IN THE SUPREME COURT OF THE UNITED STATES

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WESLEY AARON SHAFER, JR., :

Petitioner :

v. : No. 00-5250

SOUTH CAROLINA :

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Washington, D.C.

Tuesday, January 9, 2001

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

APPEARANCES:

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

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

C O N T E N T S

P R O C E E D I N G S

(11:15 a.m.)

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

Mr. Bruck.

ORAL ARGUMENT OF DAVID I. BRUCK

ON BEHALF OF THE PETITIONER

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

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

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

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

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

MR. BRUCK: No.

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

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

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

MR. BRUCK: Yes. The trial judge --

QUESTION: -- argument.

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

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

MR. BRUCK: Excuse me. The prosecutor.

QUESTION: The prosecutor -- yes.

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

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

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

MR. BRUCK: Yes. In formulating --

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

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

show that the defendant would be dangerous in the future. It --

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

MR. BRUCK: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Well, yesterday's --

QUESTION: The -- go ahead.

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

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

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

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

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

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

QUESTION: Mr. Bruck, you said that the State

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

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

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

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

QUESTION: It has to be future dangerousness to

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

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

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

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

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

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

MR. BRUCK: Certainly --

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

MR. BRUCK: Yes, and --

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

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

QUESTION: Which said what?

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

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

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

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

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

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

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

and therefore a Simmons instruction has to be given.

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

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

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

(Laughter.)

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

MR. BRUCK: That's okay.

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

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

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

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

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

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

over, except in South Carolina.

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

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

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

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

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

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

MR. BRUCK: Yes, of course.

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

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

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

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

QUESTION: So that -- okay.

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

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

MR. BRUCK: No.

QUESTION: Has that ever been passed on?

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

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

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

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

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

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

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

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

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

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

life in prison.

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

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

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

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

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

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

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

MR. BRUCK: If there is --

QUESTION: Do you think Simmons said that?

MR. BRUCK: No. I think that either -- no, I don't think it's the jury's question. I think that is the question for another day. I think a good argument could be made that you are entitled to it, but it is not an argument that we need to make, because the reason, in this case, the jury probably asked is that the State proved future dangerousness, or at least took a pretty good run at it, as they said they were going to do in their pretrial notice. They were good to their word.

QUESTION: Mr. Bruck, you said a moment ago that you didn't have a chance to get your side of the argument to the jury. Certainly the defense counsel could have stated to the jury, he'll never get out of prison because the alternative is life without parole.

MR. BRUCK: No, Your Honor. As a matter of fact, counsel requested the right to read that statute to the jury. The State opposed the argument, and the judge ordered him not to do it, and as a result, all he was left with was various metaphors for the term, life imprisonment, which by its terms -- I mean, if you analyze it closely --

QUESTION: Well now, are you saying that -- in South Carolina do you have to submit in advance your arguments to the other side?

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

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

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

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

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

QUESTION: Okay.

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

QUESTION: That might well have been a problem.

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

QUESTION: Very well, Mr. Bruck.

Mr. Zelenka, we'll hear from you.

ORAL ARGUMENT OF DONALD J. ZELENKA

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

QUESTION: Well, the supreme court, as I read

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

MR. ZELENKA: That's correct.

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

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

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

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

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

MR. ZELENKA: That's correct.

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

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

QUESTION: Well, I would think that Simmons

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

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

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

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

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

MR. ZELENKA: That's correct.

QUESTION: And I would have thought that Simmons

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

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

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

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

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

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

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

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

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

QUESTION: Have there been any?

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

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

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

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

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

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

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

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

MR. ZELENKA: What I'm --

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

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

QUESTION: Oh, a guilty plea, yes.

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

QUESTION: Right.

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

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

MR. ZELENKA: That's correct.

QUESTION: Okay.

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

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

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

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

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

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

For the second reason, we submit that future

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

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

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

QUESTION: Has it been asked for in any case?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: No, I'm addressing --

MR. ZELENKA: The emotional trauma --

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

MR. ZELENKA: That's correct.

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

MR. ZELENKA: No, it was not phrased as that. There was nothing --

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

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

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

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

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

upon future dangerousness.

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

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

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

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

QUESTION: As a tactical decision.

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

QUESTION: That seems to me to --

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

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

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

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

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

QUESTION: I just don't understand that.

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

until the death of the offender. The concern --

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

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

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

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

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

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

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

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

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

QUESTION: Mr. Zelenka --

MR. ZELENKA: -- at that time.

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

MR. ZELENKA: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

MR. ZELENKA: They --

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

MR. ZELENKA: That's correct.

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

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

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

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

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

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

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

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

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

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

QUESTION: Not the judge, and not defense counsel?

MR. ZELENKA: That's correct.

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

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

Now, if the judge made that instruction --

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

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

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

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

QUESTION: Thank you, Mr. Zelenka.

Mr. Bruck, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DAVID L. BRUCK

ON BEHALF OF THE PETITIONER

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

In the record of this case that you have here,

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

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

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bruck.

The case is submitted.

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