BROADDUS: They are referred to, Mr. Chief
2 Justice, in the amicus brief filed by the American
3 Medical Association and the American College of
4 Obstetricians and Gynecologists in the other two cases
5 which the Court will hear this afternoon, and I believe
6 the reference specifically would be on Page 23 and 24 of
7 that brief.

8 Virginia would respectfully suggest that based
9 on H.L. v. Matheson, it is not incumbent upon it to fine
10 tune its statutes to facilitate abortions, but if fine
11 tuning is necessary to accommodate any proven medical
12 advances, which are not present in this particular case,
13 but if that were the obligation imposed upon us, then
14 certainly the legislature would be capable of making
15 such changes.

16 In this particular situation, even Dr. Cates,
17 who suggests that certain procedures could be safely
18 performed outside of hospitals, acknowledges in an
19 article printed on Page 101 of our addendum that other
20 authorities, to use his term, recommend that all
21 abortions in the second trimester be performed in
22 hospitals.

23 I would like to turn briefly --

24 QUESTION: Mr. Broaddus, may I ask you a
25 question?

1 MR. BROADDUS: Certainly, sir.

2 QUESTION: Your fine tuning comment made me
3 think of this. Is it not correct, though, that within
4 the second trimester, that there is only one
5 justification for regulating the procedure, namely,
6 protect the maternal health of the woman involved?

7 MR. BROADDUS: Yes, sir.

8 QUESTION: Now, something in the record, I
9 can't remember what it is, indicated there were some
10 6,000 second trimester abortions performed in Virginia.
11 Is it safe to assume that the state is making sure that
12 all of those are performed according to the standards
13 that are -- the health standards that you are
14 advocating?

15 MR. BROADDUS: I believe, sir, that the
16 information in the addendum suggests that there are
17 approximately 3,000 abortions performed in the second
18 trimester, and that they were performed, or at least
19 there is other information in the addendum that suggests
20 that -- I am getting somewhat confused on my facts.

21 I believe that there are approximately 3,000
22 abortions performed --

23 QUESTION: During what period of time?

24 MR. BROADDUS: In the second trimester.

25 QUESTION: But during what -- during a year,

1 or during --

2 QUESTION: For 1978, and 1979 a similar
3 number.

4 QUESTION: And there is some kind of an
5 enforcement program to be sure they have all been
6 performed in accordance with the statute, is there?

7 MR. BROADDUS: There are requirements that the
8 clinics and the hospitals be inspected annually to
9 ensure that they continue to maintain the standards that
10 they are required to keep. Beyond that, unless it comes
11 to the attention of a local prosecuting authority that
12 there has been a violation of the law, then I don't know
13 of an enforcement program as such designed for this
14 particular procedure.

15 QUESTION: But if in fact a significant number
16 of them were not being performed in appropriate
17 facilities by reason of the statute, then the question,
18 I think, would arise as to whether the statute is in the
19 best health interests of the people involved.

20 MR. BROADDUS: Well, I would respectfully
21 suggest, sir, that there is no information in the record
22 of this case that suggests that they are not uniformly
23 performed in the second trimester.

24 QUESTION: And I take it there is no
25 legislative history indicating what kind of an inquiry

1 the legislature made as to the possible impact of this
2 statute on where these operations might be performed.

3 MR. BROADDUS: There is no written legislative
4 history that we could bring before this Court that would
5 indicate the nature of the inquiry. The committee did
6 make inquiries as to the medical health concerns, but
7 that is not a written document which --

8 QUESTION: As far as public records goes, is
9 this the only prosecution involving a second trimester
10 abortion of which we have any official knowledge?

11 MR. BROADDUS: I am not aware of any other
12 prosecution, sir.

13 QUESTION: You referred to investigations or
14 inspections, periodic inspections by the State Health
15 Department of hospitals. That is done on an annual
16 basis, is it?

17 MR. BROADDUS: Yes, sir.

18 QUESTION: Now, does the State Department of
19 Health inspect in any way establishments of the kind
20 that this appellant was operating?

21 MR. BROADDUS: Not unless he is possessing a
22 license. Without a license, there would be no
23 inspection.

24 QUESTION: On the facts of this case, has he
25 been subject to any periodic examination?

1 MR. BROADDUS: There would be no obligation
2 for the State Department of Health to make such an
3 investigation.

4 QUESTION: He would be just like any other
5 doctor's office.

6 MR. BROADDUS: Yes, sir.

7 QUESTION: General, you talked about there was
8 no written evidence of the state's reason for this
9 statute. As a matter of fact, there is no evidence, is
10 there, in this record, of the purpose of the state?

11 MR. BROADDUS: None in the record of the
12 trial. That's correct, sir.

13 Turning briefly to the two criminal law
14 related questions, Virginia --

15 QUESTION: Well, did the defendant put in any
16 evidence going to the justification for the hospital
17 requirement? Any expert testimony?

18 MR. BROADDUS: The defendant put on experts
19 who testified that in their opinion, his particular
20 facility was sufficiently well equipped, that it was
21 safe to administer the procedure within that facility.

22 QUESTION: They didn't -- He didn't challenge
23 the requirement of having some facility that measures up
24 to standards?

25 MR. BROADDUS: That's correct, sir. He did

1 not. He simply tried to bring himself, as I read the
2 record, within what is a --

3 QUESTION: He could have had a license if he
4 -- He should have been able to get a license if he
5 applied for one?

6 MR. BROADDUS: Yes, sir.

7 QUESTION: Well, I gather, Mr. Broaddus, it is
8 no violation, criminal or otherwise, is it, or was it,
9 for him to operate without a license?

10 MR. BROADDUS: No, sir. No violation, so long
11 as he didn't perform second trimester abortions in that
12 office.

13 QUESTION: I see.

14 QUESTION: Or some other operations that might
15 require hospitalization, without a certificate that he
16 might do so.

17 MR. BROADDUS: I don't know of any other
18 criminal law requirements for hospitalization
19 requirements. Certainly he could maintain his practice,
20 perform first trimester abortions in that facility.

21 QUESTION: Apart from the criminal law, is
22 there any Virginia statute that restricts the kind of
23 operation he might perform in that facility other than
24 second trimester abortions?

25 MR. BROADDUS: I'm not aware of any.

1 QUESTION: Brain surgery or anything like
2 that?

3 MR. BROADDUS: No, sir.

4 QUESTION: He could do that at home. He could
5 do that at home, I guess, brain surgery.

6 (General laughter.)

7 MR. BROADDUS: Well, I would respectfully
8 suggest, sir, that surgeons are not likely to perform
9 appendectomies or other types of operations in their
10 offices.

11 QUESTION: Except in an emergency,
12 conceivably.

13 MR. BROADDUS: Conceivably, yes, sir.

14 QUESTION: If a patient came to the office,
15 and it was obvious that there was a ruptured appendix,
16 conceivably he might be justified in doing it right
17 there.

18 MR. BROADDUS: Certainly. Yes, sir.

19 QUESTION: Well, there are laws against
20 malpractice, I suppose.

21 QUESTION: Or they might well lance a boil, a
22 carbuncle, to dignify it, in the office.

23 MR. BROADDUS: I apologize, sir. I didn't
24 catch your question.

25 QUESTION: What I am trying to say is that

1 there are all kinds of surgical procedures --

2 MR. BROADDUS: Yes, sir.

3 QUESTION: -- minor and major, and would it be
4 violative of Virginia law in any respect if a physician
5 lanced a carbuncle on the back of a patient's neck in
6 the office?

7 MR. BROADDUS: No, sir.

8 QUESTION: And that is a surgical procedure.

9 MR. BROADDUS: Yes, sir, I would agree. Now,
10 that brings up the medical necessity question. The
11 Virginia Supreme Court has authoritatively construed the
12 Virginia statute, and it has decided, indeed, it decided
13 in 1966 or '67 in the Russo case, which it states in its
14 opinion, that the medical necessity issue is a matter
15 for the defense to assert, and once the defense asserts
16 it, then the burden is placed upon the Commonwealth to
17 prove beyond a reasonable doubt that there was no
18 medical necessity.

19 QUESTION: What is involved in the assertion?

20 MR. BROADDUS: That could be brought about
21 either through the cross examination of witnesses for
22 the prosecution, by the introduction of witnesses on his
23 own behalf, or through any other means which brings it
24 to the attention of the court and the prosecution.

25 QUESTION: But it isn't necessarily fatal to

1 the state's case on its side of the case if it puts on
2 no evidence of necessity.

3 MR. BROADDUS: That's correct, sir. That's
4 absolutely correct. Now, in this particular case,
5 counsel for Dr. Simopoulos argued that the indictment
6 was effective because it did not affirmatively negate
7 medical necessity, and that was the argument which I
8 believe the Court will find if it examines the
9 transcript. I do not believe that the Court will find
10 an argument that the Commonwealth was affirmatively
11 under the constitutional obligation to prove in its case
12 in chief that there was no medical necessity.

13 Dr. Simopoulos we do not believe invoked that
14 defense at trial, and how could he? He stated that the
15 girl's condition was normal which he ascertained as a
16 result of his examination of her. He stated that she
17 could carry the fetus to term. He stated, and I quote,
18 that "The option of abortion was entirely up to her, and
19 I had no business in influencing her one way or the
20 other." He simply left the decision entirely up to
21 her.

22 So, we submit that he has no standing to
23 assert that issue at this time, but in any event, the
24 Virginia Supreme Court has found that there was no
25 medical necessity. That finding is certainly supported

1 by sufficient evidence in the record.

2 Also, the court's construction of the statute
3 does not in any way implicate improperly presumptions or
4 in key elements of a crime. Such was the case in
5 Mullaney or in Sandstrom. The defense is never required
6 to shoulder the burden of proof. It simply has to
7 invoke the defense. I think that that will make this
8 particular situation fall well within this Court's
9 decision last term of Engle versus Isaacs, where the
10 defense merely had to invoke the defense of
11 self-defense. The prosecution then had to affirmatively
12 disprove it beyond a reasonable doubt, and the Court
13 concluded that even in those circumstances, that did not
14 mean that on its case in chief, the prosecution had to
15 disprove that as an element of the offense.

16 QUESTION: Mr. Broaddus, may I ask you another
17 question about history? Because when I first read this
18 statute, I understood it to require the procedure to be
19 performed in a conventional hospital, and I have since
20 learned that since 1977, at least, it is permissible to
21 perform it in these other licensed facilities. During
22 the interval between the period when the statute was
23 enacted in 1977 when the regulations were adopted, could
24 the procedure have been performed in any facility other
25 than a conventional hospital?

1 MR. BROADDUS: Prior to '77, sir?

2 QUESTION: Yes. In other words, I am just
3 wondering what the legislature was thinking of when it
4 enacted the statute.

5 MR. BROADDUS: I think prior to '77, sir, it
6 would have been possible to perform it legally only
7 within a conventional general acute care hospital,
8 because the state prior to that time did not have the
9 licensing requirements for out-patient hospitals.

10 QUESTION: Thank you.

11 MR. BROADDUS: On the issue of causation,
12 which is mentioned in Dr. Simopoulos's brief, we shall
13 touch upon that very quickly. Again, the starting point
14 is the doctor's own examination, in which he stated that
15 her condition was normal, and that she could carry the
16 fetus to term.

17 He then injected her with a saline solution
18 for one purpose, to induce an abortion. That was the
19 only purpose. His own witness testified that the
20 procedure works at least 90 percent of the time, and an
21 American College of Obstetricians and Gynecologists
22 Bulletin, which we have printed on Page 78 of our
23 addendum, states the procedure is effective 97 percent
24 of the time within 72 hours.

25 Between the time of the injection and the

1 delivery, the girl had only peanut butter and jelly
2 sandwiches, and pain pills prescribed by the doctor.
3 There was no other intervening cause which was likely to
4 bring about an abortion. Within the normal time --

5 QUESTION: Did he prescribe the peanut butter
6 sandwiches? It sounded as though that is what you said.

7 (General laughter.)

8 MR. BROADDUS: She told the doctor, Mr.
9 Justice Blackmun, that she was going to go to a motel.
10 He said that was okay. And when she went to the motel
11 for the period of -- prior to delivery, she carried with
12 her that supply.

13 Within the normal time period within which the
14 procedure is predicted to work, in fact, it did work.
15 She delivered her fetus just as Simopoulos had
16 predicted, and just as he had intended. So when the
17 evidence is viewed in the light most favorable to the
18 prosecution, as it must be, certainly it is sufficient
19 to permit a rational trier of fact to find beyond a
20 reasonable doubt that the crime was committed.

21 For the reasons which we have stated and the
22 reasons in our brief, we respectfully ask this Court to
23 affirm the judgment of the Supreme Court of Virginia.

24 QUESTION: General, let me ask, suppose there
25 is compliance by an out-patient clinic with the

1 regulations and the law, and they get a license, and
2 they are authorized to perform a second trimester
3 abortion, and -- do they keep the patient there until
4 the abortion is -- or would they have at that time?

5 MR. BROADDUS: The procedure, the surgical
6 procedure has to be performed within the hospital.
7 Certain procedures can be performed, and that is the
8 entire culmination of the process. In this particular
9 situation --

10 QUESTION: It is because of the method that
11 was employed --

12 MR. BROADDUS: Yes, sir.

13 QUESTION: -- that there was an interval.

14 MR. BROADDUS: That's correct, sir.

15 QUESTION: What if a licensed establishment
16 had used this method at this time? Would they have
17 released her until the abortion was complete?

18 MR. BROADDUS: Presumably so, sir, even in a
19 general acute care hospital presumably that would have
20 been the situation. She would have been instructed to
21 return at the appropriate time for the delivery of the
22 fetus.

23 QUESTION: Oh, she would return. She would
24 have been released?

25 MR. BROADDUS: Yes, sir, for the interval

1 between the administration of the procedure and the time
2 when the delivery is anticipated to occur.

3 Thank you, sir.

4 QUESTION: Do you know whether -- Does the
5 record show that she was instructed to return?

6 MR. BROADDUS: If I may answer the question,
7 Mr. Justice Blackmun, that is a matter in dispute. The
8 doctor testified that he did instruct her --

9 QUESTION: That he did or did not?

10 MR. BROADDUS: That he did instruct her to
11 return. His nurse gave her a set of written
12 instructions which do state that she should return. The
13 girl stated that he never instructed her to return, that
14 she told him she was going to a motel. He said that was
15 okay, and she knew exactly what he meant by that, and
16 that when she read the instructions after she left his
17 office, she was confused because she had previously
18 clearly understood that he knew that she was not coming
19 to the hospital at any time.

20 QUESTION: Well, it is disturbing that she
21 delivered in a motel.

22 MR. BROADDUS: It is distressing. Yes, sir.

23 CHIEF JUSTICE BURGER: Mr. Lucas.

24 ORAL ARGUMENT OF ROY LUCAS, ESQ.,

25 ON BEHALF OF THE APPELLANT - REBUTTAL

1 MR. LUCAS: If I may further reply to Justice
2 Blackmun's question concerning whether she was told to
3 return or not, under the Virginia Supreme Court
4 interpretation of the statute, that might not make any
5 difference, but on Page 187 of the Joint Appendix, she
6 squarely admits that the doctor told her to go to the
7 hospital if she had severe cramps. She never threw away
8 the instruction sheets, which were clear, and his two
9 phone numbers 24-hour-a-day were circled in there.

10 This question about ambulatory surgical
11 centers is extremely important, I think, to this
12 particular case, and it is unfortunate there was no
13 opportunity to respond to it in the lower courts or in
14 the trial or to put on a full exposition of it. Looking
15 at the regulations, the Part 3 regulations on
16 out-patient hospitals actually require more extensive
17 extra technology than do the Part 2 on out-patient
18 surgical hospitals.

19 In construing those regulations and reading
20 them as to what do they contemplate, there is no
21 indication whatsoever that the out-patient surgical
22 hospital scheme contemplates second trimester
23 abortions. There is no evidence that a second trimester
24 abortion has ever been done in an out-patient surgical
25 hospital.

1 The Commonwealth named four facilities. The
2 Virginia Heart Institute certainly does no second
3 trimester abortions. The Hampton General Out-Patient
4 Emergency Center certainly does none. The Fairfax
5 Surgery Center is in the community involved here, and
6 was never named by any witness as permitting second
7 trimester abortions. And there is another one in
8 Norfolk, Virginia, that I know nothing about, except it
9 is not in the list of second trimester abortions offered
10 by the Commonwealth in its exhibits. They list no
11 out-patient surgical facility that ever performed a
12 second trimester abortion.

13 Thank you.

14 CHIEF JUSTICE BURGER: Thank you, gentlemen.
15 The case is submitted.

16 (Whereupon, at 11:04 o'clock a.m., the case in
17 the above-entitled matter was submitted.)

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CERTIFICATION

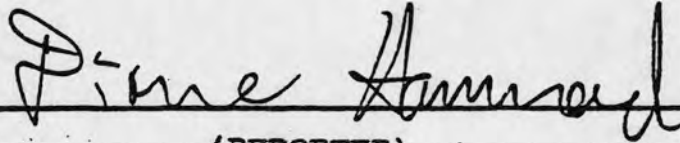
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CHRIS SIMOPOULOS, Appellant, v. VIRGINIA

#81-185

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pina Amador", is written over a horizontal line.

(REPORTER)

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