ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOSEPH ROGER O'DELL, III, Petitioner v. J. D. NETHERLAND, WARDEN, ET AL.

CASE NO: 96-6867

PLACE: Washington, D.C.

DATE: Tuesday, March 18, 1997

PAGES: 1-53

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

JOSEPH ROGER O'DELL, III, :

Petitioner :

v. : No. 96-6867

J. D. NETHERLAND, WARDEN, :

ET AL. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, March 18, 1997

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

APPEARANCES:

ROBERT S. SMITH, ESQ., New York, New York; on behalf of the Petitioner.

KATHERINE P. BALDWIN, ESQ., Assistant Attorney General of Virginia, Richmond, Virginia; on behalf of the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 96-6867, Joseph Roger O'Dell v. J. D. Netherland.

Mr. Smith, you may proceed whenever you will.

ORAL ARGUMENT OF ROBERT S. SMITH

ON BEHALF OF THE PETITIONER

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

The principal issue here is whether a reasonable jurist in 1988 would have believed the decision in Simmons v. South Carolina compelled by the Court's prior decisions in Gardner and Skipper.

I think the main things I want to emphasize are first how closely analogous Skipper and Simmons are, how, indeed, hard it would be to avoid going from the holding of Skipper to the holding of Simmons and, on the other hand how distant the issue in Simmons was from the issue in California v. Ramos, which is the case principally relied on by the Commonwealth, and how very difficult it is to get from Ramos to a result opposite to the result that was reached in Simmons.

QUESTION: Mr. Smith, I'd like to ask you a hard question at the outset. If you are contending that we're

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

dealing with nothing new in the Simmons decision, what do you say about the 4-1-4 split on this Court about whether the Simmons rule was even required by the Constitution?

MR. SMITH: The split on this Court as to whether the Simmons rule was required by the Constitution, I believe the Court was 7 to 2 on that issue, Your Honor, it's my understanding. It was a -- there was a plurality opinion written by Justice Blackmun speaking for four justices.

QUESTION: Yes.

MR. SMITH: With Justice O'Connor speaking for three justices --

QUESTION: Yes.

MR. SMITH: -- joining in the same holding.

QUESTION: Well, I don't recall what the split was, but in any event there was a split.

MR. SMITH: There was a dissent, Your Honor. I think even the dissent, in my view, did not so much reject the narrow rule of Simmons, the rule as narrowly stated by the majority in Simmons, which is quite -- there wasn't a majority, but the rule as narrowly stated by the plurality in Simmons was quite specific.

When you have an allegation of future dangerousness, and a defendant seeks to rebut that by showing that he is ineligible -- ineligible for parole, he

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

has a due process right to do that.

I do not read the dissent as rejecting that holding so much as the dissent in Simmons says, this case does not present that narrow issue. Indeed --

QUESTION: Skipper was not really a due process case, was it? It was an Eighth Amendment case.

MR. SMITH: I think it was both, Your Honor, but I think it was much more clearly and easily a due process than an Eighth Amendment case.

QUESTION: Well, I thought the text of the opinion pretty well limited itself to Eighth Amendment.

MR. SMITH: The text does limit itself to the Eighth Amendment. A footnote says --

QUESTION: So you're relying on a footnote to say that it's a due process case?

MR. SMITH: Yes, because that is what the footnote says, Mr Chief Justice. The footnote says in so many words --

QUESTION: It's a strange place to find doctrine.

MR. SMITH: Not always, Your Honor. I think here it's not strange because I think what happened is the Court wrote a difficult and disputed Eighth Amendment opinion and dropped a footnote to say, and by the way, there's an easy due process route to the same result, with

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

which the three dissenters agreed. They were not dissenters, I'm sorry. They concurred, but they concurred only on that ground, only on the due process ground. The --

QUESTION: You didn't mention the footnote in your -- in the habeas petition.

MR. SMITH: In the petition itself --

QUESTION: There was a 151-page habeas petition which doesn't mention that footnote.

MR. SMITH: In the -- we did not mention it in the habeas petition itself. We did on direct appeal in 1988, at a time before the petitioner's conviction became final. We did argue that this rule was compelled by Skipper.

The -- I think the facts of Skipper were a defendant who had -- was charged with being a future danger, where the prosecution was trying to prove future dangerousness, and the response he wanted to make was, I have behaved well in prison up to now, and therefore I'm not going to be so dangerous as you might otherwise think. It was held that he had a -- unanimously that he had a due proces right to do that.

The issue in Simmons seems to me almost a fortiori -- when he's saying, yeah, it's not so much whether my behavior's been good in there, but you want to

know whether I'm going to be in prison or not, and it's hard to imagine a much more relevant fact on the issue of future dangerousness than whether the man is going to get out or not. The --

QUESTION: He can be dangerous in prison, I assume, can't he?

MR. SMITH: He certainly can, and the prosecution --

QUESTION: Murders in prison occur with some frequency.

MR. SMITH: The -- but he can be dangerous in prison and the prosecution is free to make that argument, but what the prosecution prefers to do, and preferred to do here, is frighten the jury with the thought that he's going to be next door to them tomorrow, that he'll be out on the street, and they -- that's a much better way to get a death penalty.

Of course the prosecution can argue life without parole isn't going to do it because he's going to kill his cell mate, and the defendant has to try to meet that argument.

But when the prosecution says, as the prosecutor did here, isn't it interesting that he can't be out on the street for more than a little while without getting into trouble, at that point it seems to me fundamental, obvious

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that the defendant should be allowed to get up and say, by the way, ladies and gentlemen, I'm not going to be out on that street any more. This is it for me. I'm going to be locked up for the rest of my life.

The -- so --

QUESTION: Unless the law changes. He would have to say that.

MR. SMITH: Yes. Yes. Unless the law changed, but you know, there are --

QUESTION: But there would be no way to guarantee the jury that this man would not be back on the street.

MR. SMITH: That -- that's an argument, Justice Scalia, but it does not make the life without parole situation irrelevant. The life without parole situation is still almost overwhelmingly relevant. The almost is you could always change the law.

QUESTION: To the force of the injustice that you're describing. I mean, you know, whether this argument that was excluded would be of such overpowering force.

MR. SMITH: It does go to the force of the argument. I respectfully submit, Justice Scalia that it's still a very powerful argument despite the fact that the possibility of changing the law does exist.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

It's still -- in a future dangerousness case, as I believe one of the opinions in Simmons said, it's about the best argument you've got, and often the only argument you've got, that I'm going to be locked away for the rest of my life. You don't have to worry about me, that may -- the jury doesn't have to buy it, but the jury certainly may buy it. It's a very powerful argument.

QUESTION: But in Ramos, and you're going to have to get to Ramos sooner or later, we in effect said the instruction to the jury about the Governor's power of commutation of a death sentence was not a required instruction. That's I think implicit in the holding. I think that's a fair reading of Ramos --

MR. SMITH: I think it --

QUESTION: -- if not explicit, and that was what the judges had before them as of the time this conviction became final.

MR. SMITH: I think it is explicit, Justice Kennedy, but it's not in anything like the context that we're talking about here.

The argument was made, I thought a -- I think a rather weak argument, and the Court thought it a rather weak argument in Ramos.

The argument was made that if you're going to tell the jury that the life sentence is subject to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

commutation -- that was the main issue in Ramos -- then you must also tell them that the death sentence is subject to commutation.

The Court's response was, and I'm reading from I think 3458 of 103 Supreme Court. The Court was, we find this argument puzzling.

A jury -- I'm skipping a little. A jury concerned about preventing the defendant's potential return to society will not be any less inclined to vote for the death penalty upon learning even that a death sentence may not assure the prisoner's removal from society.

The argument that the petitioner made in Ramos -- I'm sorry, the respondent in Ramos, that the prisoner made in Ramos, and that the Court rejected, was simply an illogical argument and was rejected as illogical.

Beyond that, Justice Kennedy, Ramos didn't present a right-of-rebuttal situation at all, and the Court noted that. Ramos was not a case where the State was saying this man will be dangerous and the prisoner was saying -- standing up and saying let me show the jury something that makes me not so dangerous. That is not what was going on.

QUESTION: What it did present was, I think, a

puzzling tactical decision that counsel has to make, but I think you have that same tactical decision in every jury case.

You have some cases where the prison -- where a prison inmate is killed, and you don't want to emphasize to the jury that he's going to be in prison the rest of his life.

MR. SMITH: We have -- well, we didn't have a tactical decision in this case, Your Honor. Because we tried to make the decision. The decision was taken out of our hands.

We said -- my client said I want to tell the jury I'm facing life without parole.

QUESTION: But the point is, is that as of the time this conviction became final you had Ramos, which made it very clear that these choices are ones for States to make.

MR. SMITH: I do not think that Ramos says or even suggests that this particular choice is open to the States, Your Honor.

Ramos does say the -- what Ramos holds, of course, is that it's okay for a State to tell the jury that the life sentence is -- life without parole can be commuted to a sentence of life with parole.

It says in dictum that the State could make

another choice. It does not say or imply that the State could make that choice in a context where it's forbidding the defendant from rebutting.

Indeed, the choice that's referred to in Ramos I think pretty clearly is a choice to be more favorable to the defendant than California had chosen to be, a choice to remain silent about the possibility of parole, and those are the words -- the possibility of parole, not the impossibility or the unlikelihood, the ineligibility of parole.

A State, the Court said in Ramos, can choose to give more protection than the Constitution requires by remaining silent on that subject. It did not say or imply that the Court may silence the defendant on that subject, may forbid him from bringing this truthful information to the jury's attention even where it is the only information that can rebut the charge of future dangerousness.

The -- I think it's -- Skipper is indeed extremely close and Ramos extremely distant. I guess I would add that even if it were not so, even if I didn't have a case as closely on point as Skipper, it would still be true that the rule in Simmons should not be considered a new rule, because I think that a relevant factor is not only the closeness of the prior precedent, but the egregiousness of the practice that is being condemned.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And I think the practice here, which really did exist here -- it may not have existed in Simmons, as the dissenting justices thought it did not. The majority thought it did -- but it clearly exists here, is the practice of scaring the jury about a dangerous man being back on the streets of their community without telling them that there happens to be a State statute that forbids under any circumstances putting him back on the streets of that community.

To me it is almost as bad -- I will grant the almost, but almost as bad as if a State had passed a law saying in a criminal case we will no longer permit a defendant to present the defense of alibi.

QUESTION: But it doesn't go to whether the defense is dangerous, whether he is a dangerous person, and that's all that Skipper involved. They allowed him to put in evidence in Skipper that he had not been dangerous when he was incarcerated, that he had indeed engaged in good behavior in prison, so the jury could conclude on the basis of that he is not a dangerous person.

What you're saying now is that it is obvious from that that you can put in evidence, not that he's not a dangerous person, but as -- but that although he is a dangerous person, you don't have to worry about it because he's going to be in jail.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Now, that's a step further. I agree it may be a good argument, and it's an argument you might want to make, but it's a step further than what we had held up to that time, which is, you can bring in evidence to show that in fact he's not a dangerous person.

MR. SMITH: Well, you're making the distinction, Justice Scalia, between he's not dangerous by reason of his character, and he's not dangerous by reason of his circumstances. I don't think there's much persuasive force to that distinction.

It's true that Skipper is not the absolutely identical case, and you don't have to have an identical case.

QUESTION: It's -- I think it's a long way -- sentencing determinations are usually made on the basis of what the defendant did and what his character is, and that's typically what a sentencing jury takes into account, and Skipper was well within that.

You wanted to show the man's character is not so bad. He behaved very well in jail. Now you come in with a totally new argument. I don't want to tell the jury that he behaved very well. He is a bad man. He's very dangerous. However, you don't have to worry about him. He'll be behind bars.

Now, that may well be -- we held that that is an

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

argument you should be able to get before the jury, but it's a quite different argument from the argument that this is not a dangerous man.

MR. SMITH: I don't think it's correct, Justice Scalia, to say that before Simmons the sentencing determination was limited to character. I think that for -- going back to the time when in Jurek and other cases these statutes were upheld, the jury was assigned a predictive function as well as a function of judging the defendant's character.

QUESTION: Predictive of his behavior, not of the circumstances of the world. Not of whether he's going to die at 55 so you don't have to worry about it if you only give him 10 years instead of 20. Should he be able to get that evidence in on the basis of Skipper? I don't think so.

MR. SMITH: Or what -- if he's terminally ill? I think -- yes, I would be startled if he didn't have a due process right to tell the jury that if I'm terminally --

QUESTION: Mr. Smith, may I ask, because your time is running short, whether you are putting your main emphasis on, not a new rule under Teague, or whether you think you have a good case under the Teague second exception, and if you think that you do, I would like to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

know what it is.

MR. SMITH: Okay. I am certainly putting my main emphasis on its not being a new rule, but I think if it were new, I would have a good case under the Teague second exception. I have -- it's a difficult argument to make, because I have to make what I think is the false assumption that there's something new about the idea of giving this due process right to the prisoner.

That is, I have to assume a world which I don't think ever existed in which it was generally accepted that you could charge a man with being dangerous in the future and forbid him from informing the jury that he's going to be unparolable for the rest of his life. It's hard to -- for me it's hard to imagine that world.

QUESTION: Well, let's make the assumption that this Court rules against you --

MR. SMITH: Yes.

QUESTION: -- on your Teague argument.

MR. SMITH: If I make that assumption, then I say that the whole point, I think, of the second Teague exception is to deal with really egregious, shocking practices that create a high risk of a wrong determination, a high risk of finding someone dangerous who is in fact harmless.

That's why there is a second Teague exception.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

It doesn't happen every day, and I think the reason it doesn't happen every day is that usually, when you find a practice as egregious as this, it's really clear that it was never approved. It was never thought of as fair --

QUESTION: Mr. Smith, it goes to both the two theories on which you proceed. Are you just relying on the fact that the State had to establish future dangerousness, or are you also relying on the specific arguments made by the prosecutor in this record?

MR. SMITH: I'm relying on both in the sense, Justice Stevens, this is a fortiori from Simmons. That is, even if Simmons had never been decided, I think I could stand here and say a decision here is compelled by Skipper, and without going to the intervening stages.

QUESTION: You think Skipper rather than Gardner is the more relevant authority?

MR. SMITH: Skipper is the more factually analogous authority. Gardner is at a higher level of generality, and the cases do say that you take into account the level of generality, so if I had only Gardner, it would not be as clear a case as I think it is.

But even if it were only Gardner, I would make the argument I started to make a minute ago about, suppose an alibi defense were prohibited, and suppose -- suppose there's not a case. Maybe there is, but suppose there's

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

not a case that ever said that a defendant had a constitutional right to present an alibi defense.

We know that he has that right. We know that whether there's a case on it or not. Of course he has a constitutional right to present an alibi defense, and it's not a new rule.

Here, it's almost that egregious.

QUESTION: Well, Gardner was a plurality opinion, was it not?

MR. SMITH: There was a plurality opinion, but the due process holding did get five votes, Mr. Chief Justice.

QUESTION: Whose, in addition to the plurality?

MR. SMITH: Justice Marshall and Justice Brennan I believe both wrote separately. Justice Brennan's decision is styled a concurrence and Justice Marshall's a dissent, but on this issue they say the same thing. They say we agree with the plurality opinion on the due process issue.

QUESTION: When, in answer to Justice Stevens, you said you base your argument here in part on the prosecutor's representations, I take it your point there is that they were, in fact, misrepresentations. Perhaps not malicious lies, but they in fact had the effect of misrepresenting the law.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. SMITH: I would say the facts, Justice Souter, but yes.

QUESTION: Okay. So it's a rebuttal of a misrepresentation which is the nub of your claim both under the Teague exception and I suppose under the Teague new rule standard itself.

MR. SMITH: Well, I think -- yes. I don't think I absolutely have to show a misrepresentation here, although it's -- they think I can't.

QUESTION: It could be so read.

MR. SMITH: Yes. There was no -- it could. It could indeed. It's the same kind of misrepresentation, actually, you had in Skipper.

The argument was made in Skipper by the prosecution, this is a bad person. He kicked the bars of his cell, and therefore the defendant was entitled to rebut. It was noted factually true that he kicked the bars of his cell. That wasn't a misrepresentation, but there was an implied misrepresentation that he was a bad actor in prison, and the defendant was entitled to disprove that.

Here, the statement is made as soon as this guy is out in the community he does something horrible. I assume for purposes of this argument that that was perfectly true, but there's an implied misrepresentation

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that you're going to see him out there in the community, and I think he had a due process right to respond to that.

QUESTION: Mr. Smith, for purposes of the Teague exception does it matter whether it's a death case or a habeas case where somebody has a term of years?

MR. SMITH: I think Teague, as I understand Teague, it applies in noncapital cases in generally the same way.

QUESTION: Yes, and there are exceptions. There are the two exceptions.

MR. SMITH: Yes.

QUESTION: Here we're dealing with the second, and my question to you is, is there any basis for taking a different approach to that second exception when it's a death case rather than a case where the defendant is sentenced to a term of years?

MR. SMITH: Well, I'm not -- I may be missing the point of your question, but I think obviously there's a difference in that in the -- where there's not a death case the issue is usually guilt or innocence, and the cases describing the second exception tend to talk in terms of the conviction of the innocent.

I think it's clear -- I don't think anyone's really arguing the contrary -- that the execution of someone who ought not to be executed is analogous to the

conviction of the innocent, or a finding of dangerousness which is a basis for execution of a man who does not, in fact, present a danger would be analogous to the conviction of an innocent person, but I'm not sure I've answered your question. There may be something else.

QUESTION: Mr. Smith, could I ask you to come back to Ramos? It seems to me you understate the relevance of Ramos to this question.

What Ramos held is that the defendant did not have the right to have the jury instructed that, regardless of whether you impose the death penalty or life imprisonment the penalty can be reduced or commuted.

Now, doesn't that go to the same issue that is involved here, namely whether the sentence you impose will eliminate the dangerousness of this individual?

MR. SMITH: I think the answer is --

QUESTION: The defendant wanted to tell the jury, look, you're not going to eliminate this man's dangerousness by imposing the death penalty, because that can be eliminated by the Governor.

MR. SMITH: First, the literal answer to your question I suppose is yes, it went to the possibility of eliminating the person from the community.

The distinction is that, as the Court pointed out in Ramos as a basis for its holding on that issue in

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Ramos, is that the instruction that the defendant was asking for was logically irrelevant to the decision the jury had to make, or if, indeed, it wasn't harmful.

QUESTION: Well, that's not all it said. The Court said in Ramos that we -- it has deferred to the State's choice of substantive factors relevant to the penalty determination.

MR. SMITH: I don't think, Justice -- sorry.

QUESTION: And at that point cites a Georgia statute identical to the South Carolina statute later invalidated in Simmons. Is that no evidence that such a statute would be --

MR. SMITH: Actually, I don't -- I don't think it was a South Carolina statute invalidated in Simmons, but I -- I think it was a practice that they found the Supreme Court to have sanctioned.

But the -- I also don't think that the language you're quoting was in the context -- I may be wrong, but I don't think it's in the context of the holding that Ramos was not entitled to the instruction on the Governor's power to commute the death penalty.

I think the context of that was, we're saying its okay for the States to tell the jury about the Governor's power to commute a life without parole sentence, and P.S., it's also okay not to tell them and to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

give the defendant more protection, but the two -- it's not only in the context of giving the defendant more protection. It's also completely foreign from the right of rebuttal.

QUESTION: I'll check that -- you think it didn't go to the commutation of the death penalty.

MR. SMITH: I think not. I think not.

QUESTION: I will check it.

QUESTION: But in Ramos and in Simmons so far as the State's position in Simmons the Court was very concerned with the fact that these aren't simple matters of historical fact, because the law can change.

If the defendant is subject to life without possibility of parole, that can change, and the prosecution can argue that in rebuttal, and that's why Simmons was new. It was instructing juries about laws, and laws can change.

MR. SMITH: I don't think law is any more subject to change than any other future event or condition like, for example, good behavior, which was the issue in Skipper. Good behavior can change, too, Justice Kennedy.

I think the law in Simmons, it was a law but it was really just a fact that was subject to judicial notice, otherwise it was like any other fact.

QUESTION: Well, it's also subject to judicial

notice that the legislature might change the rules on parole.

MR. SMITH: Certainly.

QUESTION: And this was of great concern to the Court in Simmons, because the instructions get very complex.

MR. SMITH: I'm not --

QUESTION: Counsel for the defense says now he's not going to be paroled, then on rebuttal the prosecution says this has been changed many times, and corrections policy is subject to the whim of the legislature.

MR. SMITH: I must say, I don't detect that great concern in Simmons, Justice Kennedy.

The argument of course can be made that parole is so inherently confusing that it should never go to the jury, but it's tough to make that argument when you have a statute that says life without parole, period, and the only complication is well, maybe they'll change the statute some day.

That's a complexity not beyond a jury's ability to deal with, and I do not think that that was a -- was something the Court really had to struggle with in Simmons.

I'll save the rest of my time for rebuttal if I may.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Very well, Mr. Smith.

Ms. Baldwin, we'll hear from you.

ORAL ARGUMENT OF KATHERINE P. BALDWIN

ON BEHALF OF THE RESPONDENTS

MS. BALDWIN: Mr. Chief Justice, and may it please the Court:

I want to begin by setting the record straight on something that O'Dell has argued this morning, and which this case is not about.

O'Dell is apparently relying not only on a lack of a Simmons instruction, but he apparently today now says he's also relying on some argument that the prosecutor made some improper argument, and that that is a separate type of rebuttal issue, and there was never, and there has never been a claim in this case of improper prosecutorial argument.

QUESTION: Well, I'm not sure -- I don't -- or I think you're referring to counsel's response to my question.

I didn't take -- in fact, I thought he was very diplomatic in not suggesting that there was any sort of ethical impropriety, but what was left, I think his point was, was a misleading impression. It was in effect a misrepresentation of possibilities, and I think I said in my question I'm not suggesting he was malicious, and

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

counsel was very careful to say that he wasn't, either.

MS. BALDWIN: But counsel --

QUESTION: It's the misrepresentation I think that is -- was of concern to me and was of concern to him.

MS. BALDWIN: Correct, and I don't believe there's ever been a claim in this case that the prosecutor misrepresented the law to this jury, and in fact --

QUESTION: But isn't it clear that the impression that a jury would take from the argument was the impression that, under the law as it existed, this individual could be paroled and placed out on the street again so that he could commit the kind of depredations that he prosecutor quite accurately was referring to as his past acts, and that in fact was not so, was it?

MS. BALDWIN: He was not allowed -- correct, he was not allowed a Simmons instruction, but if this prosecutor had in any way directed this jury that O'Dell was going to get out on parole, that would have been an issue that would have been reversed immediately and automatically by the supreme court.

QUESTION: No, but isn't that --

QUESTION: You say that claim was never made.

MS. BALDWIN: There was never an objection to the prosecutor's argument in any way, shape, or form, and if it had been, and if the record had supported that, the

Virginia supreme court would have reversed that conviction.

QUESTION: Okay, but he is arguing that he had a right to rebut something.

MS. BALDWIN: Yes, the Simmons right.

QUESTION: That it would have been relevant to put in this information about the law.

MS. BALDWIN: That's right, but the type --

QUESTION: I'm sorry. Go ahead.

MS. BALDWIN: I'm sorry.

QUESTION: What I was going to say -- my question was going to be, isn't it the case that what he wants to rebut was an implication about the law which in fact is not correct, i.e., the implication that under the law he could be paroled for this offense?

That's what he -- that's the implication. That's what he wants to rebut, and that implication is wrong, isn't it?

MS. BALDWIN: That is the Simmons claim, and in 1994 that would have been error. That's correct.

QUESTION: Okay.

MS. BALDWIN: In 1988, it's our position there was no error in this case, because there was no such due process right of rebuttal.

QUESTION: Well, there may not have been -- on

your view of Simmons there may not have been Simmons error, but there was, in fact, an erroneous implication raised about the state of Virginia law at the time the argument was made

MS. BALDWIN: Well --

QUESTION: That is -- you concede that, don't you?

MS. BALDWIN: No -- Justice Souter, actually I disagree with that completely. I don't think there was any misleading or misrepresentation of what Virginia law was in this case. The only thing --

QUESTION: What he says -- I have what he says. what he says in the brief is, he says, you may still sentence him to life in prison.

What does this mean? No sentence ever meted out to this man has stopped him. Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose, so I suppose that the jury might think that if we sentence him to life in prison, he will get out and continue to commit crimes, and it is in that context that the instruction that life means life was asked for.

QUESTION: Well, wasn't --

QUESTION: Now, if there's agreement about -- is that right?

QUESTION: Wasn't this defendant someone who had

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

committed a murder --

MS. BALDWIN: Yes.

QUESTION: -- while he was sentenced to prison --

MS. BALDWIN: Yes, Justice O'Connor --

QUESTION: -- that might refer to that?

MS. BALDWIN: Yes, Justice O'Connor. I think that --

QUESTION: And then held in prison, and while he was a prisoner he had committed a murder.

MS. BALDWIN: I think that is --

QUESTION: And then he got out, and within a very short time murdered somebody else, and the prosecutor brought this out to the jury.

MS. BALDWIN: Yes.

QUESTION: What prosecutor wouldn't have?

MS. BALDWIN: Absolutely.

QUESTION: I'm not saying that was all improper. What I'm interested in is that this is a case in which they asked for an instruction in a context where because of what the prosecutor said, and because of the law, the jury might think that he will in fact be released for -- from prison if the sentence is life.

QUESTION: I would have thought the jury would have thought that he'd kill somebody in prison.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, I don't --

QUESTION: That seems to me --

MS. BALDWIN: The only point that I wanted to make on this particular -- it seems to be a secondary argument that has been made, is that it doesn't in any way fit this case.

O'Dell was the one who mentioned the word parole before this jury to begin with. The issue never came up until in his cross-examination of Donna Doyle in the sentencing proceeding he cross-examined her about the Florida -- the failure of the Florida parole system, so there's none of this Skipper-type of rebuttal.

In other words, in Skipper, the prosecutor was arguing, this individual is going to be dangerous in jail. In fact, he's going to rape other prisoners. That was the argument the prosecutor made in Skipper, and the defendant was not allowed to rebut that with evidence that he was not going to be -- that he would be of good behavior in jail.

That is not -- there is no such rebuttal issue in this case.

QUESTION: But Ms. Baldwin, in --

MS. BALDWIN: The only issue was a Simmons issue.

QUESTION: Justice Stevens.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Could I just ask you to comment, because I accepted this, and I guess I should not have. They say in the brief that in cross-examination of O'Dell the prosecutor used the words parole and release 17 times.

MS. BALDWIN: Yes. Yes, Justice Stevens, and that was on cross -- that was on cross-examination, after O'Dell extensively, in his own direct examination, had presented to the jury his entire criminal history, when he was out on parole --

QUESTION: Did he represent himself?

MS. BALDWIN: He did represent himself, but stand-by counsel was the one who conducted his direct examination.

QUESTION: But then there's also a reference in their brief -- and again, I haven't checked the record myself -- to an argument by the prosecutor, isn't it interesting, he's only able to be outside of the prison system for a matter of months, and then things happen and so forth.

MS. BALDWIN: Yes.

QUESTION: I thought it was fair to infer -- tell me if I'm wrong on this -- from the proceeding as a whole that the prosecutor argued in substance implicitly that he is especially dangerous because he might be out of prison.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MS. BALDWIN: I don't believe that that's a --

QUESTION: You don't --

MS. BALDWIN: I don't believe that that's a fair inference from the prosecutor's argument.

The prosecutor was arguing his history, his past criminal history, which included the fact that he committed crimes when he was on parole, which had been presented to begin with by O'Dell so that was -- that's separate from the O -- from the Simmons --

QUESTION: Do you think it's fair to say that the prosecutor did not create the impression that the only way to keep him off the street was by the death penalty?

MS. BALDWIN: Oh, absolutely, in this case in particular, because O'Dell had committed murder in prison, and the jury was well --

QUESTION: Yes, that's what the jury thought.

MS. BALDWIN: And the jury -- yes.

QUESTION: I mean, I hadn't thought of it that way.

MS. BALDWIN: The jury was well aware of that, so we have that argument under our harmless error argument. In fact, to go to the point that this would have -- parole information to this jury wouldn't have made any difference anyway.

QUESTION: But in all events that's a harmless

error argument.

MS. BALDWIN: That's under harmless error.

QUESTION: Under a Simmons regime they would have been mandatorily entitled to this instruction --

MS. BALDWIN: That's correct.

QUESTION: -- and the question is to Simmons --

MS. BALDWIN: Yes.

QUESTION: If that's the case, if the jury understood its equally dangerous in prison or out, I kind of wonder why the prosecutor objected to the instruction.

MS. BALDWIN: Well, he objected to it because under Virginia law it was absolutely not allowed that juries receive information about parole whether it benefited the prosecution or the defendant, and that was a clear -- that was clear law in Virginia.

QUESTION: So all of this testimony should have been excluded, too, where they're referring to parole --

MS. BALDWIN: He actually to his benefit was allowed over the prosecutor's objection to testify to the jury, I will never get out of prison, and the judge actually allowed that testimony, even though the prosecutor objected.

QUESTION: You see, in Simmons itself the argument of future dangerousness was -- the prosecutor only implicitly argued that this man would be out of jail

because they said it's an act of self-defense, and from that the court was willing to infer that that was the thrust of the argument. But you don't think that kind of inference is permissible from this prosecutor's argument.

MS. BALDWIN: I do not believe it is. I believe he was doing nothing but arguing history.

QUESTION: If it were, would you agree, then, that clearly Simmons would not have been a new rule? If the prosecutor had in effect misrepresented to the jury that this man will get out of jail unless you sentence him to death, that -- and the court then refused to give the instruction, I think you would agree that that would have been impermissible.

MS. BALDWIN: Well, no. That would have been a prosecutor misleading the jury on a matter of State law, affirmatively misleading --

QUESTION: As a matter of fact.

MS. BALDWIN: -- and he would have been entitled to correct that, and that would have been reversed. That's why no Virginia prosecutor would have ever made such an argument, because they knew that their cases would have been reversed if they had told juries improper information, anything to do with this man's future parole.

QUESTION: And in fact, pre-Simmons, wasn't one of the rationales for that that it's a distraction to the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

jury to begin to speculate about what might or might not happen on parole, particularly because the law changes constantly --

MS. BALDWIN: That's exactly right.

QUESTION: -- and they wanted the jury to focus precisely on what the sentence -- sentencing options before them were.

MS. BALDWIN: That's correct, Justice Kennedy, and I think very important here and significant is, actually is a 1952 case from Virginia, Jones v. Commonwealth, and this is a case which the Ramos supreme court, the California supreme court had relied on.

And in Jones v. Commonwealth the rationale for the States, and which they believed was the majority rule -- was the majority of States believe this, and that was that even if the defendant was ineligible for parole, because that's what happened in Jones v. Commonwealth and he wanted an instruction, the Virginia supreme court said, well now, if we have to instruct him on that, to have a completely accurate instruction we would also have to tell them that really doesn't guarantee he won't be released, because the Governor could commute it. In other words, the Briggs instruction.

And Virginia supreme court said, we're not going down that road. We are not going to allow that, because

that would be so prejudicial.

And in 1988, the most significant factor that shows that the Virginia supreme court's decision was a reasonable interpretation of existing law is the fact that no other case anywhere had held that Virginia's practice was unconstitutional.

And I believe, Justice Ginsburg, as you pointed out, that the Simmons case itself was not unanimous, and I think that is compelling, if not dispositive evidence of the fact that it was a new rule because it obviously was susceptible to debate among reasonable jurists.

But in 1988, under Ramos, it was very clear from Ramos that the decision of whether States should even -- should, could, or should not instruct juries about any matters that come after the verdict about commutation, pardon, and parole --

QUESTION: At it's simplest --

MS. BALDWIN: -- which is clearly within the discretion of the States.

QUESTION: At its simplest level, I was taking their argument, or a possible argument to be the following.

At its simplest level you have a rule growing out of preceding cases that where the jury is under an important potential, false apprehension about the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

difference between life and death, that under those circumstances the defendant has a right to clarify matters.

And on that very simple, basic way of looking at it, you would see Gardner, Skipper, and Simmons, each is involving a fairly simple misapprehension that was important and later clarified, while Ramos, you would see as involving a possible misapprehension, but one that was very unlikely to affect the jury. Not impossible, but unlikely.

Now, under -- that's the theory, or a theory I think that would say, Simmons is simply an application of a preceding existing general principle, and Ramos is the same thing, though the facts of it lead to the opposite conclusion, so I'd appreciate comments on that.

MS. BALDWIN: I would disagree with that for two reasons. First of all, I don't think that that's what Simmons said. I don't believe that Simmons is a rule of defining for juries, or giving them definite instructions about a sentencing option.

Simmons is a case about rebuttal of future dangerousness, a due process right of rebuttal of future dangerousness, and nothing else. It doesn't have anything to do with an instruction being inaccurate. It's not -- that is not the rule of Simmons.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And secondly, in 1988, I think the equally important case to Ramos that was out there was Caldwell, and I think Caldwell clearly told States that if you want to correct jurors' possible misapprehensions about appellate procedures, or we can infer from that anything that comes after the jury verdict, then you may do that, State, if you want to, but -- and the controlling concurring opinion in Caldwell said specifically that's a matter of -- that's a policy choice to be made for a State.

So I'm a court in 1988. I think a reasonable interpretation of the law governing this issue that O'Dell is bringing before me is not only Ramos, but it's also Caldwell, that says these matters are policy choice.

And in fact I think that it was the prudent course in 1988 for a court to decide not to instruct their juries about -- or take on that task of trying to disabuse them of misperceptions that they may have about appellate commutation, pardon, and parole procedures, because it's in my view in 1988, as a reasonable jurist, that's too speculative.

It's getting too far away from the matter at hand, and that is, what is the appropriate sentence for this individual, and I think there was complete support for that.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

The Virginia supreme court relied on Ramos, the Fourth Circuit relied on Ramos, the Fifth Circuit relied on Ramos, and this Court's decision in Simmons was not even unanimous, so I don't see how there can be a legitimate argument made that this was not a new rule.

I wanted to address briefly the question about this being a watershed, fulfilling the second exception to Teague or not, and I think that this Court's cases on the second exception have made absolutely clear that the rule has to do something more than just improve accuracy.

It has to do something more than that. It has to literally alter our understanding of the bedrock procedural elements covering criminal cases. It has to be something that -- the terminology that's been used is groundbreaking, and in specific --

QUESTION: Those are not synonymous with new rule, are they?

MS. BALDWIN: They are not synonymous --

QUESTION: Or are they synonymous with new rule?

MS. BALDWIN: Well, no. I think that you can have a new rule -- I mean -- well, I don't know. That's a difficult question, because I think that if you are faithful to this standard --

QUESTION: Well --

MS. BALDWIN: -- it's going to be very difficult

to come up with a rule that will ever meet the second Teague exception.

And there's a reason for that, and that's because the entire purpose of the new rule doctrine is to validate and uphold judgments and a finality of judgments that were reasonable when they were made, and so it should not be an exception, and this Court in Gecky v. Branch specifically said, if -- just because a practice is claimed to have been shocking, which I submit it definitely is not, but that's O'Dell's argument, that does not mean that it qualifies as a Gideon-type new -- exception to the new rule doctrine.

QUESTION: What do we do about a situation in which the rule is new in the sense that there's no other decision on the books, but in fact the decision is in response to a problem which no one would ever have conceived would have arrived?

In other words, in effect it's such an egregious case that it was never -- there was never any need to litigate it before, so in once sense it's a new rule because there wasn't any prior decision, and in another sense it's an old rule because no one in his right mind would ever have thought that it would be necessary to litigate that point.

Would that kind of a decision satisfy the second

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Teague exception?

MS. BALDWIN: I don't think so, unless it met this standard of this primacy and centrality. I don't think it can be something that is a particular practice in one case.

QUESTION: Oh, I quite agree, but assuming it reaches the point of fundamental importance that we're talking about, would it satisfy the second Teague exception to be this unusual kind of new rule, which is new only in the sense that it's so fundamental that no one ever had to litigate it before?

MS. BALDWIN: Well, I don't think that alone would satisfy the second exception. It would have to be -- whatever it is, this Court would have to be willing to say that this is like Gideon. This is that ground --

QUESTION: Oh, that's right. That's why I say, we'll assume that it is of fundamental importance. Start with that.

MS. BALDWIN: It has to be more than that.

QUESTION: Right, and there are two ways to satisfy the something more. One way is to say, this represents a real about-face in our jurisprudence. No one ever thought we would do this, but it now seems necessary.

A second way would be to say, there's nothing new about this. People have followed this kind of law

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

forever. No one would ever reasonably have disputed it. What's new is that in this odd case it had to be litigated and go on the books.

Now, assuming that we're dealing with a matter of fundamental importance, would this second kind of case, the egregious case that never had to be litigated before but has now been litigated and represents what most people would have supposed the law always had been, would that kind of a case satisfy the second Teague exception?

MS. BALDWIN: Justice Souter, I don't think I'm going to agree that -- I cannot possibly conceive of a rule, frankly, that would meet the second exception, so I would say even under those circumstances not. But you know --

QUESTION: Would you say, then, that it was no rule, no new rule in the first place, that even though there was no prior case law on it, it simply represented what had been the accepted law, so that the Teague issue never arises?

MS. BALDWIN: Oh, right. If that's --

QUESTION: You would say it fell into that category.

MS. BALDWIN: If that's the case then it's not a new rule and we don't even get to that.

QUESTION: Okay, so new does not -- your

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

argument about what is new and how Teague should be understood is not new in the sense that looks exclusively to prior cases, but new in fact, new in substance.

MS. BALDWIN: Yes, and --

QUESTION: That's what a new rule is.

MS. BALDWIN: You don't need to reach that in this case anyway.

QUESTION: Okay.

MS. BALDWIN: Because all Simmons is -- all Simmons was, was essentially an exception that was carved out of the Ramos general rule of deference to States to decide whether to instruct juries about parole or not.

This is really nothing more than an additional -- an incremental change, but -- an important change, but nevertheless an incremental exception that has been carved out of that heretofore general deference that States knew that they had in these --

QUESTION: That's -- I accept your explanation --

MS. BALDWIN: That's why I don't think it satisfies the second exception.

QUESTION: Yes.

QUESTION: I share your puzzlement about the second exception, which seems to say we're not going to allow new rules to overturn settled cases unless it's a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

really new rule, then we will allow it. It seems a rather strange exception to the rule.

QUESTION: May I ask a factual question, Ms. Baldwin?

You mentioned that the -- apparently the jury was apprised of the fact that this man had committed a murder while he was in prison before. I don't find reference to that in the prosecutor's closing argument, and I notice in your brief your citation for that is to the court of appeals' opinion, and I just wondered, did this come out at the trial itself?

MS. BALDWIN: Oh, yes. Yes, Your Honor. The -- his -- during the prosecution's case in the sentencing hearing the only thing the prosecutor presented --

QUESTION: This was at the penalty hearing?

MS. BALDWIN: At the penalty hearing.

QUESTION: Yes.

MS. BALDWIN: The only thing that the prosecutor presented in his case in chief was O'Dell's prior conviction orders, which showed what he'd been convicted of, and one of the was a second degree murder, and then he also -- they also presented Donna Doyle, who had been --

QUESTION: Right.

MS. BALDWIN: -- attacked by O'Dell 10 years before.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And then O'Dell in his case, when he came in, he went into great detail explaining to the jury about this murder that had occurred in prison, because it was the killing of another inmate, and he had an explanation that he gave to the jury.

QUESTION: But am I correct in reading the prosecutor's argument, the prosecutor did not refer to that incident at all in his closing.

MS. BALDWIN: He referred to the murder, on page 61 of the appendix. He did not refer to -- he did not describe it as a murder that occurred in prison.

He says, there is a graduation of seriousness of the offenses from use of a car, to a robbery, to a murder, to an abduction, and another robbery, and now to another murder, so he listed it.

QUESTION: But that's what he then followed with talking about, isn't it interesting that he's only able to be outside of --

MS. BALDWIN: Yes.

QUESTION: -- the prison system for a matter of months and a year-and-a-half before something has happened again.

MS. BALDWIN: And I think that was a fair argument considering O'Dell's obvious strategy to present this to the jury.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: But you don't think that argument implied to the jury that the death penalty is necessary in order to avoid a repetition of these crimes.

MS. BALDWIN: I do not believe that that is what this was.

QUESTION: Okay.

MS. BALDWIN: I do not believe it at all.

As this Court has stated many times, the purpose of Teague is to promote finality for State court judgments and to uphold those which were valid when made.

The Virginia supreme court's decision in O'Dell was made in good faith reliance on precedent that was existing at the time, and there was no decision anywhere that dictated a different result in 1988. Virginia should be permitted to carry out the sentence in this case --

QUESTION: Ms. Baldwin, if there is any content at all to that second exception, why shouldn't it be for a case where literally it's a life or death choice?

MS. BALDWIN: I think specifically for the reasons underlying the purpose of the new rule doctrine to begin with, and those are irrespective of sentence.

The -- we always have to look back and say what the new rule doctrine -- it was meant to promote finality of judgments, and to uphold -- to uphold judgments which were valid when made so that courts can know that if they

reasonably and in good faith apply constitutional precedent that exists at the time they're making their decision they can be assured that those judgments will remain valid, and I think that that is irrespective of the sentence in the case, and I don't think there's -- there definitely should not be an exception, because it would -- I think it would destroy the new rule doctrine.

QUESTION: Of course, the theory of the exception is that the error was so serious the judgment was not valid when it was made. That's the whole theory, that if there's a sufficiently serious constitutional error, the whole thing is void.

That was the old-fashioned notion in habeas corpus years ago, and that's the underlying basis.

MS. BALDWIN: For the second exception? I'm not sure I understand.

QUESTION: Maybe I'm mixing up the two exceptions, but when the error is sufficiently serious that -- the whole thing is void.

MS. BALDWIN: Well, I don't --

QUESTION: I'm mixing up the exceptions.

MS. BALDWIN: I don't believe that that's what this Court has said defines the second exception.

QUESTION: What I actually have trouble in, but I don't know that you can help, is everything's new in a

sense, and everything relates to everything --

MS. BALDWIN: Yes.

QUESTION: -- previously in a sense, so how is the line drawn?

What they're saying here is, it's so obvious that juries think that life doesn't mean life. The average person in the street thinks that, life doesn't mean life, that it doesn't take much before they think in the jury box, life doesn't mean life, and therefore tell them, life means life, otherwise they'll sentence the person to death under that misapprehension.

MS. BALDWIN: Well --

QUESTION: Now, that's what I think he's saying is so serious, because there's such a basic principle in the law, that certainly you're not going to sentence people to death when the jury's under a serious misapprehension that somebody is trying to cure.

And all the details of all these cases, which you're absolutely right, they're all over the place in terms of complexity, that's really beside the point when you see that very basic thing that they're trying to illustrate.

MS. BALDWIN: But I think that that's what Simmons said in 1994. That's what this Court has said in 1994, and that's a perfectly reasonable position.

To use Simmons as the prism through which we look back at other cases is what the new rule doctrine says we can't do. You've got to go back in time and say, is that what courts thought in 1988.

And I submit a perfectly reasonable, I think rationale for the rule in 1988 was that courts for one thing did not consider rebuttal, I think, in the way that Simmons described rebuttal.

I mean, they -- I think as Justice Scalia pointed out, it was reasonable for a court to believe that you were not rebutting future dangerousness by showing that you were going to be parole-ineligible, because by doing that you were showing that you had a horrendous record, so terrible that the State was not going to let you out on parole. A reasonable court I think would have not thought that was rebuttal.

I mean, and in addition, all of the arguments that this -- if we go down that road it's going to be so speculative it's going to end up prejudicing the defendant, because if you want to give a complete picture you're going to have to come in and show that the Governor could let him out, he could escape from prison, any number of things that would deflect the jury, I believe.

Unless the Court has any further questions, I'll conclude.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Thank you, Ms. Baldwin.

Mr. Smith, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF ROBERT S. SMITH

ON BEHALF OF THE PETITIONER

MR. SMITH: Mr. Chief Justice, I just want to address briefly the idea that the death sentence here was the result of the fear that he would be dangerous in prison, which has been an argument made both in the harmless error context and also in the context of suggesting that it was reasonable to -- a reasonable jurist in 1988 might have taken that approach.

I think the -- that what happened here is very closely analogous to what happened in Skipper. I'm not saying that improper arguments were made. Very fair arguments were made, but the arguments had nothing to do, or at least did not advertise themselves to have anything to do with the man's dangerousness in prison.

The prosecutor had what you might think is this absolutely wonderful fact that a prison murder had occurred, and did not even mention in his closing argument that that murder was in prison. Indeed, he put it in the middle of a -- what he called an ascending hierarchy, and chose to stress the more serious things that had happened afterwards.

He talks about a night stalker. He talks about

the man at large on dark and rainy nights, and then he uses the language that I think Justice Souter read. Isn't it interesting that he is only able to be outside of the prison system for a matter of months to a year-and-a-half before something has happened again.

But what is interesting about it? What's interesting about it, of course, is that it generates in the jury the thought that this might recur. It's not an improper argument. It's a perfectly fair argument as long as the defendant is allowed to rebut it, but it cries aloud for rebuttal.

QUESTION: It might recur. I mean, all the defendant can say is, well, as the current law is, he wouldn't get out. Should the State be able to come in and say, well, the current law may be changed? In fact, it was changed only 2 years ago. Or introduce statistics about how State laws are changed.

MR. SMITH: Within --

QUESTION: I mean, I understand that, you know, that's not how we ultimately concluded, but I don't know that you couldn't have looked at it that way at that time and just said, we don't want to get into all these things.

MR. SMITH: I guess I just -- I respectfully submit, Justice Scalia, that what is obviously happening is that you have someone whom the prosecution is

portraying successfully as a terrifying individual, that for him to be able to say, I'm facing life without parole is such an obvious thing. It is so obviously unfair to prevent him from doing that.

QUESTION: Now, did the defendant so testify in front of the jury and tell the jury that he wouldn't be eligible for release?

MR. SMITH: No, Your Honor.

QUESTION: That didn't occur. That was a misstatement by counsel?

MR. SMITH: I don't think that's what Ms. Baldwin said.

He never said that he would be ineligible for parole. He said, I'm 45 years old. I've got to do, what he called a flat 16 years because I've got a parole violation, and therefore he drew the inference something like, I ain't never gonna get out.

That to me is not nearly comparable, does not render harmless at all the Simmons error to say that, assuming the jury understood and believed what he was saying, which is a big assumption, that's a long way from saying I'm facing life without parole.

He tried to say it. He proffered that testimony and it was objected to. He asked for an instruction, and by the way an instruction has nothing -- even though it's

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

an instruction as a matter of fact, an instruction is simply a way that you judicially notice facts brought to the attention of the jury.

He wanted to put this fact, the fact that he was facing life without parole, before the jury. He wanted to put it in in rebuttal of an argument that was made and made very effectively that he was a dangerous person who could not be in the community for more than a few months without causing trouble.

He was not permitted to do that. That was an obvious violation of due process. It would have been a clear violation of due process to a reasonable jurist in 1988.

If there are no other questions, I'll conclude.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith. The case is submitted.

(Whereupon, at 12:07 p.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

JOSEPH ROGER O'DELL, III, Petitioner v. J. D. NETHERLAND, WARDEN, ET AL.
CASE NO. 96-6867

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

BY Ann Marie Federico

(REPORTER)