OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: 89-7691

CASE NO: DALE ROBERT YATES, Petitioner V. PARKER EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL.

PLACE: Washington, D.C.

DATE: January 8, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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DALE ROBERT YATES, :

Petitioner :

v. : No. 89-7691

PARKER EVATT, COMMISSIONER, :

SOUTH CAROLINA DEPARTMENT OF :

CORRECTIONS, ET AL. :

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Washington, D.C.

Tuesday, January 8, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:58 p.m.

APPEARANCES:

DAVID I. BRUCK, ESQ., Columbia, South Carolina; appointed by this Court on behalf of the Petitioner.

MILLER W. SHEALY, JR., ESQ., Assistant Attorney General of South Carolina, Columbia, South Carolina; on behalf of the Respondents.

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P R O C E E D I N G S

(1:58 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-7691, Dale Robert Yates v. Parker Evatt, Commissioner, South Carolina Department of Corrections, et al.

Mr. Bruck, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID I. BRUCK

ON BEHALF OF THE PETITIONER

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

This case appears here for the third time. On two prior occasions this Court has ordered the South Carolina Supreme Court in this capital murder case to grant the relief which Federal law requires. On its third consideration, the second remand by this Court, the South Carolina Supreme Court has now, by a 3 to 2 vote, held the two unconstitutional burden-shifting jury presumptions of an essential element of malice in this case to be harmless error, and the propriety of that harmless error determination is now the issue before this Court today.

The case, as the Court is already well aware, involves an accomplice liability prosecution in which Dale Yates was convicted of murder and sentenced to death for a

homicide which was committed by his accomplice, one Henry Davis, during the course of a robbery, after the time when Yates had already yelled to Davis to leave the scene, had himself left the store, and was either waiting in the car outside or had already fled the area. Davis, of course, was then shot to death by the sole surviving witness to the homicide, one Willie Wood, moments after the decedent was stabbed and died.

The State supreme court has found the instructions on malice to have been harmless error on the grounds that identifying really for the first time 8 years after the trial the real issue in the case to have been whether or not Davis, the actual killer, entertained malice, and not whether Mr. Yates entertained malice. And then having thus, shall we say clarified, and I would submit really changed the issue that was placed before the jury at trial, into one concerning whether Davis entertained malice when he killed the victim, the court then simply grossly misread the simple record facts before the jury in order to find that malice -- that Davis' malice was overwhelmingly proven.

The particular misreadings, I think, which provide the simplest and best basis upon which this case should be decided are simply that the State supreme court found that Davis lunged at Mrs. Wood with his knife, and

that he inflicted a multiple stabbing which resulted in her death. In fact the record contains no evidence that Davis lunged at Mrs. Wood. Indeed the very vague and unclear and unsatisfactory evidence from Willie Wood, the only surviving witness, indicates that it was Mrs. Wood who reached for or grabbed Mr. Davis from the side or from the rear, and then seconds later she was stabbed through the heart.

QUESTION: At this point or at some convenient point in your argument could you comment on the argument of the amicus that once evidence of the use of the knife is introduced the presumption of malice disappears under State law in any event? I take it I am characterizing that argument correctly.

MR. BRUCK: Yes. Of course, I think that is a rather belated attempt to save what is -- in any event what the South Carolina Supreme Court has found to be a burden-shifting and unconstitutional mandatory rebuttable presumption of malice. The -- and I would note, of course, that the State, as respondent, has made no such argument in this case, either in the brief in opposition or in their brief.

But in any event, if the Court were to wish to revisit that underlying claim, I think one would be forced to conclude that there is -- to say that in a case in

which the defendant was not present when the killing occurred, when there was only one witness, the State's witness, who himself did not see -- Willie Wood did not see the stabbing. So it is not fair to say that the -- that -- it cannot fairly be said that the circumstances attending the use of the knife were brought out in evidence. They were not. No one knows exactly how the knife was used, whether Mrs. Wood was stabbed when she lunged at Henry Davis, whether he was flailing in some way trying to get away from the man that was about to put five bullets in him and kill him when he accidentally stabbed Mrs. Wood. All of these things are quite possible, but we simply don't know.

So as far as the amicus, this -- they call it a bursting bubble. I think the real term is a fly away presumption.

QUESTION: But at least as for Yates you certainly -- I'm not sure that you don't know enough about the use of the weapon with respect to Davis. You may well know enough. You certainly -- it doesn't say how many circumstances of its use have to be introduced, the instruction to the jury. It just says once the circumstances --

MR. BRUCK: No.

QUESTION: Well, but giving you the benefit of

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the doubt as to Davis -- certainly as to Yates, the full circumstances of the use of the weapon were introduced. How he fired, it went through the hand, lodged in the chest, and so forth.

MR. BRUCK: Yes, of course.

QUESTION: That, that was quite complete.

MR. BRUCK: Of course, but under South Carolina law that does not create an irrebuttable or conclusive presumption of malice, or it does not -- the State wishes to create a felony murder rule which does not exist in South Carolina. The shooting by Yates was not of the murder victim, and so that cannot, as a matter of law, supply the malice. It is certainly a factor to be considered. It is certainly evidence of Yates' state of mind. But -- but there were contrary, there was contrary evidence, including the fact, the State argued vigorously at trial that this was a, an intent to kill scheme from the beginning, and that was how the case was tried. That was the issue that was -- that was joined.

And there was certainly evidence that Yates did not have the intent to kill anyone else in the store, that he ran out, he said let's go. He ran out of the store still believing that Willie Wood was still alive, which he in fact was, with three unspent rounds in his gun. So the evidence was clearly in conflict as to Yates' intent.

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QUESTION: Well, but you're talking about malice -- you're not contending that malice, for purposes of South Carolina law, means intent to kill?

MR. BRUCK: No, it does not. It -- in this case it was tried as intent to kill. The judge used the term malice interchangeably with intent to kill all the way through his instructions, as I pointed out in the reply brief. There are other ways in which malice can be shown, other than a specific intent to kill a particular individual. However, they are not relevant to this case, both because they were not charged to the jury in this case.

There are two basic theories that the State tries to bring up at this late date. One is so-called depraved heart murder. That is to say a degree of recklessness so extreme that it would be tantamount to intent, and that it would support an inference of malice. And that's, really -- the State basically concedes, or at least fails to disagree with our contention that Davis' intent to kill is not overwhelmingly proven, but they say it doesn't matter because mere recklessness is enough. And mere recklessness is not enough. Recklessness is involuntary manslaughter under South Carolina law. There is, however, a greater degree of recklessness which is known in the common law in most States, I think, and

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certainly in South Carolina as a depraved heart murder.

But to say that you -- that it is proven overwhelmingly by the unsatisfactory and vague evidence in this case that we are not merely dealing with criminal recklessness in the handling of the knife, but depraved heart malice, that it is that degree of recklessness, simply is not supported by the record. If ever there was a fine gradation that our system of law entrusts to the jury to make, it is that.

And as to Yates' --

QUESTION: I think it's more than being reckless, isn't it, to go into a store with a knife in your hand, and when someone tries to stop the robbery, to struggle with a knife in your hand and end up the struggle with the knife lodged in somebody's heart? I mean, you condemn that as reckless action? That's much more than reckless, isn't it?

MR. BRUCK: Well, reckless, you know, is -- under South Carolina -- is more than negligence. It is an -- it is a state of extreme indifference to human life.

QUESTION: Well, isn't that the case when you -- when you commit a store robbery with a knife in your hand and struggle when someone tries to stop the robbery with the knife in your hand, even if you don't intentionally plunge it into someone's heart, struggle in such a fashion

that that's the result?

MR. BRUCK: I do not contend that the jury could not reach that conclusion. I concede that the evidence is there.

QUESTION: Could it reach any other conclusion, other than this is the kind of thing that, other than an absolute intent to kill, which is covered by the intent requirement?

MR. BRUCK: Yes, in all candor I just have to say that I think a jury could reach the conclusion that while it was reckless for him to have been in the situation, for him to be accosted from the side or from the rear by someone that he may not have even known was there, is not evidence that as a matter of law or that conclusively establishes the depraved and malignant heart. That's the language. That is the level of recklessness that is required. It is -- it is a level of recklessness so extreme that it is taken in the law to be the same as intent, to be tantamount to intent.

Now again, I do not deny that the evidence might support or would support that if the jury took that view. But to say that it is overwhelmingly proven, I just don't think is supported by this record. And I think that's why the supreme court yielded to the temptation to exaggerate the record. Now a multiple stabbing is evidence par

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excellence of intent. The only trouble is that there was no multiple stabbing, and there was no lunging.

QUESTION: Does the evidence show how many wounds were inflicted on Mrs. Woods?

MR. BRUCK: Yes, Your Honor, it does. There was a single narrow wound to the chest.

QUESTION: Nothing else?

MR. BRUCK: Nothing else. The, this was a very thoroughly prosecuted case, but the prosecutor did not press on to determine even such details as the amount of force that might be required to inflict that wound. And thus the jury would be quite capable -- it would be quite reasonable for the jury to conclude that this could have been an accidental stabbing, rather than the brutal, vicious, multiple stabbing described without evidentiary basis by the State supreme court.

Because the State supreme court so exaggerated this record evidence, I would submit that this really is all -- as far as this Court need go to decide this case. There was a jury issue as to what happened in that store. The event is entirely depicted through circumstantial evidence. What happened is simply not clear, and it cannot fairly be said that a jury would have had to have found Davis' intent beyond a reasonable doubt simply from the fragments of testimony that were offered by Willie

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Wood.

I'd further point out that Mr. Wood, although his bias is surely an understandable one, he is nevertheless about as biased a witness as one is likely to have. He is testifying against someone involved in the murder of his mother, someone who had himself shot Mr. Wood through the hand. And in addition, Mr. Wood had killed with five shots the actual stabber, in this case Mr. Davis, and naturally had to recall the events in a way that would have made that homicide justifiable. That's not to say that it wasn't justifiable, it's simply to say that a jury could reasonably have been somewhat critical in evaluating Mr. Davis' testimony, and might reasonably have wondered whether they were getting a picture of what happened in that store, sketchy as it was, that was so reliable as to establish malice beyond a reasonable doubt.

QUESTION: Tell me, what did the -- did the supreme court in this latest round here say it was harmless error because the jury -- there was so much evidence of Davis' --

MR. BRUCK: That's correct.

QUESTION: -- culpability that the presumption was harmless error?

MR. BRUCK: That's correct.

QUESTION: And without any reference to Yates'

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culpability?

MR. BRUCK: That's exactly right. They said that Yates' mental state doesn't matter; it's irrelevant.

QUESTION: Because this is an accomplice case?

MR. BRUCK: Because this is an accomplice case. Now, there are --

QUESTION: But, I suppose under our cases the person who is sentenced to death must have himself or herself intended to kill somebody?

MR. BRUCK: Yes, well, the court below got around that by saying that well, he did intend to kill somebody, or at least the jury could have concluded that because he fired at someone else, at Willie Wood, and shot him through his out stretched hand and the bullet landed in his pocket. So that is enough to support, so said the South Carolina Supreme Court --

QUESTION: Well, I know, but I thought they said all they needed to do was to find that Davis was culpable?

MR. BRUCK: That's for the conviction of murder. We're still at the guilt phase. And then -- the trial was tried before Enmund and the direct appeal was decided after Enmund, and the court did its own review -- made its own Enmund findings in effect on direct appeal, and said that Yates had a sufficiently -- that of course is a case, this -- which -- that is an issue which awaits review on

Federal habeas, although I hope we don't have to go there.

QUESTION: So you're just arguing mainly here that there just -- it couldn't have been harmless error because there was so little evidence? Is that it?

MR. BRUCK: Well, that's the first -- that's the first and I would submit the easiest way of disposing of this case. I shouldn't say so little. There simply wasn't evidence that conclusively or overwhelmingly established malice under all the facts and circumstances. The jury could have had -- could have had a doubt.

If the Court were not to accept that view, though, and were to agree with the South Carolina Supreme Court, even when we take away all of the exaggeration on which the State supreme court's opinion and judgment actually rest, we then come to another rather serious problem, which is that it is most unlikely in this case that the jury understood its task to make any evaluation of Davis' malice, for the simple reason that they were never told to do so.

On the contrary, the -- most of the instructions, all except a single little fragment that that State stakes its whole case on, clearly refer to Yates and to Yates' mental state, which would be a plausible way under South Carolina of prosecuting this case. The court -- the trial court charged at the

beginning of the malice instructions that in order to convict one of murder the State must not only prove the killing of the deceased by the defendant, but that it was done with malice aforethought. The killing of the deceased by the defendant, that is Mr. Yates, and that it was done with malice.

QUESTION: But the court's instruction said, "And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck."

MR. BRUCK: Yes.

QUESTION: That doesn't refer to Yates. Nobody would think that --

MR. BRUCK: No, it doesn't. That is the fragment on which the court relies. There are several things I would like to say about that. The first is that the jury would have understood the term killer to refer to defendant, because it's -- the court is referring at the beginning of that same instruction to must prove the killing of the deceased by the defendant. And therefore once they have proven the killing of the deceased in some legal way by the law of parties by Yates, he becomes, for purposes of these instructions, the killer. It's clear

that the jury couldn't have made any sense of these instructions and applied them at all, unless they were willing to treat Yates as the killer that the judge was talking about.

I would further point out that that instruction came before the judge even got to the subject of accomplice liability, so it's unlikely that when the jury heard that instruction they understood it in any way to refer to the mental state of Davis. I think what that -- the jury most likely would have understood, and certainly there is a reasonable likelihood that the jury would have understood that what that instruction meant was at the time of the killing they had to look at the intent of the person on trial, the defendant, who -- against whom the killing had to be proven.

That conclusion is strengthened by the prosecutor's argument in this case, which not once focused on the mental state of Davis, the mental state of malice. Not one word was said about that. On the contrary, the prosecutor said that by the use of the gun, by Yates' use of the gun, that proved that the intent required, the requisite intent -- I'm sorry, the requisite malice was in his heart, that is in Yates' heart. That is the way the prosecutor argued the case.

And under those circumstances we have a

situation a little like Clemons v. Mississippi where the prosecutor argued the case one way and then the State supreme court, without any explanation, disregards all of that and says it was surely harmless because the judge instructed the jury in some other way. In fact in this case the, the judge did not so instruct the jury. And to take this one phrase out of context, as the State does, without any careful attention or any attention at all, I would submit --

QUESTION: Well, what -- are you suggesting we say that they focused on the wrong -- on the wrong evidence, namely the evidence relating to Davis rather than to Yates?

MR. BRUCK: I would --

QUESTION: And ask them to focus on Yates? Or do you think they focused on Yates and said even if -- even if we must look at the evidence of Yates' culpability, that we have already done so, as the evidence is so overwhelming about Yates? Did they say that?

MR. BRUCK: No. The State supreme court never focused on Yates' malice.

QUESTION: Well, you, you expect us to -- would it satisfy you if we said -- sent it back again and said focus on Yates?

MR. BRUCK: Well, with all due respect to the

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South Carolina Supreme Court, I think the time has come when they need some more precise instructions on how this case should be decided. The -- I would suggest that the --

QUESTION: Your argument seems to be that they have focused on Davis rather than Yates.

MR. BRUCK: Yes. Had they focused on Yates this would not have been a closed case at all, because it is clear that Yates' mental state was very much in dispute. Yates argued -- he both contested that he had any malicious intent with respect to any homicide in the -- or the likelihood of any homicide in the store, that there was an express plan to leave without, the moment there was any resistance, without any use of violence.

Now I realize that that plan did not go as expected. He did -- he was ordered by Davis to shoot, and he shot. He then, however, withdrew, or attempted to, and called to Davis to do the same.

QUESTION: Do you -- you want us to decide the whole thing here and say they focused on Davis rather than Yates, and focusing on Yates it couldn't possibly be harmless error, the presumption?

MR. BRUCK: That's correct. I don't think it's necessary to go that far, because even indulging the groundless assumption that the State court -- that the

jury did focus on Davis, the fact remains that the error still isn't harmless. But I don't think there's any fair reading of this record.

QUESTION: Let's assume that the jury focused on Yates, all right? Now the error in question is what? What instructions are we concerned about.

QUESTION: Presumption.

MR. BRUCK: Two presumption, unconstitutional presumptions of malice.

QUESTION: All right. Now --

MR. BRUCK: And if the jury focused on Yates, their question would have been did Yates have malice at the time of the crime.

QUESTION: One of the two presumptions was the bubble presumption, is that correct? Is that the one we're talking about?

MR. BRUCK: It has been described in that way, yes.

QUESTION: Now, why, why doesn't the second sentence of that instruction automatically render the first sentence, "if you consider it error," to be harmless? "I further tell you that when the circumstances surrounding the use of that deadly weapon are put into evidence and testified to the presumption is removed." Now the circumstances were put into evidence and testified

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to, so even if the presumption was an erroneous one, no harm done.

MR. BRUCK: Well, I think it -- it would still have been a, a burden-shifting problem for the jury to determine whether or not the actual circumstances, in other words whether they believed the explanation enough to relieve -- the circumstances suggest, the true circumstances, in other words if you, if you have been convinced of the actual facts, it still has a burden-shifting quality. I don't think there is any way to hammer these -- the so-called fly-away presumption into the round hole of Sandstrom and Malaney. These are, these are old jury instructions which really, I think, are unconstitutional regardless.

Even so we're left with the other unconstitutional presumption which is the intentional doing of -- the presumption which arises from the intentional doing of an unlawful act, and not necessarily a dangerous unlawful act, but any unlawful act, which is to say the carrying of the gun or the plan to commit the armed robbery. And the South Carolina Supreme Court has twice held that this instruction also was a burden-shifting and unconstitutional instruction under Francis v. Franklin.

QUESTION: Could any jury have found that

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presumption to be operative, namely the doing of a willful, deliberate, and intentional unlawful act that wouldn't necessarily have found what is -- what was necessary to establish malice under South Carolina law here, which is an intentional killing?

MR. BRUCK: Sure. Sure. The jury could have found that the doing of the unlawful act was simply the plan to commit the robbery. Now, the State --

QUESTION: And that is not enough under South Carolina --

MR. BRUCK: Absolutely not. The State has attempted to create a law -- if it were enough we would have felony murder in South Carolina. We do not. In fact in this very case on direct appeal, this Court --

QUESTION: Yes. I was rather assuming that you did except in name, and you say you really don't.

MR. BRUCK: Absolutely not. I have cited cases in -- for example the Thompson case, which I've cited in the reply brief, is an armed robbery killing, two shots through the head where there was an argument that there should have been instruction on involuntary manslaughter because the defendant claimed the first -- undoubtedly an armed robbery in a store, rather similar to this, in the same county. The claim was that the defendant said the gun went off by accident. He wanted an involuntary

manslaughter, which is a killing, unlawful killing without malice. The court said no because the second shot was intentional.

Had there been felony murder the answer would have been no because it was during the course of an armed robbery. But that is not the law in South Carolina, and the court cites absolutely no authority to suggest it is the law, and they can't because there is none.

QUESTION: You say the Supreme Court of South Carolina made a statement of law and cited no authority for it?

MR. BRUCK: No. I'm saying that the respondents --

QUESTION: Oh, you're paraphrasing the respondents' contention, not the supreme --

MR. BRUCK: Oh, yes, absolutely. The South Carolina Supreme Court, I suppose, had there been a felony murder rule, this would have been -- the case would have been tried and decided very differently. But there was not. And indeed on direct appeal in this case they sustained, they said it was proper for the judge to refuse to give a felony murder instruction.

If there are no further questions, I would like to save the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Bruck.

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Mr. Shealy.

ORAL ARGUMENT OF MILLER W. SHEALY, JR.

ON BEHALF OF THE RESPONDENTS

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

The record proves in this case that any error in the malice instruction is factually harmless. As such there is no reason why this Court should not give effect to the natural and common sense conclusion that the error is immaterial. The petitioner has shown no good reason why an error which is factually harmless should be legally prejudicial.

The South Carolina Supreme Court in deciding this case properly found that Davis' malice was the key for the whole crime. They properly found, under Rose v. Clark and under Chapman v. California, that the malice instruction here would not have had to have been relied upon by the jury to conclude that Davis did in fact have malice.

QUESTION: Is that a satisfactory -- I wanted to ask you just about that very point. They say that we find beyond a reasonable doubt the jury would have found it unnecessary to rely on either presumption. They wouldn't have had to rely on it. But what if they in fact did rely on them?

MR. SHEALY: Your Honor, I think following the harmless error analysis here the court in essence has concluded that the evidence is so overwhelming of Davis' malice that the jury would not have had to do that. I think the facts here in that regard -- have to be clear about those and bring them out. Davis clearly planned the armed robbery with Yates. He went into the store. He was armed with a knife --

QUESTION: No, I just want to focus for a moment, if I may, and I don't mean to cut you off, but on the proper test of harmless error is it merely that it would not have been necessary to rely on the instructions, or is it clear beyond -- beyond a reasonable doubt the instructions could not have made a difference?

MR. SHEALY: I think it, the proper test would be beyond a reasonable doubt the instructions would not have made a difference in this case because the evidence is so overwhelming.

QUESTION: But that's not what they found. They found it would not have been necessary to rely on the instruction. In other words, what they found was there was enough evidence in the record to justify the finding of malice without the instructions. And is that a sufficient test of harmless error?

MR. SHEALY: I think, in spite the articulate

turn of phrase, I think that the record nevertheless supports the --

QUESTION: Well, the record might support it, but they didn't apply that test.

MR. SHEALY: Again, I would say it's -- a strange turn of phrase, but I think in the cases they cited and the way they wrote the opinion I would argue that -- not focus on that one bit of language, that they had to consider the whole record here under Rose v. Clark, and properly decided the case. I understand what you're saying, but I simply think when one takes the whole opinion in context, the way they recite the facts, the way they state the facts, I think it's perfectly --

QUESTION: Well, you would agree, would you not, that it would not be sufficient merely to conclude that it was not necessary for the --

MR. SHEALY: That is correct.

QUESTION: -- jurors to rely on those instructions?

MR. SHEALY: That is correct.

QUESTION: Okay.

MR. SHEALY: But I think, as this Court has said and many times, while it usually sends cases back for harmless error analysis, it can apply the harmless error analysis and it can do it. And I think on these facts it

is clearly harmless error. I think, once again, the facts of Davis' malice, they are both in the store, they both have a deadly weapon, they both demanded money from Willie Wood.

And a key point about Davis' malice which the petitioner didn't bring out in oral argument is that it was Davis who instructed Yates to fire the shots at Willie Wood. Yates was ultimately convicted also not just of murder but of assault and battery with intent to kill, armed robbery, and conspiracy to commit armed robbery. The record is clear. Davis says to Yates, shoot. Yates shoots and hits Willie Wood twice, and was convicted of assault and battery with intent to kill on Willie Wood for that crime. That is also evidence of Yates' malice -- excuse me, Davis' malice, and his intent throughout this whole crime.

So we would submit it is clearly harmless error. There is just no other reasonable conclusion that the jury could have drawn.

QUESTION: What you really mean is you don't even need the jury, don't you?

MR. SHEALY: No, sir, I wouldn't say that. I think you need the jury, I just think that the -- I think here it's just a traditional harmless error analysis. The record is so overwhelming on Davis' malice --

QUESTION: Well, what about harmless error as applied to Yates?

MR. SHEALY: I'm sorry.

QUESTION: What about whether this presumption was harmless error as applied to Yates?

MR. SHEALY: Well, here again this concerns the South Carolina law of accomplice liability. Strictly speaking, Yates' mental state as far -- is not relevant as far as Helen Wood is concerned. Yates is guilty under the law of accomplice liability, and I would direct the Court to the Joint Appendix on page 150, if I might, where the law of accomplice liability is defined by the South Carolina Supreme Court in the case below.

What the jury in essence has to find is that these two men combined together to commit an unlawful act, in this case armed robbery, that a killing arose out of this, and that -- has to find as a matter of fact that as a natural and probable consequence of this combination of this crime and the way it was committed, that a killing was likely to result. The jury does not need to find, to convict Yates of murder, that he specifically intended the death result or subjectively expected that one was likely. They must merely find that it was, given the way the crime occurred and the nature of the crime, that one was quite likely to in fact occur. And I think that's supported --

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QUESTION: So if -- Davis' malice automatically proves Yates'?

MR. SHEALY: If he meets the other -- other tests and other elements of the law of accomplice liability. And it's very important to understand precisely what that is as far as the conviction for murder.

QUESTION: And whether the death penalty -- we're talking about guilt or innocence here?

MR. SHEALY: Yes, sir. The --

QUESTION: And not about the death penalty?

MR. SHEALY: That's exactly right. The only thing that --

QUESTION: And they death -- whether the death penalty is, in this case is valid is still to be decided?

MR. SHEALY: I think so. Let me say in response that the only thing that you have before you here today is from the guilt phase. You have no evidence from the sentencing phase. And furthermore I would point out that, following Tison, this Court did say in Tison, to the extent that this Court believes it is relevant, is that one whose participation is major and whose mental state is one of reckless indifference to the value of human life, the Eighth Amendment does not preclude the death penalty

in that case. And that's not properly before the Court --

QUESTION: You think -- you think the -- that it doesn't violate the notion of presuming somebody's intent as known -- where it's known to the crime, you don't think it violates that rule against presuming it to presume it from the fact that your accomplice had it, had intent?

MR. SHEALY: No, sir, because again, once again --

QUESTION: Well, it is sort of a presumption, isn't it?

MR. SHEALY: I don't think it's just a presumption. I think he has --

QUESTION: If Davis has it, Yates has it. Isn't that -- that is --

MR. SHEALY: The jury, once again --

QUESTION: That's not much of a way of proving Yates' --

MR. SHEALY: Well, once again, even though the death penalty issue is not before the Court, the jury is not presuming. It was what they are charged in the law of accomplice liability. They must find as a matter of fact that he did combine with Yates, I mean with Davis, that he did not withdraw, that they worked together to commit the crime, it was part of a general common scheme enterprise

from which a death was a reasonable or likely result.

QUESTION: Mr. Shealy, what is the adjective you used before liability? Is it conference?

QUESTION: Accomplice.

QUESTION: Oh, accomplice. Accomplice liability.

MR. SHEALY: Yes, sir. The jury must find all that. So I don't think that's in a genuine sense presumption. They have got to find that this criminal enterprise, this scheme was such that a death was a natural and probable consequence. And they must also find as a specific fact that Yates and Davis were together on the initial enterprise.

And I would point out that, but for the murder, the assault and battery with intent to kill, the armed robbery, and the conspiracy to commit armed robbery, at least as far as the armed robbery and conspiracy to commit armed robbery is concerned, those are almost conceded by Yates' own testimony. They are. The assault and battery with intent to kill was an issue, but the conspiracy to commit armed robbery and the crime of armed robbery was virtually conceded by Yates. There is no question about the common scheme or plan involved here.

I would also point, going back to one of Justice Scalia's questions, is whether the jury in this case would

have in fact focused on Davis' malice, and I don't think that following the standard in Boyd v. California and Cup v. Knowlton, there is no reasonable likelihood that they would have done anything else. Not only is the language cited by Justice Scalia relevant at the bottom of page 96 and the top of 97, that's the primary language relied on by the State supreme court that it's the malice of the killer which is relevant, but look to the middle of page 97, where the court says, and if I may read, "If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties and the homicide was a probable or natural consequence of the acts done in pursuance of the agreed-upon unlawful act," and this is the part -- significant language, "all present, participating in the unlawful undertaking, are as guilty as the one who committed the fatal act." The only one who committed the fatal act in this case is Henry Davis, and he killed Helen Wood. That focused the jury once again on the difference between Yates and Davis, and it was Davis, the person who committed the fatal act, whose malice they had to focus on.

QUESTION: Well, they -- you're really saying that the, whatever presumptions were given to the jury in this case are wholly irrelevant with respect to Yates.

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MR. SHEALY: That did not affect, in the sense that they did not affect the jury's consideration of his mental state in any way, that is correct. That is precisely what we're arguing. Once again on page 98, the judge, in the distinction between the private malice distinction there refers to the slayer, at the beginning of the first paragraph on page 98. It says it's the malice and the ill will of the slayer versus that of the accomplice, again focusing on Davis. The jury could have not heard these instructions, simply could not have done that and walked away and not focused on Davis' malice.

I also think one final point that is very important here to keep in mind is the distinction between malice and intent, which we have tried to argue forcibly in our brief. The petitioner seems to ignore the distinction, and in fact almost argues at times that the malice and the specific intent to kill, the intent to kill are the same thing. Nothing could be further from the truth. The court, if you look at these instructions in South Carolina law, the first thing the judge did was tell the jury precisely what malice is in South Carolina in the common law. It is something which springs from wickedness, from depravity, from depraved spirit, from a heart devoid of social duty and fatally bent on creating mischief. That's not mere recklessness.

QUESTION: Well, it's not, but isn't it also correct, as your brother points out on page 4, that at another point, which he cites to page 96 of the Appendix, the judge said malice may be expressed by circumstances which show directly that an intent to kill was really and actually entertained. I mean, maybe he didn't give his instructions very consistently, and at one point he did seem to identify them.

MR. SHEALY: I don't think the judge did really identify malice as intent to kill, and let me explain why. Again following Boyd and Cup, we're looking at the whole charge. Right after the judge defines malice, following South Carolina common law, look what he says to the jury. "The words express or implied do not mean different kinds of malice, but they mean different ways in which the only kind of malice, just defined, known to the law, may be shown." Then he proceeds to suggest to the jury --

QUESTION: Mr. Shealy, would you slow down a little bit? A couple of us are having a little trouble.

MR. SHEALY: I'm sorry. I'm sorry.

Then he proceeds to suggest to the jury, in his discussion of implied and expressed malice, the kinds of evidence they can consider that are relevant to a finding of express or implied malice. And under South Carolina law, and as at common law, the strongest element, evidence

of malice is an intent to kill. They are not the same thing, but intent to kill is strong evidence of malice. And that is what the judge told the jury after explaining how malice could be shown, not that it was the same thing. He has defined it, he has told them what kind of evidence they can look for that is relevant to finding malice, then he goes on and gets into the presumptions which are the -- really at issue in this case.

QUESTION: Well I think if I sit down quietly with the instructions I may be able to follow exactly what you have just outlined. But isn't the difficulty with your argument that if we have to engage in that precise an analysis of the instruction in order to see it your way, that it's very difficult to conclude beyond a reasonable doubt that the jury could not have been influenced by the mistaken instruction?

MR. SHEALY: Following what was said by this Court in Francis, that jurors are assumed to be conscientious of their duty, they are assumed to understand instructions and to strive to make sense out of them, I think when you hear that, and if you listen to the plain language used there, we may just have a difference of opinion, but I think that what the jury was told is that this is the kind of thing you consider that is relevant for malice. He did not tell the jury that malice

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was the same thing, especially after the previous definition when the word intent to kill was never used in this charge. And in light of that, I simply think that the jury had to understand they had to focus on Davis' malice --

QUESTION: Mr. Shealy, in the -- in South Carolina is it the practice to send the jury instructions in written form to the jury, or are they just delivered orally?

MR. SHEALY: They are delivered orally.

QUESTION: So that they had to just catch all this orally?

MR. SHEALY: Yes, sir. The jury, it is the practice, of course, if the jury has a question they can come back out and ask. But this is -- would have been delivered orally.

Let me address, aside from Davis' malice which is the key question here, the petitioner raises what he calls two facts about Yates' mental state which he believes would have been precluded or preempted by this malice instruction.

First pertains to Yates', and I think I have addressed this somewhat, his subjective expectation, subjective intent that a killing would occur from this crime. And second, Yates' intent to withdraw. First,

strictly speaking, once accomplice liability is properly understood, Yates' mental state is not the relevant one. It is Davis'.

But to the extent that Yates' was relevant and the malice charge might have affected it (1) one, under the nature, given the law of accomplice liability, intent -- and this is the mistake I believe the petitioner makes, with all due respect to him -- intent is not the issue. It is malice. It is kind of the extreme gross recklessness, the wanton behavior that Yates so clearly exhibits throughout this whole crime. He has planned it, he has conceded, he has admitted on direct that he has planned it. He admits he was there to commit an armed robbery. He admits he clearly fired a shot at Willie Wood at the direction of Davis, which struck ultimately Willie Wood in the chest. Yates' malice is all over this record, and there is no way the jury could have escaped that. The instruction could not have turned the jury's attention away from Yates' mental state, because the malice is just so overwhelming they just had to recognize it given the nature of the facts in this case.

The same thing -- I'm sorry, the same thing is true, I think, of the -- Yates' intent to withdraw here. Once again, the charge on withdrawal is proper under South Carolina law. Exactly what does Yates do here? Under his

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own testimony -- his own testimony is virtually the only evidence of this. He leaves the store with his gun and the money in hand. He runs out to the passenger side of the vehicle, not the driver's side, the passenger side, gets in, and under his own testimony, waits, waits for Henry Davis, his accomplice, to come out of the store. He is still involved in the criminal enterprise. They're just trying to make a getaway at this point.

Once he realizes that Henry Davis is in trouble, perhaps shot, as he was, or caught, he slides over onto the driver's seat and makes his getaway, and is caught moments or minutes later. There is no withdrawal here whatsoever. There is not even evidence of withdrawal in the record, I think, if properly understood. Clearly Yates was involved in the criminal enterprise to the end. He was trying to make his getaway; he was not trying to withdraw.

QUESTION: Mr. -- may I ask you this question, just to be sure we don't, don't forget it? Your opponent argues that the record was misstated by the South Carolina Supreme Court, both by saying that Davis lunged at Mrs. Wood when there is no evidence of that, that she had knife wounds in the plural, and that there were brutal multiple stabbing. And the argument that is made, as I understand it, is that, (a) that that's an inaccurate statement of

the record, and I don't understand you to challenge that, that the -- and (b) that if something that important is found erroneously in the supreme court record, how can we be confident of the integrity of their analysis of the factual record?

MR. SHEALY: A couple of things. First if I can address the lunged portion first, if you read the facts, and I think I presume correct in the brief, you read the facts and the testimony of Willie Wood very carefully, I think you get the following picture. And by the way, the argument the petitioner makes to this Court about Willie Wood's testimony, I think it would be appropriate for a jury at closing argument to disbelieve him. But that's the only thing we have in the record on appeal.

Willie Wood testified that once Yates left the store the only inference in the record is that Davis came at him with the knife, and on two occasions Willie Wood says he was trying to stab me in the back. The only inference is that Davis was behind Wood, chasing him with the knife, and Willie Wood was trying to get away. He had a gun on him, we later found, under his coat which he was trying to get to later, but at that time he was scared Yates was going to get him in the back. Once they got into a scuffle, if you read very carefully Mr. Wood's testimony, he got in a scuffle with Yates and it appears

is that Helen Wood came from behind and grabbed Yates in an effort to pull him off Willie Wood at the last minute from behind.

I would submit that as far as the lunging is concerned, the only way Helen Wood could have gotten stabbed is if Yates had somehow turned, thrust the knife, and the pathologist's testimony in this record clearly indicates that the stab wound penetrated, and I quote almost verbatim, the full thickness of her chest, and stabbed her like that. I don't see how she could have been stabbed unless he lunged or thrusted in some manner. So perhaps the South Carolina Supreme Court inferred it from that.

As far as the multiple stabbing is concerned, I think that's an artful phrase. I think it clearly shows she was stabbed once, although through the full thickness of her chest, as the pathologist testified. It wasn't a scrape, it wasn't a nick. It was something that plunged the knife through her entire chest.

I don't even think those facts (1) are really crucial to the harmless error analysis. Whether or not she lunged, which I think there was a lunge, which I think there was as a multiple stabbing, is beside the point. The question is whether Davis had malice as charged and properly defined. This Court can find that even on its

own authority without the supreme court's --

QUESTION: No, but it does seem clear that if there were a multiple stabbing your argument in favor of harmless error would be much stronger.

MR. SHEALY: I agree.

QUESTION: And if they thought there was a multiple stabbing it may well be that they came to a conclusion based on an erroneous premise.

MR. SHEALY: I agree it would certainly be stronger if there were multiple stabbing. But what I simply mean to say to Your Honor is I think -- assuming there is not, assuming there is the stabbing as we have it in the Joint Appendix, the evidence is still, I think, overwhelming of Davis' malice, which is something this Court can find.

QUESTION: But see, you're in effect arguing that there is a basic for a harmless error determination for reasons other than those relied on by the State supreme court.

MR. SHEALY: Yes, sir, and I don't -- the lunging is, I think -- I do stick to that. I think that's the only inference in the record, the multiple stabbing, I think is the only misstatement.

QUESTION: Or to put it differently, what you're arguing is that this error in the supreme court's harmless

error determination was harmless error, basically. That's the question before us in a way.

MR. SHEALY: That's Your Honor's phrase. Perhaps so. But I do think this Court on its own authority can conduct the harmless analysis. It has done so in the past and it can do so now.

I would also point out that with regard to the, to the malice charge in this case, that there was no objection at trial to this charge. The Court has often referenced that in making its own harmless error analysis in cases like this. A trial attorney didn't obviously think it was harmless, has no objection in the record, so I would invite the Court to consider that as part of its analysis.

As far as the prosecutor's argument is concerned, let me address that because the petitioner did address that in his oral arguments. The prosecutor did for sure argue to the jury that there was an intent to kill, and we would submit that there is strong evidence of intent to kill, and the jury could have found that on this record. But I think you have to look at that in terms of what kind of case this is. This is a capital case. You're only focusing now on the guilt phase.

From the beginning of this case the prosecutor knew and was trying to get to a jury verdict at the end

which would result in a sentence of death. For that reason I think he was urging upon the jury to find the highest level of scienter of mental state that he possibly could to convince them that Yates was truly a bad person and that the death penalty was warranted. He did not necessarily have to get to that high mental state to get murder, but he may have believed, and I think properly so, as a matter of trial strategy, that it was important to get to it in order to get a sentence of death.

So that's how I explain the prosecutor's argument. I don't think he disregards the definition of malice. The depraved heart aspect is just that he is trying to up and reach a death sentence and not merely a murder conviction.

With regard to some other aspects of the trial court's charge here, the trial judge did, as I think Justice Scalia pointed out during the petitioner's oral argument, that he comes back to the jury and in essence tells them when all the facts and circumstances surrounding the use of the deadly weapon are before the jury, then in essence the presumption vanishes. Now, I'd submit we know there's a scuffle. We know who had the weapon, we know who used it, we know how it was used, and we know what happened to Helen Wood. For all practical intents and purposes, while the South Carolina Supreme

Court did not address that I believe because they were constrained by this Court to find that it was violative of Francis v. Franklin, I think nevertheless that could be considered as almost a cure of that particular aspect of the instruction, given the facts of this case.

Bear briefly what -- I would like to reference the standard in this particular case. I do believe that the South Carolina Supreme Court, in applying harmless error analysis, applied the appropriate standard of Chapman v. California, which seems to have been adopted expressly by this Court in Rose v. Clark. The way the issue was phrased by this -- the majority of this Court in Rose is, is Chapman v. Standard -- is the Chapman standard applicable to Sandstrom and Francis type errors. I think the court applied that.

To the extent that the petitioner may argue that the Carella concurrence is valid as far as a new standard, we would submit that it is harmless under either standard. That under South Carolina law looking at Carella, you have an armed robbery as defined in South Carolina with the surrounding circumstances, with the use of a deadly weapon. That simply can't be committed as defined under South Carolina law without also having malice. You don't need malice under South Carolina law to be convicted of armed robbery, but for sure if you commit armed robbery -

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- and if you commit armed robbery in South Carolina, you have to also commit the lesser included offenses of larceny and assault. And to commit armed robbery with the use of a deadly weapon like this, we would submit, is clear evidence of malice, especially the way this particular crime was carried out.

QUESTION: But that is to say that you have a felony murder law. That's -- that's the line of reasoning I was going along, but now we're assured that there's, there's no such thing as automatic conviction for felony murder.

MR. SHEALY: There is not. The reason -- I don't want to --

QUESTION: But you're saying there is. That as a practical matter that's the case.

MR. SHEALY: I don't want to get into a semantic quibble. I shy away from the word felony murder because in my experience there is typically statutory number of States, and we don't have a statute like that. We have accomplice liability. The jury was charged not, ladies and gentlemen of the jury, if you find a felony, an armed robbery is a felony, then you must presume malice, and therefore presume murder. That might be a classic and erroneous felony murder type instruction. That's not what they were told.

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They were told, again -- to go back to page 150, the accomplice liability, if you find the unlawful act, the combination to commit an unlawful act, and the way it was committed and the nature of the act, and the way it was carried out, a natural and probable consequence is that a death could result, you can convict the accomplice, even though he's not the slayer. That's what they were told. They were never told, ladies and gentlemen, armed robbery is a felony. If you find the armed robbery then you can also find murder. That perhaps is felony murder, and that's not the charge that was given in this case.

If I may conclude there briefly by saying that because the error here is factually harmless, it should not be declared legally prejudicial. This is so because under the charge the jury would have had to focus on Davis' malice. No other possibility was reasonably likely. Furthermore, nothing in the charge would have precluded the jury's consideration of Yates' own mental state, particularly in light of the overwhelming evidence of his own malice.

Thank you.

QUESTION: Thank you, Mr. Shealy.

Mr. Bruck, do you have rebuttal? You have 7 minutes remaining.

REBUTTAL ARGUMENT OF DAVID I. BRUCK

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ON BEHALF OF THE PETITIONER

MR. BRUCK: Thank you, Your Honor.

If I may, Justice Souter's question observed that the trial judge at one point in the charge referred interchangeably to malice and intent. I would point out that there is a second point later on in his charge point, at page 97 of the Joint Appendix, where he said, referring to malice aforethought, he said, he defined that or explained that as that there must be a combination of a previous evil intent and the act. Again, repeatedly we have this equation in the charge between intent and malice. So I think the, the State's efforts to drive some great distinction between those two really have no application to this case at all.

Further increasing, we would submit, the likelihood that the jury interpreted the issue, the presumptions to apply to Yates' mental state is the language that on the instruction at page 98 of the Joint Appendix, that a defendant -- this is during the discussion of accomplice liability -- the judge says that the defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice. Now obviously the jury would have had to have interpreted that to mean, or likely interpreted that to mean that well, there is private

malice and then there is something like shared malice. The malice that Yates, in engaging in this dangerous, if it was a dangerous conspiracy likely to result in death, would have -- would have entertained.

And that really makes -- the State tells you that there is no issue about Yates' mental state, that that is completely irrelevant. Well, that is simply wrong.

There are two areas in which mental -- in which Yates' mental state were crucial, even if the jury had focused on Davis' malice. First is that Yates' mental state is crucial as to the scope and particularly as to the dangerousness, the likely homicidal nature of the original agreement. That is simply a question of intent. What is it that Yates -- what sort of a crime did Yates intend to commit? Originally Yates definitely joined the issue, that was the core of his defense, which was we intended not to use any violence at all and to retreat.

Now that's obviously not the way it worked out, but in order to convict him of accomplice liability South Carolina law is clear that the agreement which triggers the vicarious liability must be an agreement to commit a crime which is life threatening. And the authority for that is State v. Peterson, a case which I discuss in the reply brief --

QUESTION: (Inaudible)?

MR. BRUCK: Well, they probably found it aided by the instruction, the shared malice, if you will. And that's why -- that's one of the several ways in which this instruction was prejudicial, because they could reach that conclusion, that crucial conclusion in order to bind Yates to the homicide of Ms. Wood by saying, well, we're supposed to presume malice from the use of the deadly weapon --

QUESTION: Well, suppose -- do you think it was harmless error to -- do you think that presumption was harmless error with respect to Davis?

MR. BRUCK: Absolutely not, for the reasons I have indicated, that it is not clear -- it requires either intent to kill or something very, very close to intent to kill under South Carolina law, notwithstanding that a felony is being committed. Another way of putting it is, no, we do not have felony murder. The malice must relate to the killing itself. Obviously any robbery has --

QUESTION: Suppose Davis was still around and they both were on trial, and all this happened, they were both convicted under these presumptions. Do you think it would have been error to hold that this presumption instruction was harmless error with respect to Davis?

MR. BRUCK: Well, yes, I think so, but we would

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have had a very different trial then.

QUESTION: Let's assume that it wouldn't have, it wouldn't have. Would you say it was still harmless error with respect to Yates?

MR. BRUCK: I would say that it was not harmless error, because I don't think that this jury clearly focused on Davis' mental state in order to convict Yates. And you simply -- it's very difficult -- it may be possible to parse these instructions through hours of careful study to find a way in which the jury focused on Davis' intent, but I doubt very seriously that that's what this jury did.

The best that can be said, I mean, we argue our inference and the State argues theirs, and we each say that it's clear. I think probably the fairest way of looking at these instructions and the way this case was tried is that it was a confused, tangled mess, and we really don't know what happened.

In order for this man to have been accorded his Sixth Amendment jury trial right, I think the dissenting opinion below, Justice Toal's opinion, was exactly right when she said that from the confusing instructions the jury might -- probably concluded that it was Yates' malice that had to be determined, and that would naturally have been prejudiced by the -- by the two, by either or both of

the burden-shifting jury instructions. That is the fairest reading.

And I will, you know, I will concede that there is a way to twist and turn through this tangled up record to get to the view the State wants, but I just don't think that there is any fair basis for concluding that that is what -- that is what the jury did. And that is the harmless error inquiry, not whether it was necessary for the jury to rely on the instructions, but whether this man was really accorded a fair trial.

In closing, I would just submit that if ever there was a case in which the jury trial right, the right to have a person's guilt found by a jury of their peers, and not by an appellate court or even by this high Court, it is in a capital murder case involving vicarious liability. We are now at the very outer barrier of the moral authority of the criminal law. That's not to say that it raises any constitutional problem to convict a person, but it most certainly does if we can't say that the facts --

QUESTION: Thank you, Mr. Bruck, your time has expired.

MR. BRUCK: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 2:51 p.m., the case in the above-

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entitled matter was submitted.)

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NO. 89-7691 - DALE ROBERT YATES, Petitioner V. PARKER EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL.

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