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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM ARTHUR KELLY, :

Petitioner :

v. : No. 00-9280

SOUTH CAROLINA. :

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Washington, D.C.  
Monday, November 26, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:59 a.m.

APPEARANCES:  
DAVID I. BRUCK, ESQ., Columbia, South Carolina; on behalf  
of the Petitioner.  
S. CREIGHTON WATERS, ESQ., Assistant Attorney General,  
Columbia, South Carolina; on behalf of the  
Respondent.

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(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-9280, William Arthur Kelly 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:

For the second time this year, the Court considers today South Carolina's compliance with your decision in Simmons v. South Carolina. The issue this time is -- is the interpretation, if you will, the South Carolina Supreme Court has placed upon the future dangerousness requirement of the Simmons decision, specifically whether, as the South Carolina Supreme Court put it, future dangerousness was neither a logical inference from the evidence nor was it injected into this case through the State's closing argument.

QUESTION: Well, in -- in some sense -- and this is what concerns me about your argument -- I -- I suppose at some level future dangerousness is -- is always inferable from the fact of -- of a horrible crime.

MR. BRUCK: I -- I think it is true that -- that

1 when a person is convicted beyond a reasonable doubt of an  
2 aggravated, death-eligible murder, it is -- it does not  
3 take very much more to put the issue of future  
4 dangerousness at issue. You can conceive of crimes -- I  
5 particularly suggest the example of an intrafamilial --  
6 that is, the murder of children by their mother where the  
7 person with no prior record and no likelihood that the  
8 situation will recur, where future dangerousness simply  
9 does not sound from the evidence.

10 However, in -- there are also --

11 QUESTION: We -- we are the ones that -- that  
12 gave you this -- this category of future dangerousness.  
13 And it either makes sense or it doesn't. If -- if there's  
14 something defensible about the category, it -- it seems to  
15 me that there would be a significant number of cases in  
16 which it doesn't apply. I -- I just don't see that from  
17 your argument. Now, maybe the category is unworkable.  
18 That's another point.

19 MR. BRUCK: Well, I should say that future  
20 dangerousness is not likely to be at issue in -- in cases  
21 where State law does not provide the jury the freedom to  
22 consider it. If aggravation was clearly limited in a  
23 weighing statute in which the jury has clearly said these  
24 are the -- or is clearly told, these are the factors that  
25 go on death side of the scale and nothing more -- only you

1 can think of a way in which the prosecution could try a  
2 case in a way that clearly conveyed the message to the  
3 jury that --

4 QUESTION: Well, how many States that use the  
5 death penalty allow future dangerousness as a factor in  
6 sentencing?

7 MR. BRUCK: You know, I don't have an exact  
8 number. My sense is that a small minority have it as a  
9 statutory aggravating factor, such as Texas, Virginia, and  
10 Oregon, and a much larger number like Georgia, South  
11 Carolina allow it along with a myriad of other sentencing  
12 factors without it ever needing to be explicitly  
13 mentioned. These are the so-called non-weighting States.  
14 I would guess --

15 QUESTION: Well, that is the concern, of course,  
16 is if -- whether this concept is something that is going  
17 to have to be applied in every capital sentencing case or  
18 whether there's some limitation.

19 MR. BRUCK: Well --

20 QUESTION: And it's hard to know from your  
21 argument the answer to that. Can you draw a line?

22 MR. BRUCK: Yes. I would say where the evidence  
23 does not sound in future dangerousness and where the  
24 prosecution does not advance the jury's consideration of  
25 future dangerousness. For example, in this case, you

1 know, on these facts, of course, none of this is  
2 implicated. This is simply Simmons. This is within  
3 Simmons. Even if we were to limit Simmons to its facts,  
4 it would include this case because you have an onslaught  
5 of future dangerousness argument. You have an onslaught  
6 of classic future dangerousness evidence presented --

7 QUESTION: Wait, wait, wait, wait, wait. You  
8 say evidence sounds in future dangerousness. What -- what  
9 evidence that -- that is introduced at -- you know, at the  
10 -- at the sentencing phase that this is a horrible person  
11 would -- would not sound in future dangerousness? You're  
12 trying to show that this is a horrible person, that he  
13 deserves the death penalty. What kind of evidence  
14 wouldn't sound in future dangerousness?

15 MR. BRUCK: Well, for example, the prosecutor  
16 here took on the issue of the fact that this young man was  
17 only 17 years old, and his -- and had no prior record,  
18 both very substantial mitigating factors. And the  
19 response was that actually the very fact that he had no  
20 prior record, the prosecutor said, makes him more  
21 frightening than a serial killer, more frightening than a  
22 career criminal, which is all future dangerousness  
23 rhetoric. Frightening means looking toward the future.  
24 One is not frightened by things that have already  
25 happened, but things that might happen in the future.

1 QUESTION: Now -- now, you're relying on the  
2 statement of -- of the prosecutor --

3 MR. BRUCK: Yes, in part.

4 QUESTION: -- on his use of the word  
5 frightening. And in another place, he does use the term  
6 dangerousness.

7 MR. BRUCK: Yes, he does.

8 QUESTION: Now, that's one thing if you want to  
9 -- and -- and we -- we can discuss that. But -- but I'm  
10 more concerned about your broader point that when the  
11 evidence, as you put it, sounds -- I'm not sure it's the  
12 proper use of sounds, but when the evidence, as you put  
13 it, sounds in future dangerousness, we have to -- it -- it  
14 is constitutionally required that you -- you have the  
15 instruction about no parole.

16 MR. BRUCK: Well, I mean, we should recall that  
17 -- that -- I mean, one can say, well, these are just the  
18 facts of the crime. The State has enormous discretion  
19 about what evidence it wants to present, and when it  
20 presents evidence that is reasonably likely or, in this  
21 case, virtually certain to cause the jury to consider the  
22 -- the elemental sentencing issue that a judge considers  
23 in almost every case, will he do it again, then --

24 QUESTION: That will always be the case. You --  
25 you are asking for a rule that -- that will cover every

1 capital case. I cannot imagine a capital case where --  
2 where the prosecution does not, at the sentencing phase,  
3 put in evidence that makes this look like a horrible  
4 person, hence, a dangerous person. And -- and I -- you  
5 know, I just don't know that we're prepared to go that  
6 far.

7 Which leads me to what words -- what are the  
8 magic words that you want the prosecution not to be able  
9 to use. Frightening is one magic word. Right? Dangerous  
10 is another magic word.

11 MR. BRUCK: It most certainly is.

12 QUESTION: Okay. I mean, we can just have a  
13 list of magic words that prosecutors shouldn't use from  
14 now on.

15 MR. BRUCK: I think there would be no harm,  
16 although this case provides absolutely no occasion to  
17 consider the issue, in dispensing with the future  
18 dangerousness requirement for precisely that reason, that  
19 when -- that it is -- there are so few cases in which the  
20 jury is not likely, in the privacy of the jury room, to  
21 ask the question, what if he gets out and does it again?  
22 This comes up in case after case. And there's a -- in  
23 weighing the -- the State -- I mean, is there a danger  
24 that the Simmons rule might then be applied in cases where  
25 it truly does not rebut something that the jury --



1 occasionally in the rare case, yes.

2 But in considering the equities, I think it's  
3 worth keeping in mind that there is unfairness not only on  
4 the issue of future dangerousness from this situation.  
5 There is also unfairness in the retributive function that  
6 the jury must suffer, and this is not in this case. It  
7 may be more of an Eighth Amendment claim, but I think in  
8 weighing the risk of unfairness to the two sides, it's  
9 worth keeping in mind that life without parole is a much  
10 more severe punishment. It is much more retributive than  
11 is life with parole. And it is -- it is more severe from  
12 the moment it is imposed, not only 30 or 40 years hence.  
13 And the reason is that life without parole means life  
14 without hope.

15 And anyone -- I -- I try these cases and -- and  
16 negotiate plea bargains in these cases at the trial level,  
17 and I can tell you that there is nothing that cuts the ice  
18 faster with the victim's family, with the prosecutor in  
19 settling a case than life without parole not because of  
20 the dangerousness, but because of its retributive effect.  
21 And there's something terribly unfair at -- when everyone  
22 in the courtroom knows how crushing this penalty is, this  
23 penalty of life without hope, except the jury, and they  
24 are left to think that their option is to let this man  
25 hope that some day he'll be out raising a family and

1 working at a job and -- and pretending to be a respectable  
2 member of the community when it isn't so.

3 QUESTION: You're asking us to overrule Simmons.

4 MR. BRUCK: No, by no means. This case -- all I  
5 am saying is that if it is true, as my friend claims, that  
6 our category of cases in these non-weighting jurisdictions,  
7 where the jury is given free rein to consider everything,  
8 that our category of non-dangerousness cases is actually  
9 so small as to be nonexistent, then in those States at  
10 least I think it would be fair. And there is no harm in  
11 saying --

12 QUESTION: But that isn't the question you  
13 presented in your petition. All you presented in your  
14 petition was, was the ruling of the Supreme Court of South  
15 Carolina in this case contrary to Simmons?

16 MR. BRUCK: Well, that's right because I  
17 represent a client and all my client requires is that  
18 Simmons be applied. We have something that I think can  
19 fairly be described as something approaching defiance of  
20 your -- of your decision in Simmons when a record like  
21 this is -- is found not to raise future dangerousness.  
22 The only thing that State can come up with that they  
23 didn't do is to call Dr. Grigson, some psychiatrist, to  
24 say --

25 QUESTION: Well, for the reasons that we've

1 indicated in our questions, I -- I don't think it's  
2 defiance. I -- I do think the prosecution is being pretty  
3 careful not to raise future dangerous explicitly because  
4 it doesn't want the jury to know this.

5 MR. BRUCK: Yes.

6 QUESTION: And it makes it a little troublesome  
7 But given the state of our law, future  
8 dangerousness has to be put in issue, and as we -- as  
9 we've indicated, I -- I think under -- under your rule  
10 that would be an issue in almost every case.

11 Let me ask you this. You've heard me ask it  
12 here before. I -- I take it that if this instruction were  
13 given, either the trial judge relented or future  
14 dangerousness was at issue, it's perfectly open to the  
15 State to say, now -- now, you may think this prisoner has  
16 no hope, but the legislature can change this tomorrow  
17 morning. Tomorrow morning the legislature can change the  
18 parole rule, and this prisoner -- this defendant can be  
19 out in the community, once again a danger.

20 MR. BRUCK: Well, I think that --

21 QUESTION: I take it that would be a fair  
22 argument?

23 MR. BRUCK: I don't think it would be for a  
24 separate reason, which is it invites the -- the jury to  
25 treat the law under which this person is being sentenced

1 as in effect nonexistent. The only thing that's real is  
2 death because that can't be changed.

3 QUESTION: Yes, but -- but the certainty that  
4 life without parole will confine him indefinitely is much  
5 less than that execution will kill him.

6 MR. BRUCK: That's true. That's true. But when  
7 -- when a court -- I mean, a jury doesn't need to be told  
8 that all manmade law is subject to being changed by man.  
9 That is something that we all know. Jurors know that,  
10 that this law was enacted by the legislature and can be  
11 changed --

12 QUESTION: Well, would you allow the prosecutor  
13 to argue it if you were the trial judge?

14 MR. BRUCK: No, I would not because to invite  
15 the jury to --

16 QUESTION: So, you're saying that the jury  
17 doesn't need to be told what it already knows, but that's  
18 inconsistent with your whole position.

19 MR. BRUCK: No. All I'm -- all I'm saying is  
20 that the jury should not be invited to speculate that all  
21 the law that it is being told to apply will melt away and  
22 cannot be relied on and thus should be ignored. And then  
23 the jury ceases really to become a jury that applies the  
24 law of the State and becomes just a pack of --

25 QUESTION: I thought your position -- I thought

1 your position was that this -- that the judge or the  
2 lawyer reads the text of what it says in the South  
3 Carolina law.

4 MR. BRUCK: Exactly.

5 QUESTION: Reads word for word what the  
6 legislature enacted.

7 MR. BRUCK: That is exactly correct.

8 QUESTION: And that's all you're asking.

9 MR. BRUCK: That's all we're asking. And, you  
10 know, my -- my submission --

11 QUESTION: Wait. Whether -- whether we should  
12 allow that to happen depends on, you know, how fair it is  
13 to the prosecution and why shouldn't the prosecution be  
14 able to point out the reality that that's what the  
15 legislature has said today and it can change that  
16 tomorrow? So, if you really want future dangerousness to  
17 be -- to be treated openly and honestly, I don't see how  
18 you can just -- just say put in the one side and not the  
19 other.

20 MR. BRUCK: Well, I have to say my case does not  
21 turn on the answer to that question. That could be  
22 decided either way, as this case is reversed, because  
23 that's not an issue in this case. It certainly would  
24 become the stuff of future appeals to this Court from the  
25 only two States that see any issue left here, Pennsylvania

1 and South Carolina.

2 QUESTION: In all the other States, in -- in  
3 every other State that has capital punishment --

4 MR. BRUCK: Yes.

5 QUESTION: -- this instruction is given as a  
6 matter of course?

7 MR. BRUCK: Regardless of any absence or  
8 presence or alleged absence of future dangerousness. In  
9 other words, every State but South Carolina and  
10 Pennsylvania already go beyond Simmons, and these are the  
11 only two outliers in which the record is combed for  
12 whether or not future dangerousness is at issue.

13 Now, as I say --

14 QUESTION: When you say it's outliers, but once  
15 again that's the -- that's the dichotomy that this Court  
16 set forth in -- in Simmons and in our past opinions.

17 MR. BRUCK: Well, yes. The -- it's true that --  
18 that Simmons set a constitutional minimum rule and it  
19 required future dangerousness to be at issue. And there  
20 are a great many -- in a -- in a non-weighing  
21 jurisdiction, there are a great many ways of putting  
22 future dangerousness at issue. It can be done, as the  
23 Court has held in Simmons itself, by argument. It can be  
24 done, as is never done in South Carolina, by instruction  
25 to the Court, because it's not a statutory factor. Or it

1 can -- as the State agrees and as the South Carolina  
2 Supreme Court acknowledges, it can be done solely by  
3 evidence without argument by the solicitor.

4 QUESTION: But what about the argument that  
5 everything that goes to future dangerousness also goes to  
6 something else? The prosecutor said, yes, I showed that  
7 this was a terrible person because he had no prior record,  
8 and I used the Billy the Kid remark because -- to rebut  
9 the age. So, I can give you a reason, other than future  
10 dangerousness, for everything that I put in.

11 MR. BRUCK: Well, it's -- it's -- there's very  
12 little evidence of future dangerousness and very little  
13 argument that cannot also be given a retributive  
14 interpretation, which is what the State has labored to do  
15 in their brief.

16 And if all that -- it's striking that the State  
17 is not at all satisfied with the test stated by the South  
18 Carolina Supreme Court, which is whether the issue was  
19 argued or whether future dangerousness is a logical  
20 inference from the evidence. The State's test for whether  
21 evidence is -- raises an issue of future dangerousness is  
22 that the evidence must only raise future dangerousness and  
23 must raise nothing but future dangerousness.

24 Now, it's rather hard. The only example, as I  
25 say, they can think of is a psychiatric opinion that the

1 man will kill again. Apparently that's the only evidence  
2 that triggers Simmons under the Attorney General's view.

3 QUESTION: So what? What's so -- what's so  
4 absurd about that?

5 MR. BRUCK: Because it ain't so.

6 QUESTION: What is so absurd about that? If  
7 Simmons meant anything, it seems to me that's what Simmons  
8 meant, or otherwise it -- it -- you know, it's virtually  
9 worthless.

10 MR. BRUCK: Well, there was no psychiatric  
11 opinion introduced by the State in Simmons itself. There  
12 was nothing but a metaphorical argument that two members  
13 of the Court didn't think raised future dangerousness at  
14 all.

15 But it was this idea of self-defense in response  
16 to someone who was a threat. That -- that was also an  
17 argument about retribution, and as the dissenting opinion  
18 in -- in Simmons pointed out, that -- you could certainly  
19 see the retributive meaning, significance, that the  
20 prosecutor meant there.

21 But it also -- it also raised the issue of  
22 future dangerousness, and that was all in Simmons. And  
23 that was enough. And that's why I say that to affirm this  
24 case would require -- would require reversing Simmons.

25 One has to weigh, too -- I mean, you know, the



1 State argues this issue as if we are keeping them from  
2 introducing evidence, and we are doing something unfair or  
3 we're saying they can't do this, they can't do that. We  
4 don't say the State can't do anything. All we say is that  
5 when they make an argument like they made in this case --  
6 he's quick-witted, doesn't that make someone a little more  
7 dangerous, calling the defendant Billy the Kid, Bloody  
8 Billy, the Butcher of Batesburg, and on and on and on and  
9 on and on -- that we be able to answer it by saying how  
10 the legislature has defined life imprisonment for the  
11 people of South Carolina.

12           These jurors are the same voters that demanded  
13 that life imprisonment be -- be enacted, and now that it  
14 has been enacted, what can be fair about keeping the  
15 defendant from telling the jury, even if all this that the  
16 prosecutor says about me is true, I will never be released  
17 again?

18           Now, the -- the State also acknowledges, both  
19 the State Supreme Court and the Attorney General, that  
20 future dangerousness was raised in this case. They make  
21 no bones about that. But they say, well, we raised it in  
22 a special way that does not implicate Simmons. What we  
23 did was we introduced evidence that not even the Lexington  
24 County jail could keep this man from being nonviolent, and  
25 that is future dangerousness. And that's why the

1 instruction that we offered, telling the jury that future  
2 dangerousness was not in the case, was denied.

3 But the -- but the State says, in defiance of  
4 all common sense, that evidence that this young man would  
5 be dangerous, even behind bars and concrete and steel, did  
6 not implicate the notion that if you notion that if you  
7 let him out, he would be even more dangerous. That is why  
8 the State says that prison dangerousness does not --

9 QUESTION: He just didn't like being confined.

10 MR. BRUCK: I'm sorry?

11 QUESTION: Maybe he just didn't like being  
12 confined. I mean, you can imagine a situation like that.

13 MR. BRUCK: Well, Mr. Chief Justice, anything is  
14 possible, but that does not commend itself to our common  
15 sense. I think what the jury is much more likely to infer  
16 from that is that if even jail and prison can't keep this  
17 guy from being dangerous, if he ever gets let out, let out  
18 on parole, Katie, bar the door. He's going to be a  
19 disaster.

20 QUESTION: Well, I'm not sure about that  
21 inference. If I were a juror and I heard about this  
22 evidence, I'd say my principal focus would be on the  
23 safety of the guards and the inmates. I'd say this man is  
24 dangerous in prison and that's the reason for capital  
25 punishment. It seems to me perfectly logical.

1 MR. BRUCK: That -- as I say, the -- the  
2 evidence has two meanings and that is one of them. We  
3 don't quarrel with that. But at the same time, if -- if  
4 he is --

5 QUESTION: Well, then you can't say it defies  
6 all logic, et cetera, et cetera. It seems to me that  
7 that's the -- the most direct conclusion that -- that  
8 should follow from the prosecution's evidence on this  
9 point. He's dangerous in prison.

10 MR. BRUCK: Even if it is the most direct, how  
11 can we say that it does not also prove that if you let him  
12 out on parole, he'll be even more dangerous?

13 QUESTION: But that isn't what Simmons said. I  
14 thought the rule of Simmons was -- was a rule of fairness.  
15 Look, prosecution, if you're going to argue that this man  
16 should be executed because it -- he will be dangerous to  
17 society if he's -- if he's let out, then, for Pete's sake,  
18 you have to let the jury know that he won't be let out.  
19 It's an unfair argument for the prosecution to say he'll  
20 be dangerous to society unless you execute him, when the  
21 prosecution knows that he'll never get out.

22 MR. BRUCK: Right.

23 QUESTION: But this is far beyond that. This  
24 has nothing to do with such an unfair argument by the  
25 prosecution. He's not saying don't let this person go

1 because he'll be praying on society. There's -- there's  
2 nothing approaching that argument.

3 MR. BRUCK: Well, I think it -- it -- what we  
4 have here is a prosecutor who has Simmons and who knows  
5 that if he wants to hide from the jury -- you see, the  
6 prosecution agrees with us about -- and this is, in a way,  
7 what is most disturbing and troubling about this case. If  
8 the prosecution did not believe, based on their evidence  
9 and their argument, that this jury was thinking about  
10 future dangerousness to society, why would they care?  
11 What possible harm could there be from a Simmons  
12 instruction?

13 I think the prosecution entirely agrees with us  
14 on the importance of this and on the dynamics of jury  
15 deliberation in a case where a -- where the -- where the  
16 State's evidence and the argument is of this nature. They  
17 know perfectly well what any practicing lawyer who tries  
18 these cases on either side knows, which is that this jury  
19 goes back in the jury room, after having seen and heard  
20 all of this, and thinks one thing for sure: We got to  
21 make sure he doesn't do it again. And it is a  
22 constitutional fact, established by the Simmons case,  
23 that's -- that part of that is parole, the jury's  
24 misconception about parole, because we've had parole for  
25 so many generations and life without parole is a new

1 phenomenon in this country.

2 QUESTION: But this -- this is not a case, is  
3 it, in -- where the trial judge put any limitation on the  
4 defense attorney's arguing this point or where the jury  
5 came back with a question. This is not one of those  
6 cases.

7 MR. BRUCK: Right. For all we know, the jury  
8 knew there was parole, wrongly. And no limitation.

9 But I have to say -- and the State has not  
10 claimed that in the face of this argument on instructions,  
11 that the lawyer -- the defense attorney should have picked  
12 up a statute book and read to the jury the instruction  
13 that the judge had just refused to give. She would have  
14 had her head handed to her on a plate if she had done  
15 that. That is not permitted in South Carolina. When a  
16 legal principle has been ruled out of a case, a lawyer  
17 cannot then attempt to charge the jury anyway. And that  
18 is not an argument you'll find in the State's case.

19 They do say that her -- her rhetorical claim or  
20 -- or co-counsel's claim that you'll never see the light  
21 of day should be deemed as the equivalent of a no-parole  
22 instruction, but you dealt with that and disposed of that  
23 argument in Shafer, where a much more explicit argument  
24 was held not to be the equivalent of an instruction on --  
25 on State law concerning parole. So, I think that -- that

1 argument has absolutely nothing to commend it and is -- is  
2 directly controlled, I would submit, by -- by Shafer.

3 QUESTION: But Shafer was explicit that counsel  
4 would not be allowed to read the statute, which is what I  
5 think counsel wanted to do.

6 MR. BRUCK: Well, that's right. But you know,  
7 it -- a lawyer doesn't, under South Carolina practice,  
8 need to ask the court whether an instruction that has been  
9 ruled out of the case -- whether it's okay for her to read  
10 it to the jury. We know that that is not permissible.

11 I should add, too, that -- that the trial judge  
12 instructed the jury in this case that he is the sole  
13 instructor on the facts. At page 618 of the record, he  
14 said, as -- I am as judge the sole -- made the sole and  
15 only instructor in the law. And so -- and that's, you  
16 know, how trials in South Carolina are conducted. Lawyers  
17 do not instruct.

18 I realize as a matter of constitutional law, if  
19 it were -- if there were a way for defense counsel to have  
20 done that, despite the -- the court's ruling, it would  
21 have sufficed under Simmons, but there was no such way,  
22 and that's why the State makes no such argument in their  
23 -- in their brief. This is not where an opportunity was  
24 passed up by defense counsel to instruct on the law. This  
25 -- there wasn't any such -- any such opportunity, and

1 that's why the -- the argument is so vague and so  
2 unsatisfactory under -- under Shafer v. -- v. South  
3 Carolina.

4 If this is enough to get around Simmons and to  
5 allow prosecutors to keep juries from knowing what the  
6 South Carolina legislature has done with respect to the  
7 abolition of parole, then you will see, as you already are  
8 seeing, case after case from South Carolina in which the  
9 envelope is constantly being pushed further and further  
10 back in what, I have to submit, is a somewhat manipulative  
11 effort to get the advantage of the jury's misconceptions,  
12 to get the advantage of the false dilemma that Simmons  
13 correctly identified in order to get more death sentences  
14 than are actually merited by the law and the evidence in  
15 each case.

16 As I say, this is the second time that -- that  
17 South Carolina has -- South Carolina's compliance with  
18 Simmons has been before this Court in this calendar year.  
19 There probably won't be another one this calendar year,  
20 but there will be a continuing procession. And, indeed,  
21 the first case in line will be Shafer v. South Carolina,  
22 which was remanded for reconsideration of the -- for  
23 consideration -- for a ruling on the issue of future  
24 dangerousness. If --

25 QUESTION: Well, perhaps -- you suggested in

1 your brief that for the future the South Carolina  
2 legislature is going to require that the jury be informed.

3 MR. BRUCK: Prospectively, yes. It will -- it  
4 will do no good for -- for people like Shafer and -- and  
5 the petitioner in this case whose cases have already been  
6 tried. But, yes, the House of Representatives has already  
7 voted overwhelmingly to, in effect, require a Simmons  
8 instruction in every case. That bill is now before the  
9 Senate and it could be by this time next year, this will  
10 be of only historical interest in South Carolina, except  
11 to the petitioner --

12 QUESTION: May I ask, as a matter of historical  
13 interest, when did the requirement that the -- I mean,  
14 when did -- when did the sentence of life without parole  
15 first authorized by the South Carolina --

16 MR. BRUCK: The very first time came in -- in  
17 1986.

18 QUESTION: 1986.

19 MR. BRUCK: And thereafter, the South Carolina  
20 Supreme Court first handed down a truth-in-sentencing rule  
21 and then reversed itself just before Simmons, and Simmons  
22 was the first case tried under the new regime.

23 If there are no further questions, I'd like to  
24 reserve my time for rebuttal.

25 QUESTION: Very well, Mr. Bruck.



1 Mr. Waters, we'll hear from you.

2 ORAL ARGUMENT OF S. CREIGHTON WATERS

3 ON BEHALF OF THE RESPONDENT

4 MR. WATERS: Mr. Chief Justice, and may it  
5 please the Court:

6 In Simmons v. South Carolina, a limited due  
7 process exception was crafted to the general rule in  
8 California v. Ramos that it was for the States to decide  
9 whether to inform the juries on matters of parole or other  
10 early release. And the issue in this case is what  
11 argument and evidentiary submissions are sufficient to --  
12 for the prosecution to have been deemed to raise future  
13 dangerousness such that due process overcomes that State  
14 law rule.

15 And petitioner in this case contends that future  
16 dangerousness can be raised simply by the gruesome facts  
17 of the crime, by misbehavior in jail, by a prior criminal  
18 record. And, of course, that would create, as has already  
19 been discussed, a virtually standardless test and would  
20 conflict with this Court's statements of the Simmons rule,  
21 as well as the subsequent interpretation of the rule by  
22 many other courts. And that is, of course, that a  
23 prosecutor must specifically rely on future dangerousness  
24 to society as a basis for death.

25 And, of course, that -- the reason for that is

1 the rationale of Simmons itself, which is a due process  
2 right of rebuttal. Future dangerousness -- a future  
3 dangerousness requirement is necessary to that due process  
4 right of rebuttal, and obviously, in order to have the  
5 right to rebut something, the other party must have first  
6 done something to affirmatively raise that issue.

7 Now, admittedly some --

8 QUESTION: Mr. Waters, in -- in your view has  
9 any South Carolina prosecutor since Simmons used words  
10 that would invoke that case?

11 MR. WATERS: Invoke Simmons itself?

12 QUESTION: Yes. It seems to me that any  
13 prosecutor, if your argument is right, can easily get  
14 around Simmons simply by not using the words future  
15 dangerousness and saying, well, this is relevant to  
16 something else.

17 MR. WATERS: Well, I think, you know, our State  
18 Supreme Court has on two occasions ruled that Simmons was  
19 violated, and in that case, the -- the prosecutor argued  
20 that, you know, he's shown that he cannot live inside or  
21 outside of prison. So, clearly that crosses the line.

22 I think, you know, the -- the fundamental --

23 QUESTION: I thought your position was if he  
24 couldn't live in prison, then Simmons was out.

25 MR. WATERS: Well, in that particular case, he

1 said both outside of society and inside prison in that  
2 particular case. That's State v. Timothy Rogers, a State  
3 court case. So, our court has on -- on a couple of  
4 occasions ruled that. I mean, obviously --

5 QUESTION: You -- you then concede that if the  
6 -- if the argument that counsel for the -- the prosecutor  
7 makes is this man is dangerous in or out of prison, in  
8 that case a Simmons instruction is warranted.

9 MR. WATERS: I think that by incorporating the  
10 outside society aspect of the argument, our State Supreme  
11 Court has already ruled that and I'm not here to -- to  
12 challenge that.

13 QUESTION: I understood Justice Ginsburg's  
14 question -- and I'm interested in it too -- as can you  
15 tell us, as a matter of practice, are there instances in  
16 where the Simmons rule is followed in South Carolina and  
17 the jury is instructed about parole because of future  
18 dangerous being an issue, or as Justice Ginsburg  
19 suggested, is it the common pattern and practice for  
20 prosecution -- for the prosecutor to stay away from this?

21 MR. WATERS: No. There are plenty of instances  
22 where -- where solicitors argue future dangerousness to  
23 society, and a life without parole instruction is given.  
24 There -- it -- it ultimately boils down to what the  
25 prosecutor does in his argument and how the trial judge

1 rules on -- on what was raised in -- in that trial. But  
2 it does happen.

3 QUESTION: Don't you have that here? I mean,  
4 the argument here was not only the -- the Bloody Billy,  
5 the Butcher of whatever it was, but the words dangerous  
6 were used I think -- I think twice to describe him in the  
7 argument, once at least. And -- and the argument included  
8 the -- the statement to the jurors, I hope you never have  
9 to be in the position again of being 30 -- 30 feet away  
10 from this kind of -- of a killer. Well, the jurors aren't  
11 going to be spending time in prison, and I -- I don't know  
12 why that argument means anything other than I hope this  
13 guy is not going to be out where you are going to be and  
14 find you as close to him again. So, hasn't -- hasn't he  
15 raised it even on -- on your criteria?

16 MR. WATERS: I don't believe so in this case. I  
17 think if you focus on the prosecutor's argument as a  
18 whole, it's clear that the majority of his argument was  
19 retributive. And we would assert --

20 QUESTION: Well, I'm not talking about -- I  
21 mean, you -- the majority of the argument isn't even the  
22 criterion that you are arguing for. You said, look, he's  
23 got to raise it on my theory. He's got to raise it as an  
24 argument that this person will be dangerous on the  
25 outside. And I assume if he does that once, that's

1 sufficient on your theory. And my question is, didn't --  
2 even on your theory, didn't he do it here?

3 MR. WATERS: Well, with regard to the dangerous  
4 comment, what the solicitor said in that particular case  
5 was -- he said, well, the evidence here is that he's  
6 quick-witted, he's not retarded. And of course, the  
7 evidence in this case also was that petitioner was a close  
8 friend of -- or the petitioner's family was a close friend  
9 of this victim. He used to work with the victim, and that  
10 he used that familiarity with the victim to make her more  
11 vulnerable.

12 QUESTION: Well, what -- what about the 30 feet?  
13 I hope you're never in this position again. What about  
14 that argument? I mean, isn't that an argument that makes  
15 no sense except on the assumption that this person might  
16 -- the defendant might be outside?

17 MR. WATERS: That -- that particular argument  
18 was -- was made at -- at the beginning of the sentencing  
19 phase in opening statement. It was a brief reference. I  
20 don't think that that --

21 QUESTION: I mean, it was made to the jurors.  
22 They heard it, didn't they?

23 MR. WATERS: They did hear that, but I think if  
24 you read it in context, it was more of the case of you  
25 just committed -- convicted this guy of a horrible crime.

1 You have a tough job ahead of you, and I hope you never  
2 have to do this again. I -- I think that -- that brief,  
3 isolated passage, when read in the context of what the  
4 solicitor was saying there, would not have such -- been  
5 such as to necessarily flag the future dangerousness issue  
6 in the mind.

7 QUESTION: So, if -- if the prosecutor had  
8 closed his argument with that, that would have sufficed.

9 MR. WATERS: I'm not -- I don't know if I would  
10 say that much. I just point out that it was very early  
11 and it was just a brief reference in opening statement,  
12 and I don't think that that -- that can be pointed to as  
13 to have crossed that line because I don't really think he  
14 used it for that inference, that you know, this -- you  
15 know, this guy is going to be dangerous to you. He was  
16 more saying, you know, you just convicted this guy of the  
17 most horrible, bloodiest crime you can imagine, and he's a  
18 horrible person, and now you've got one more tough job to  
19 do. And I hope you never have to go through this again.  
20 I think that was the point of his argument, not that this  
21 guy --

22 QUESTION: He didn't -- my -- my -- you correct  
23 me if I'm wrong, because I don't have the transcript in  
24 front of me, but my recollection is he didn't say, I hope  
25 you don't have to go through this again. He said, I hope

1     you're -- you know, you're not in this position of being  
2     30 feet away from this kind of a person again, which is I  
3     think quite different.

4             MR. WATERS: Well, he -- he did not say, I hope  
5     you don't have to go through that, but I think if you read  
6     his argument, that was the point of it, and I think in  
7     context, that's the obvious point of it rather than future  
8     dangerousness.

9             QUESTION: May I ask this? You gave us a couple  
10    of examples of the South Carolina Supreme Court itself  
11    setting aside the conviction -- or executions because they  
12    had failed to give the instruction. And you -- you've  
13    just quoted the example he mentioned both inside and  
14    outside prison.

15            Now, did they consider the -- your argument that  
16    if read in the context of the entire argument, it -- it  
17    was a featured part of the argument, or did they -- could  
18    the -- could one reasonably think that from those  
19    opinions, just that mere mention was enough?

20            MR. WATERS: In that -- in that particular case,  
21    the solicitor focused much of his argument on that. He  
22    said, this -- this defendant has shown by his prior  
23    record, because the defendant had had prior incarcerations  
24    and prior releases -- he's shown by his prior record that  
25    he cannot exist safely both inside prison and outside

1 society. So, I would concede that crosses the line. I  
2 think it was focused on in that case, and it was a direct  
3 statement of outside society.

4 And I -- I don't want to get into magic words,  
5 but I think when you say outside society, when he clearly  
6 focuses, that -- that would be a magic word triggering  
7 Simmons.

8 QUESTION: But you would draw a line depending  
9 in part on how much the issue was emphasized in the  
10 argument. Not just an isolated comment, for example,  
11 would not be enough.

12 MR. WATERS: What I'm saying is that if there's  
13 an isolated comment in the context of an -- of an argument  
14 that focuses on retribution, that -- it's kind of a  
15 Donnelly v. DeChristoforo principle, that you shouldn't  
16 assume that the prosecutor intended to worst meaning from  
17 that, and you shouldn't assume that the jury necessarily  
18 took the worst meaning from that. And -- and so, I'm not  
19 saying -- I'm just saying that the context does matter,  
20 and -- and that's essentially what we have here.

21 In Simmons, you know, we had a -- the more  
22 egregious situation. We had the prosecutor say, jury, you  
23 know, the death penalty is going to be society's response  
24 to a threat, society's response. The prosecutor said,  
25 jury, you know, this will be your act of self-defense to



1 this particular defendant. The death penalty will be an  
2 act of self-defense. The prosecutor even went on -- so  
3 far as to say his own expert calls him dangerous and had  
4 brought that out in cross examination. There's none of  
5 that here. All they can do in this case is -- is go  
6 through a technical parsing of the argument.

7 QUESTION: Well, why shouldn't -- why shouldn't  
8 it be? Why isn't it fundamentally unfair in every capital  
9 case, after all, not to give the instruction that the  
10 alternative is life without parole? After all, you have a  
11 jury who knows it has a murderer in front of it. It's  
12 trying to decide among all alternative punishments. Death  
13 is the worst, and then the State won't tell them what the  
14 alternative is. Apparently every State but two have  
15 decided that is unfair. And why, to go back to basics,  
16 isn't it as unfair a thing just about as one can imagine  
17 to tell the jury you have to give life or something else  
18 and then not tell them what the something else is,  
19 particularly when they're likely to think he'll be out  
20 after a few years?

21 MR. WATERS: Well, I think the jury in this case  
22 -- you know, they are told life imprisonment, and they're  
23 never told that there's any possibility of --

24 QUESTION: But sitting -- in your experience,  
25 wouldn't you say most jurors are sitting there thinking

1     that life doesn't mean life?

2                 MR. WATERS: Well, I -- I'm not sure that that's  
3 necessarily true. I mean, in State v. Patterson, which  
4 was a 1986 case in South Carolina, there was a voir dire  
5 of the jury on that, and most of the jurors said, we  
6 thought it meant, you know, he'll never get out. So, I  
7 mean, there's conflicting evidence on that. I know this  
8 Court has repeatedly referred to the fact that it -- it is  
9 new event and many jurors may not know, but I don't know  
10 if that's necessarily the case.

11                As a matter of fundamental fairness, we're  
12 still talking about, to some degree, deference to the  
13 States. And -- and so --

14                QUESTION: What does deference to the State got  
15 to do with fundamental fairness? It seems to me that's an  
16 entirely different argument.

17                The fundamental fairness question that Justice  
18 Breyer is raising is in a context in which it may or may  
19 not be debated as to whether jurors know instinctively  
20 that life really means life, doesn't fundamental fairness  
21 require that they be instructed unequivocally so that they  
22 know the terms within which they must act in coming to a  
23 verdict. That's the fundamental fairness question.

24                MR. WATERS: Well, I think that the -- the  
25 ineligibility of parole, as this Court held in Simmons, is

1     only directly relevant to future dangerousness to society  
2     argument, and that, of course, was the due process  
3     rationale followed in Simmons.

4             As far as whether under an Eighth Amendment  
5     context or even under a due process that life without  
6     parole is an effective rebuttal to retribution arguments  
7     and that sort of thing, that's not presented by this case.  
8     But I -- I think that the -- the relevance, again, of --  
9     of ineligibility for parole is to rebut future  
10    dangerousness to society. That's what --

11            QUESTION: Well, in -- in Simmons, there's no  
12    question that the future dangerousness issue, together  
13    with the jury's question and so on, presented an egregious  
14    case of -- of a need for instruction.

15            MR. WATERS: Yes.

16            QUESTION: But let's -- let's assume -- and I  
17    don't believe this is this case, even remotely, but let's  
18    assume we had a case in which somehow future dangerousness  
19    were not an issue. And let's assume we -- we had a -- a  
20    straight retribution case. Given the fact that there is  
21    enough history to put in -- in doubt, to put into question  
22    what really is meant by life imprisonment, in the absence  
23    of a further instruction, why doesn't fundamental fairness  
24    require that the jury know for sure what the terms mean,  
25    which it must select from in sentencing this person?

1           MR. WATERS: Well, again, the jury is told we're  
2     dealing with death or life imprisonment.

3           QUESTION: No, but that simply begs the  
4     question. That -- that is changing my question to you.  
5     My question to you says we're operating in a context in  
6     which historical practice leads one to -- to question  
7     whether jurors really do understand that life means life  
8     in this case in this State now. On that assumption, why  
9     doesn't fundamental fairness require that the juries be  
10    given a clear instruction so that they're not sitting  
11    there wondering what it means if they come back with a  
12    life sentence?

13          MR. WATERS: I think that that depends that --  
14    that be all to end all is the without parole context of  
15    life. I mean, life is still a very severe penalty, and --  
16    and in order to get to your point, I think that you have  
17    to assume that adding without parole to it makes it so  
18    far --

19          QUESTION: You bet I assume that. There is a  
20    big difference between life imprisonment, in which a  
21    person never walks out of the prison, and life  
22    imprisonment in which the person walks out 15 years later.  
23    Yes, I make that assumption and I want you to make that  
24    assumption in answering my question. Why doesn't  
25    fundamental fairness require that the juries understand

1     that?

2                 MR. WATERS:  Well, again, I would have to fall  
3     back to the fact of is the only aspect of the State's case  
4     that it rebuts is future dangerousness to society.  And --  
5     and so that --

6                 QUESTION:  And my question to you is let's  
7     assume a case in which that is not the issue, a case in  
8     which we're talking about retribution.  I want to narrow  
9     the issue down here.  Why doesn't fundamental fairness  
10    require that the jurors understand what the words mean?

11                MR. WATERS:  Because if it is a purely  
12    retributive case and -- and future dangerousness was not  
13    an issue, then there is nothing fundamentally unfair.  The  
14    State has not made any arguments that the defendant did  
15    not have an opportunity to rebut.  And -- and that's the  
16    holding of Simmons.

17                QUESTION:  Yes, but the -- the argument to the  
18    contrary would be if you were sitting there thinking that  
19    this terrible murderer is in front of you and you are  
20    asked what is the appropriate punishment, and on the one  
21    hand you were told it's death, and on the other hand you  
22    were told -- well, you're not told because a person who  
23    wants to retribute, wants vengeance, would surely like to  
24    know that the alternative to death, which is surely  
25    vengeance, is life in prison forever, not just life in

1 prison for 10 or 15 years. I mean, can you think -- in a  
2 death case punishment stage, surely that would be on  
3 anyone's list of top five of the relevant factors.

4 MR. WATERS: I don't know if you can necessarily  
5 assume that's the case when the jury hears evidence and  
6 they're instructed on what to consider and the focus of  
7 the evidence is his adaptability in prison, which is the  
8 case in this case and many other cases.

9 And I think with regard to life without parole  
10 being a response to purely retributive arguments, it's not  
11 such an obvious be all and end all response to -- to  
12 retribution that due process steps in, as opposed to the  
13 situation in Simmons where future dangerousness to society  
14 does respond to that. I think that there is still a  
15 distinction there that -- that retribution is not  
16 necessarily directly responded to by a life without parole  
17 sentence, and so --

18 QUESTION: I assume that the reason for these  
19 rules were just -- just State principles that the law says  
20 what it says, and we don't want to get into the  
21 refinements of -- of how long a life sentence may be. In  
22 those States that do allow the fact that a life sentence  
23 does mean a life sentence to be introduced, do those  
24 jurisdictions also permit or do other jurisdictions permit  
25 the prosecution to show that a life sentence does not mean

1 a life sentence?

2 MR. WATERS: There -- there are a number of --  
3 of jurisdictions that have wrestled with that. I think  
4 California v. Ramos is an example of that. Illinois has  
5 had -- has wrestled with that. So, some do allow charges  
6 on the possibility of commutation, on the possibility of  
7 pardon, on the possibility of change in the law and -- and  
8 add argument on that as well.

9 And, of course, South Carolina's policy has  
10 always been that we want a simple either/or choice, death  
11 or life, and -- and we don't want to bring in these  
12 collateral concerns. Now, whether the members of this  
13 Court disagree with that as a matter of policy, this  
14 Court, of course, has stated in many contexts that, you  
15 know, the -- the wisdom of policy decisions, as long as  
16 they have a certain modicum of -- of reasonableness, are  
17 for the States.

18 QUESTION: Is the prosecution allowed to argue  
19 in South Carolina when -- when the choice is -- is life or  
20 death, is the prosecution allowed to argue the possibility  
21 of commutation?

22 MR. WATERS: No, no. Parole and early release  
23 is off-limits on both sides of the coin, and there's never  
24 been a State case yet to rule that, well, to be fair, the  
25 prosecution needs to have that, at least as --

1           QUESTION: Well, that's not really very fair, is  
2     it? When -- when the jury, you know -- if you instruct  
3     the jury that life means life, it really doesn't mean  
4     life. You'd have to let the prosecution come in and say  
5     it could be commuted.

6           MR. WATERS: Absolutely, absolutely, and I would  
7     agree with that.

8           QUESTION: Or the -- all the law can be changed?

9           MR. WATERS: Or it could be changed.

10          QUESTION: The South Carolina Supreme Court  
11     hasn't dealt with that issue, though, has it? Because --  
12     because Simmons is relatively new. Has there been a case  
13     where the prosecutor says, okay, judge, I said future  
14     dangerousness, but I want to tell them that the law can  
15     change, that there's a pardon, that there's a clemency  
16     power? That hasn't come up, has it?

17          MR. WATERS: Not of which I'm aware. In fact,  
18     this rule developed initially when there was parole  
19     eligibility, and it was really a rule initially created to  
20     -- to benefit defendants, frankly, in -- in that they  
21     didn't want the jury to know -- the defense didn't want  
22     the jury to know that there was parole eligibility. So,  
23     the South Carolina Supreme Court said, okay, we're going  
24     to charge life. Life means life imprisonment. That's  
25     what it means.



1           QUESTION: Well, then the South Carolina Supreme  
2 Court itself changed its rule on that?

3           MR. WATERS: It had. There was a period of time  
4 where their -- they did sanction charging on parole  
5 eligibility. This was prior to life without parole on --  
6 on either 20- or 30-year parole eligibility, depending on  
7 the jury's finding of aggravators. That existed, I  
8 believe, for about 4 years, and was overturned in 1991 I  
9 think. So, there was a period of time.

10           But the policy -- the rule has always stayed the  
11 same, though, and that is that we don't want the jury to  
12 be legislating a plan of punishment. We don't want to be  
13 -- them to be concerned about these possible future  
14 events. We want them to make an either/or choice.

15           And South Carolina will remain true to Simmons,  
16 but beyond that, unless the policy is considered to be so  
17 unreasonable as to not pass the laugh test, then I think  
18 that they can potentially -- they can have that policy.

19           And I want to bring up another point, especially  
20 with regard to this and -- and what the prosecution did in  
21 this case. I don't think the -- the Court should -- or I  
22 don't -- I don't think it would be wise to -- to assume  
23 that prosecutors are going to be dishonest or to assume  
24 that the State court is going to be dishonest and is going  
25 to circumvent this rule.

1           And in fact, what the prosecution was doing in  
2   this case, yes, he was trying to avoid Simmons, but he was  
3   doing that to obey the law. And -- and clearly in -- in  
4   Justice O'Connor's concurrence, it said that if the  
5   prosecution does not argue future dangerousness, then the  
6   charge does not have to be given, and -- and that's what  
7   the prosecutor was doing here. So, he wasn't trying to  
8   circumvent the law. He wasn't trying to be sneaky. He  
9   was trying to obey the law, and -- and --

10           QUESTION: Yes, but he was trying to get the --  
11   prevent the jury from getting this information.

12           MR. WATERS: That's true. That's true. He made  
13   a tactical decision that he -- and I don't know if it's  
14   necessarily tactical -- he was not going to rely on future  
15   dangerousness, and since that would not trigger Simmons,  
16   then the State law rule would apply. And that's --

17           QUESTION: And -- and he also kind of snuck in  
18   the word dangerousness there in the -- in the 30-foot  
19   example, but they don't count because they weren't  
20   prominent in his argument.

21           MR. WATERS: Well, I'd -- I'd like to -- to  
22   address that specifically. At that point in the argument,  
23   he was talking about the particular crime in this --

24           QUESTION: What -- what passage are we -- are we  
25   talking about a passage? I don't have it in my -- where

1 the -- the prosecutor expressly says future dangerous?

2 MR. WATERS: No, not at all.

3 QUESTION: I thought perhaps from his question  
4 that's what we were talking about.

5 MR. WATERS: What he -- what he was doing was he  
6 said, okay, this defendant is quick-witted. This  
7 defendant -- the evidence says this defendant is not  
8 retarded. Now, doesn't that make him more dangerous for  
9 Shirley Shealy, for this crime on this January the 5th,  
10 for this particular lady? And what he was saying, if --  
11 if you read his argument in context, was again that the  
12 petitioner in this case was a close family friend of the  
13 victim and also used to work at that very same Kentucky  
14 Fried Chicken.

15 QUESTION: Mr. Waters, it wasn't quite like  
16 that. He said dangerousness, and then counsel for the  
17 defense stopped him at that point, and then he came back  
18 with, well, I meant dangerous for her.

19 MR. WATERS: Well, I don't know if you can  
20 necessarily read that that was at a protracted period. It  
21 may have been he just cut off before he finished his  
22 sentence. But what he was trying to say was is that he  
23 was more dangerous for her because she would have trusted  
24 him. She would not have expect to be cut to ribbons by  
25 this person because he was her friend. And that's what

1 the prosecution was saying. He was saying that makes this  
2 crime more aggravated. It's more premeditated. It's more  
3 callous. He preyed on the vulnerability of the victim.

4 QUESTION: And she was outside prison when this  
5 happened.

6 MR. WATERS: She was outside prison, but this is  
7 retribution. This is, you know, jury, sentence this  
8 defendant to death for all the bad things that he has done  
9 culminating in this capital crime. This was such a  
10 horrible crime. And if you read the prosecution, there's  
11 at least five or six examples where he says, what's the  
12 punishment that fits the crime? It doesn't matter if he  
13 doesn't have a prior record. This case is bad enough on  
14 its own. This is a case for the death penalty. And that  
15 was a recurrent theme from the beginning, the middle, and  
16 the end of his argument, from start to finish.

17 So, I would assert then that, you know, when  
18 read as a whole -- and -- and again, if you look at the  
19 evidence of dangerousness -- and there's been some raised  
20 of whether -- the issue raised of whether dangerousness  
21 within prison counts. And obviously, as a matter of  
22 logic, it doesn't because, you know, whether or not the  
23 defendant is going to get out of prison has nothing to do  
24 with whether he will be a danger inside.

25 But more -- more --

1           QUESTION: But if he is a danger inside, it  
2 follows that he will be a danger outside if he gets out.  
3 Isn't that the kind of common sense inference that anyone  
4 would draw?

5           MR. WATERS: I -- I don't think the link is --  
6 is so readily made. I mean, it's common knowledge that --  
7 that prison --

8           QUESTION: Well, the -- the evidence of -- of  
9 his dangerousness included things that he used to like to  
10 torture small animals, psychiatric evidence to the effect  
11 that he wants to -- to take action, homicidal action,  
12 against anybody who annoys him. The -- the word was a  
13 little bit more flamboyant in the psychiatrist's  
14 testimony, but that was the point. These -- these don't  
15 go to conditions that would only come into play inside of  
16 a prison.

17          MR. WATERS: Well, in that particular instance,  
18 number one, the prosecution never used any of that in his  
19 closing argument. But I don't --

20          QUESTION: Well, it brought out in its cross  
21 examination.

22          MR. WATERS: Absolutely.

23          But -- but number two, if you -- that there was  
24 their adaptability expert, and all of this went to focus  
25 on what the jury had before it, which was adaptability to

1 prison, and that's the issue that they were focused upon.

2 And -- and what -- and the expert said, well, you know --

3 QUESTION: Let's -- let's assume that. Let's  
4 assume that was the -- was the point. The fact is the  
5 evidence came out, and there's -- there's no common sense  
6 basis that I can think of to say that this evidence would  
7 not indicate that if the individual got out of prison, he  
8 would be very dangerous to the people he came in contact  
9 with. And I thought you were arguing that you couldn't  
10 make such an inference.

11 MR. WATERS: I think that that -- that evidence  
12 is very close, but I would -- I would assert that -- that  
13 the way it was used in this particular case to respond to  
14 adaptability, which is dangerousness within prison, which  
15 was the specific issue that was focused before this jury.  
16 If the prosecution --

17 QUESTION: But what started all of this, I  
18 thought, was -- was the point that you were making that  
19 the evidence that went to dangerousness in prison did not  
20 ground in inference of dangerousness outside. Maybe I  
21 misunderstood your point.

22 MR. WATERS: No. I -- I agree that that  
23 particular -- those particular instances are a bit broader  
24 than the majority of evidence of dangerousness within  
25 prison, but I think that the -- his expert said, look,

1 he's not a violent person. He hasn't had a violent past.  
2 He -- he's -- he's not mentally ill. He's -- he's going  
3 to be great in prison. He's not the type of individual  
4 that poses a risk in prison. He's not a predatorial,  
5 institutional violent individual, which their witnesses  
6 were noting a distinction between society in prison and  
7 society outside of prison.

8 And I think all the State was doing was cross  
9 examining on that, saying, wait a minute. You're saying  
10 he's going to be adaptable? Well, he says, you know, he  
11 has violent fantasies. Well, that was brought out on  
12 direct by the defense. They -- they brought that out, of  
13 these violent fantasies, and the State was merely cross  
14 examining on a point that already had been made by the  
15 defense and saying, your opinion here is that he's  
16 adaptable. Well, what about this -- this violent fantasy?

17 So, it was only used in the context of -- even  
18 though it -- I agree, it has a broader context -- a  
19 broader -- you know, it wasn't just his misbehavior in  
20 prison, but it was only used by the State here to  
21 challenge the adaptability prison in -- or the  
22 adaptability issue of -- of what he would do in -- within  
23 prison.

24 QUESTION: And it is important to the State, I  
25 suppose, to show that he will be dangerous in prison.

1 MR. WATERS: Oh, absolutely. This is the --

2 QUESTION: The jury presumably would not want to  
3 give a life sentence to someone who's going to continue to  
4 kill in prison.

5 MR. WATERS: Absolutely. And this is -- this,  
6 of course, is the state of -- of Skipper, and -- and it's  
7 an inevitability that -- that you're going to see an  
8 adaptability case. But --

9 QUESTION: The argument is made whenever the  
10 State makes that point, that perfectly valid point, to the  
11 jury. It automatically triggers Simmons.

12 MR. WATERS: I'm sorry? The -- the point?

13 QUESTION: The argument made is that when the  
14 State makes that perfectly valid point about dangerousness  
15 in prison, it automatically triggers Simmons. And you say  
16 it should not unless -- unless the prosecutor specifically  
17 argues violence, dangerousness outside of prison.

18 MR. WATERS: Correct. As a matter of logic  
19 that --

20 QUESTION: But that really doesn't help you here  
21 because here you further had evidence of his escape risk.

22 MR. WATERS: And --

23 QUESTION: So that this wasn't a guy who was  
24 just going to sit quietly and -- and enjoy his time in  
25 prison. This is someone who presented an escape risk and



1     hence raised a risk of -- of acting out his dangerous  
2     propensity if he succeeds in escaping.

3             MR. WATERS:   And I think that that's -- I would  
4     agree with that wholeheartedly.   I think the majority of  
5     the -- of the prosecution's dangerousness within prison  
6     evidence went to him being an escape risk, and -- but the  
7     fact of the matter is, is whether or not you buy there's a  
8     distinction between -- or accept there's a distinction  
9     between inside prison and outside society, whether or not  
10    -- whatever you think about Simmons, the fact of the  
11    matter is that ineligibility for parole does absolutely  
12    nothing to respond to the fact that he's an escape risk.  
13    He's saying he's going to bust out.   It -- the fact that  
14    he can't get parole does nothing to respond that he's  
15    going to bust out -- that he might bust out of prison.

16            QUESTION:   So, you should have been happy with  
17    the instruction is what that proves.

18            MR. WATERS:   I'm sorry?

19            QUESTION:   You should have been happy with the  
20    instruction.

21            MR. WATERS:   With the?

22            QUESTION:   Because you're concentrating on what  
23    would happen in prison.   So, the instruction wouldn't help  
24    you -- it wouldn't hurt you.   It would actually help you.

25            MR. WATERS:   What?   The --

1           QUESTION: This fellow is going to be kept where  
2 he'll be the most dangerous. Therefore, you should kill  
3 him. That's your argument.

4           MR. WATERS: No. That's -- that's not  
5 necessarily my argument. I think the argument, again,  
6 goes to adaptability. I certainly -- certainly wouldn't  
7 -- wouldn't assert that.

8           But, you know, as far as to his contention that,  
9 well, why does the State care, you know, about giving this  
10 charge if they're saying they're not raising future  
11 dangerousness, again it raises these collateral concerns  
12 down the road of pardon, which he's eligible for pardon.  
13 It raises the -- the issues of change in the law, and --  
14 and the State seeks to avoid those. And so, that's why it  
15 cares. It doesn't want to have to get into that.

16           And if that issue is given, I don't know if a  
17 trial judge, without direction from the Supreme Court, the  
18 State Supreme Court, would allow a prosecutor to then  
19 respond with -- with, you know, arguments about change in  
20 the law. And -- and I guess, you know, depending on -- on  
21 what happens, we'll have to see guidance on that.

22           QUESTION: Mr. Waters, you didn't really mean --  
23 your brief could be read to say that -- that the lawyer  
24 was effectively allowed to tell the jury that life means  
25 life. You said something in your -- the jury -- that

1 because the line was about defendant would never see the  
2 light of day.

3 MR. WATERS: Right.

4 QUESTION: It's no different than -- from what  
5 it was in Shafer in that respect.

6 MR. WATERS: I -- I fully understand what Shafer  
7 held, and my only point with that was, was that the  
8 reasons that -- that this Court relied upon in Shafer were  
9 not present in this case, to why those were not  
10 sufficient, and that was, number one, the jury asked. So,  
11 obviously, it didn't work. And number two, that the judge  
12 told the jury, well, parole eligibility is not for your  
13 consideration, which raised the concern in Simmons that,  
14 well, parole is available but for some --

15 QUESTION: But you -- but you don't dispute that  
16 if the -- if the lawyer then -- if she had tried to say in  
17 open court, now, jurors, I'm going to read you from the  
18 South Carolina, that she would have her head cut off by  
19 the judge.

20 MR. WATERS: I think it's very unlikely the  
21 trial judge would have allowed her to do that.  
22 Absolutely.

23 And -- and we would just assert, though, that --  
24 that this is a case -- there's no indication whatsoever  
25 that the jury was confused or concerned with his possible

1 release. They didn't ask the question. They weren't --  
2 it wasn't interjected by the trial judge. And so, all I'm  
3 saying is -- is that makes this case materially different  
4 from what happened in Shafer when it said that that was  
5 insufficient.

6 And this -- this lawyer argued natural life in  
7 prison -- imprisonment extensively, said, you have two  
8 choices, jury. You have death, a quick, painless death,  
9 or you have a long, slow death, and that a wife -- and he  
10 asserted earlier, that well, you know, the -- but the jury  
11 might think he's going to get out of prison and have a  
12 wife and a car. Well, no. The defense argued in this  
13 case just the opposite. They -- they argued that a wife  
14 is never ever going to happen for Billy Kelly. A car is  
15 never ever going to happen for Billy Kelly, and -- and  
16 concluded by saying, I think life imprisonment is the  
17 right punishment in this case because he'll never see the  
18 daylight -- the light of daylight again. So, I think it  
19 was clearly made to the jury, and there's no indication  
20 that there was confused -- they were confused. There's no  
21 indication of a fundamental unfairness in this case.

22 Finally, I think again this Court has stated in  
23 -- thank you very much.

24 QUESTION: Thank you, Mr. Waters.

25 Mr. Bruck, you have 4 minutes remaining.

1 REBUTTAL ARGUMENT OF DAVID I. BRUCK

2 ON BEHALF OF THE PETITIONER

3 MR. BRUCK: Thank you, Your Honor.

4 The question has come up again concerning the  
5 history of South Carolina's handling of this matter. I  
6 should say that a very detailed accounting of the whole  
7 history, legislative and judicial, is provided in the cert  
8 petition in Simmons itself, and it's not a very edifying  
9 tale. It really shows that the legislature, when they  
10 first considered a limited life without parole, was  
11 deadlocked because of a fear that it would reduce the  
12 number of death sentences, and the legislative compromise  
13 that finally came out was we can go ahead and have life  
14 without parole because you don't have to tell the jury  
15 anyway. So, it won't have any effect. And that was  
16 the --

17 QUESTION: The Supreme Court of South Carolina,  
18 I gather from your opponent, shifted its position too.

19 MR. BRUCK: Yes, it did.

20 QUESTION: And what was the reason for that?

21 MR. BRUCK: It's not entirely clear. The  
22 membership of the court changed, and indeed, the -- the  
23 legislative leader of this proposal to stop telling the  
24 jury or not to tell the jury about parole joined the  
25 court, and then the membership -- and then the court's

1 position changed. If there was a connection, I don't  
2 know. But it -- it -- it's an odd history.

3 The -- my friend says that, well, South Carolina  
4 doesn't want the jury to know about commutation. For a  
5 very good reason. There is no such thing as commutation  
6 of a life sentence under South Carolina law. We're one of  
7 only two life without parole jurisdictions that do not  
8 allow the Governor to commute a life without parole or any  
9 prison sentence. The commutation power only extends to  
10 the death penalty. So, there is a pardon power which --

11 QUESTION: When you say commutation, that's all  
12 synonymous with --

13 MR. BRUCK: Clemency.

14 QUESTION: -- clemency?

15 MR. BRUCK: That's right.

16 There is a pardon power which, according to the  
17 record in Simmons, has never been exercised, and by its  
18 terms requires a showing of the most extraordinary  
19 circumstances.

20 And there -- so, South Carolina's life without  
21 parole is as locked down as any State's. The idea that,  
22 well, there's lots of play is simply not so, and -- and so  
23 there's very little that the State could come back with.

24 But as a constitutional matter, if there was any  
25 play at the joints, absolutely, if the jury is told the

1 truth that there's no parole, the jury can also be told  
2 the truth about any possibility of release that might  
3 exist. We don't deny that for a moment. But the State  
4 recognizes that the -- that the real issue is the  
5 unavailability of parole, and that's why they fight this  
6 tooth and nail.

7 Justice Ginsburg inquired about prior cases in  
8 which the State Supreme Court has reversed under Simmons.  
9 And it's important to keep in mind there are only two, and  
10 they both involved cases that were tried before Simmons  
11 came down. And that is why in one case the verbatim same  
12 argument about what to do with him when he is in our midst  
13 was made by the prosecutor because they didn't have  
14 Simmons as the script about what not to say.

15 But since Simmons came down and since  
16 prosecutors who are of a mind to defeat the rule in  
17 Simmons have had the -- the facts of Simmons to go by, not  
18 one case by the South Carolina -- the South Carolina  
19 Supreme Court has not reversed under Simmons in a single  
20 case, in every instance.

21 Now, it's true that occasionally trial judges  
22 have given a life without parole instruction under  
23 Simmons. Oftentimes it's because a prosecutor, out of a  
24 basic sense of fairness, does not take the position that  
25 the prosecutor took in this case. We're really dealing

1 with a due process rule where you sort of feel it in your  
2 heart that there's something wrong, and that applies to  
3 prosecutors and judges too. But when a prosecutor decides  
4 to -- to use the Simmons script, they've had very good  
5 success in having this instruction not given.

6 And I should say that if this -- if these facts  
7 are now held by this high Court to be not to trigger the  
8 rule in Simmons, you will see that as being -- as being  
9 the rule. Now, it's possible that the legislature will  
10 step in. It's equally possible, after such a large  
11 loophole in Simmons, a loophole that will swallow the  
12 entire case, is decided by this Court --

13 QUESTION: Thank you, Mr. Bruck.

14 MR. BRUCK: Thank you.

15 CHIEF JUSTICE REHNQUIST: The case is submitted.

16 (Whereupon, at 11:59 a.m., the case in the  
17 above-entitled matter was submitted.)  
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