

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: BOBBY LEE RAMDASS, Petitioner v. RONALD J.  
ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF  
CORRECTIONS.

CASE NO: 99-7000 1-2

PLACE: Washington, D.C.

DATE: Tuesday, April 18, 2000

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**Supreme Court U.S.**

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1                   IN THE SUPREME COURT OF THE UNITED STATES

2                   - - - - - BOBBY LEE RAMDASS,

3                   Petitioner

:

4                   v. : No. 99-7000

5                   RONALD J. ANGELONE, DIRECTOR, :

6                   VIRGINIA DEPARTMENT OF

:

7                   CORRECTIONS.

:

8                   - - - - - X

9                   Washington, D.C.

10                  Tuesday, April 18, 2000

11                  The above-entitled matter came on for oral  
12                  argument before the Supreme Court of the United States at  
13                  11:12 a.m.

14                  APPEARANCES:

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

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

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## PROCEEDINGS

(11:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 96-7000, Bobby Lee Ramdass v. Ronald Angelone.

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 *Simmons v. South Carolina*, this Court held

that a capital defendant may rebut the State's allegation of future dangerousness by showing, if it is so, that he could never be paroled from prison on a life sentence if the jury gave him a life sentence.

Immediately after deciding Simmons, this Court reversed this case and remanded it to the Virginia Supreme Court for reconsideration in light of Simmons.

The issue now presented is whether the Virginia Supreme Court erred when it effectively engrafted onto this Court's holding in Simmons an additional requirement that, in order to come within the ambit of Simmons, a defendant must not only have no possibility under State law of being released on parole throughout his entire lifetime, but also that that ineligibility have been formally declared on the day of his capital sentence.

1 Now --

2 QUESTION: Well, you say the -- the court  
3 engrafted that onto Simmons. But I -- I thought that  
4 Simmons had simply spoken in terms of eligibility for  
5 parole under State law.

6 MR. BRUCK: Yes, but it -- it looked at -- it  
7 implicitly looked at all of State law and not --

8 QUESTION: Well, how can you -- how can you say  
9 it implicitly looked at all of State law?

10 MR. BRUCK: Parole eligibility under Simmons  
11 means that there is no possibility of parole absent -- and  
12 the Court looked at remote -- what it described -- the  
13 plurality described as hypothetical possibilities, some of  
14 which would have --

15 QUESTION: Well, but -- but the plurality is not  
16 the controlling opinion in that case.

17 MR. BRUCK: Yes, but the concurrence necessarily  
18 had to accept -- in order to reach the same result, had to  
19 accept the plurality's characterization of parole  
20 ineligibility as not including remote hypothetical  
21 possibilities. And it listed such things as commutation,  
22 which can lead to parole eligibility and release on  
23 parole, clemency which can have the same, and also a  
24 change of law.

25 In other words, it looked to State law --

1           QUESTION: When you say -- now, tell me again.

2       When you say it, what are you referring to? The plurality  
3       opinion?

4           MR. BRUCK: The plurality made this explicit,  
5       but the concurring opinion of Justice O'Connor, which  
6       created the majority in Simmons, could not have taken any  
7       other view because if that was correct, then it would not  
8       be -- if -- if the plurality opinion as to what  
9       constituted ineligibility was not the view of the Court,  
10      then Simmons -- the holding of Simmons as expressed by the  
11      concurring opinion could not have been handed down because  
12      it would not be possible to say, given these remote  
13      hypothetical possibilities in the future, that Mr. Simmons  
14      himself was truly ineligible for parole.

15           QUESTION: Well, this is something slightly  
16      different than that, of course. It's not a remote  
17      hypothetical possibility at all, but rather an expected  
18      entry of a judgment, is it not?

19           MR. BRUCK: Yes, but it is --

20           QUESTION: And -- and is that a ministerial act,  
21      or -- or what was to take place here? Is it a --  
22      something that might well not have occurred --

23           MR. BRUCK: No.

24           QUESTION: -- the entry of the judgment?

25           MR. BRUCK: No. Whether we call it ministerial

1 or whether we simply acknowledge that it was inexorable  
2 really makes no difference. It was going to happen. The  
3 jury's verdict on this, what would have been the last  
4 strike, had been handed down. He had been found guilty.  
5 All motions to -- to strike the evidence, that is, for  
6 directed verdict, judgment NOV, in effect, had been  
7 already denied and, under Virginia law, could not be  
8 renewed. The sentencing was 19 days away.

9 Now, the -- interestingly, the State has never,  
10 until its brief in this Court, ever identified something,  
11 anything, that might have happened in reality to -- to  
12 block the entry of that judgment and thus --

13 QUESTION: Now, the defense counsel did tell and  
14 argue to the jury --

15 MR. BRUCK: Yes.

16 QUESTION: -- did he not --

17 MR. BRUCK: He did.

18 QUESTION: -- that this person would never, as a  
19 practical matter, get out, if he lived to be 120?

20 MR. BRUCK: Yes, but Virginia law prohibited him  
21 from giving the most important aspect of that, which was  
22 that these long terms of years could not be reduced by  
23 parole, and the jury spotted the omission. And we know  
24 that. We don't have to speculate about that because they  
25 came out and said, if we give him life, is there any

1       possibility of parole?

2                 Now, this is the Simmons question. Recall that  
3       Simmons is a right of rebuttal. It is not a right to have  
4       the defendant's technical legal status on the day of his  
5       sentencing hearing exhibited to the jury. It is a right  
6       to rebut an issue that the State brings into the case in  
7       -- under Virginia law. And under Virginia law, it was  
8       joined much more vigorously than it ever was in Simmons.  
9       In Simmons, it was a non-statutory factor that arguably  
10      was present in the prosecutor's jury argument. Here it  
11      was the entire legal basis for the State's request for the  
12      death penalty.

13                QUESTION: Mr. Bruck, in this case you say, you  
14      know, it's pretty clear that it would have -- in the next  
15      case it won't be quite so clear that -- you know, that --  
16      that he will get the third -- the third strike which will  
17      render it impossible for him to be paroled. And the next  
18      case will be a little less clear than that.

19               Frankly, I -- I don't know where to stop, short  
20      of the bright line that's urged by your opponents in this  
21      case, which is at the time the sentence in this case was  
22      pronounced, could you say it was the State law that this  
23      person could not be paroled? And you could not say it at  
24      the time that this -- that this jury was sitting.

25               MR. BRUCK: But we do say that because what

1       Virginia failed to do is to look not at the single  
2       statute, but at the entire relevant body of State law  
3       which includes the provisions of State law that I was  
4       citing a moment ago to Justice O'Connor.

5                   QUESTION: Well, shouldn't we look to the  
6       Virginia Supreme Court for that decision as to -- I mean,  
7       are you saying that the State supreme court in deciding a  
8       question of whether someone was parole eligible made a  
9       mistake of State law?

10          MR. BRUCK: No. We should definitely --

11          QUESTION: What are you saying?

12          MR. BRUCK: -- look to the Virginia law if the  
13       State gives us the law and if the State looks at the  
14       relevant State law. But that is what Virginia failed to  
15       do. They looked not at the issue -- in effect, the issue  
16       that they had to address --

17          QUESTION: Well --

18          MR. BRUCK: I'm sorry.

19          QUESTION: Well, you -- you concede, don't you,  
20       that under the law of Virginia, this person was not  
21       eligible for parole at the -- at the critical -- or was  
22       eligible for parole at -- at the critical point?

23          MR. BRUCK: We concede that -- that under  
24       Virginia law, his ineligibility had not yet been formally  
25       declared, but when one takes into consideration the other

1 provisions of Virginia law, we by no means concede that  
2 there was any possibility of his ever being paroled. And  
3 that is the question in rebuttal that -- that it was so  
4 crucial in this case and that Simmons recognized what the  
5 -- a defendant has a due process right to have the jury  
6 know about.

7                   QUESTION: Well, you're saying -- I guess you're  
8 saying -- that the question of what is a sufficient  
9 certainty or a sufficient probability, if you will, that  
10 there will be no parole is a question of Federal law.  
11 That's a question of what Simmons means, and Simmons was a  
12 constitutional decision.

13                   MR. BRUCK: Yes, although --

14                   QUESTION: So, Virginia can say, yes, in this  
15 sense the -- the ineligibility is yet to be determined  
16 because a decree has not been entered. But I think you're  
17 saying the question before us, the Simmons question is, is  
18 it certain to a sufficient degree of probability, however  
19 we may want to articulate that, for Simmons purposes, that  
20 he will not, at some relevant future time, be parole  
21 eligible and that's a question of Federal law?

22                   MR. BRUCK: That's correct.

23                   Now, that is certainly a -- a question that is  
24 -- that is -- that arises from State law, but I think it's  
25 tremendously important in this case that the Virginia --

1 it -- we do not disagree with an answer from the Virginia  
2 Supreme Court that we don't like. Virginia never  
3 addressed that question. And the Commonwealth now says  
4 that that question has nothing to do with Simmons, that  
5 the State court was under no obligation, in effect, to --  
6 to say what the correct answer to the jury's question  
7 was, and that has nothing to do with Simmons. Simmons --  
8

9                   QUESTION: Well, Justice Scalia has raised a  
10 question which I think is one that should be of concern,  
11 and that is, where do you draw the line? Where is the  
12 line drawn? And if we were to agree with you that in  
13 substance it was, in effect, just a ministerial act that  
14 remained and therefore this man was parole ineligible,  
15 what about the next case where, as a practical matter, the  
16 defendant wouldn't be parole eligible for 80 years? Must  
17 that be given also to the jury in an appropriate case?

18                   MR. BRUCK: If -- well, Simmons of course said  
19 lifetime. And it would arguably, I think, be an extension  
20 of Simmons to -- to change that. And of course, we cannot  
21 extend Simmons in habeas and I recognize that.

22                   QUESTION: So, you would concede --

23                   MR. BRUCK: Yes.

24                   QUESTION: -- that that kind of hypothetical --

25

1 MR. BRUCK: Yes.

2 QUESTION: -- is ruled out by Simmons --

3 MR. BRUCK: Yes.

4 QUESTION: -- that to do that would require an  
5 extension.

6 MR. BRUCK: I do concede that.

7 QUESTION: But you think that you fall within  
8 Simmons, properly understood, without extending it in this  
9 case.

10 MR. BRUCK: Yes. Yes, we absolutely believe  
11 that.

12 Recalling of course --

13 QUESTION: May I go back to with the -- the  
14 question -- one of the things I believe that I said in  
15 Simmons, it doesn't necessarily have to be the judge, if  
16 the lawyer can bring it out. And here the lawyer told the  
17 jury. But we know that the jury had a question on that  
18 question. They were deliberating for what? 3 hours? And  
19 they came out and said, if defendant is given life, is  
20 there a possibility of parole at some time before his  
21 natural death? And that's the question that the lawyer  
22 had wanted to answer before, and -- but he couldn't under  
23 Virginia law.

24 MR. BRUCK: Precisely. Precisely.

25 QUESTION: So -- so, he couldn't do what Simmons

1 said a lawyer could do and then the judge doesn't need to  
2 do it. Virginia law prohibited the lawyer from doing  
3 that.

4 MR. BRUCK: That is exactly correct. And --

5 QUESTION: But it makes no difference if the  
6 answer was -- was no, he would not be ineligible for  
7 parole.

8 MR. BRUCK: But that was not the answer under  
9 Virginia law.

10 QUESTION: Well, you ultimately have to come  
11 back to that. You ultimately have to come back to showing  
12 that that was not the answer.

13 MR. BRUCK: And I think that's very clear. I  
14 mean, the State has --

15 QUESTION: May I -- this is a jury that's not  
16 composed of lawyers. Their question was -- didn't say is  
17 this person eligible for control. They asked is there a  
18 possibility of parole at some time before his natural  
19 death. They were asking is there any chance he's going to  
20 get out.

21 MR. BRUCK: Exactly. Exactly. And that is the  
22 question with which Simmons is concerned. That's why I  
23 say -- and it is clearly established --

24 QUESTION: Is that what Simmons -- it's not a  
25 matter of law. It's just, you know, what are the odds --

1

2 MR. BRUCK: No.

3 QUESTION: -- if -- if it's really a thousand to  
4 one even though there's a -- you know, a small possibility  
5 under State law? Is that Simmons said?

6 MR. BRUCK: No. It -- it arises --

7 QUESTION: It doesn't have to be absolute  
8 impossibility under State law?

9 MR. BRUCK: Yes, yes, that's correct, with the  
10 exception of remote hypothetical possibilities. And in  
11 Simmons --

12 QUESTION: Oh, I see. So, it's not absolute.  
13 It's -- it's --

14 MR. BRUCK: Nothing is absolute except death.

15 QUESTION: Well, no.

16 QUESTION: Taxes.

17 QUESTION: I think whether under current --  
18 whether under current Virginia law he will be ever  
19 eligible for parole can be absolutely answered yes or no.

20 QUESTION: Then it would be a much easier rule  
21 to apply than the one you --

22 MR. BRUCK: But it would not apply the rule in  
23 Simmons. It would change and constrict the rule in  
24 Simmons.

25 And the best proof of that is the fact of

1 Simmons itself because if Virginia was correct that the  
2 rule of Simmons only can be called upon when State law has  
3 already affixed the stamp of parole ineligibility to a  
4 defendant, then Simmons would have lost the case. And the  
5 reason for that, as the State pointed out in their brief  
6 in Simmons, is that under South Carolina law -- and there  
7 was State case law, the State against McKay, State against  
8 Torrence, making this very clear, that in South Carolina,  
9 the decision as to whether or not the two strikes and  
10 you're out statute that was involved in Simmons prohibits  
11 parole is made not by the sentencing court. In fact, it  
12 may not be made by the sentencing court. It is made after  
13 conviction by the parole board. And the court may not  
14 make that decision.

15 And that was one of the reasons why South  
16 Carolina created the rule of no comment that was partially  
17 invalidated in Simmons.

18 QUESTION: That just says that the court can't  
19 make the decision. It doesn't say what the decision had  
20 to be. The decision by the parole board had to be that he  
21 is ineligible.

22 QUESTION: Yes, but your point is the decision  
23 had not yet been made. This isn't his case.

24 MR. BRUCK: The decision had not yet been made.  
25 That's correct.

1                   QUESTION: By -- by the authority who had the  
2 authority to make the decision.

3                   MR. BRUCK: And had the Attorney General of  
4 South Carolina taken the view that the Commonwealth takes  
5 now, they would have made exactly the same argument and  
6 said, well, there are statutory exceptions. Perhaps the  
7 parole board -- there's no South Carolina case construing  
8 these exceptions to the two strikes and you're out rule.  
9 We don't know that the South Carolina parole board might  
10 not have said that his priors were part of a continuing  
11 course of conduct, takes him out of the rule. And all  
12 kinds of things could happen. Lightning might strike, and  
13 that in effect is Virginia's argument here, that lightning  
14 might strike.

15                  QUESTION: The difference is there he was in the  
16 rule. All of the factors that had to occur before the  
17 parole board decided the case had occurred, and here  
18 something has not occurred which is essential to the  
19 judgment that you're not parolable, namely that you've  
20 been convicted three times.

21                  MR. BRUCK: Justice Scalia --

22                  QUESTION: That hadn't occurred.

23                  MR. BRUCK: -- everything in Simmons had not  
24 occurred either because under South Carolina law, which is  
25 different than Virginia's, the parole board has to make a

1 factual determination.

2 Now, it's true that the antecedent --

3 QUESTION: That's just the determination. Sure,  
4 the determination hadn't been made, but all of the factors  
5 that bear upon that determination had occurred. And here  
6 all of the factors that -- that bear upon the  
7 determination you want made had not occurred.

8 MR. BRUCK: The only factor that remained -- I  
9 -- I don't believe it's a real distinction because --  
10 because of the difference between South Carolina law --  
11 but the -- and -- and Virginia. But the only factor that  
12 remained here was that 19 days hence judgment would be  
13 entered on this armed robbery conviction.

14 Now, what -- what is so revealing about this --  
15 and recalling, of course, that we're dealing with the  
16 right of rebuttal. The State says beyond a reasonable  
17 doubt, jurors, will he commit acts of violence in the  
18 future -- not will he be a dangerous person. That's not  
19 the sentencing question. It's will he commit acts of  
20 violence in the future that will -- that will -- or that  
21 would pose a substantial threat to society.

22 Now, that is the issue that the State joined in  
23 this case, and under Simmons, he was allowed to give the  
24 critical information that he was -- whatever threat he  
25 might pose, was going to be in prison.

1               Now, the State, as I say, has never offered a  
2 suggestion, just as the Virginia Supreme Court certainly  
3 offered no suggestion, of how on the level of reality this  
4 ineligibility could -- could fail to become final. But  
5 finally in the brief, they do make two suggestions, and  
6 the suggestions show why Virginia has been so reticent  
7 about engaging this on the level of reality up till now  
8 because both suggestions -- one is that the prosecutor in  
9 the other case might decide to null pros the case after  
10 the jury's guilty verdict, and the other suggestion is  
11 that the judge might whimsically decide to dismiss it.

12              Now, this I think can only be described as  
13 unlawful behavior or certainly arbitrary behavior, and  
14 that cannot be the foundation for a finding that there was  
15 -- that the answer to the jury's question in this case,  
16 the Simmons question, was yes. The answer to the jury's  
17 question was no.

18              Now, it is true that lightning might strike, but  
19 it was true in Simmons. And the Simmons plurality listed  
20 some of the ways in which lightning --

21              QUESTION: Mr. Bruck, what about the answer is  
22 -- you're asking us to draw the line where in -- in  
23 practical reality we know that this person is going to get  
24 judgment entered on the conviction. But suppose it's just  
25 that somebody has pled guilty to a qualifying -- a crime

1       that would qualify for a strike, hasn't yet been  
2       sentenced.

3                    MR. BRUCK: Exactly the same thing would apply.  
4       In fact, Simmons itself was based on guilty pleas. The -  
5       - the guilty --

6                    QUESTION: But in Simmons there was the -- the  
7       adjudication. I'm -- I'm taking this case one step back  
8       from where we are in the Domino Pizza case. So, the --  
9       the -- it's not just that the -- that all post-trial  
10      motions have been made and that nothing -- nothing was  
11      wanting except the judge's signature on the judgment. But  
12      there's just been a guilty plea. There's been no  
13      sentencing.

14                  MR. BRUCK: A guilty plea is at least conclusive  
15      as a jury's verdict. It's an admission of everything  
16      necessary to support the judgment. In the absence of any  
17      reason to doubt the validity of that guilty plea, we have  
18      the same issue. But of course --

19                  QUESTION: Well, I take it you would accept a  
20      reasonable doubt standard. Is there any reasonable doubt  
21      that this person will -- will be parole eligible at, you  
22      know, some future time?

23                  MR. BRUCK: That would be -- and -- and I think  
24      that's a nice way of restating the holding of Simmons  
25      in --

1           QUESTION: What if he's only been indicted for  
2 the third crime, but the -- the evidence is overwhelming?

3           MR. BRUCK: Simmons does not apply.

4           QUESTION: Simmons -- why not? I mean, chances  
5 are virtually certain he's going to be convicted.

6           MR. BRUCK: I --

7           QUESTION: But you say Simmons would apply if he  
8 had already confessed to that third crime even though he  
9 hasn't yet -- what if he has confessed to it?

10          MR. BRUCK: I'm sorry?

11          QUESTION: What if he has confessed to the third  
12 crime?

13          MR. BRUCK: If -- I do not believe that Simmons  
14 could be read to extend that far without extending it.

15          QUESTION: Why not? I mean, as you say, if he's  
16 confessed, he's going to be convicted.

17          MR. BRUCK: We don't even know if it's going to  
18 be prosecuted. But this is a situation where a jury's  
19 verdict, or in the hypothetical a guilty plea, has been  
20 rendered, and that puts this in a different -- it is  
21 always possible, of course, to imagine --

22          QUESTION: I know, and I don't want to go nuts  
23 trying to figure out how far down the line we're -- we're  
24 going to carry this.

25          QUESTION: Is the issue of reasonable doubt, as

1 you've now phrased the thing -- is that -- that submitted  
2 to the jury?

3 MR. BRUCK: No. This is -- this is a question  
4 of law, and in the vast majority of cases, there will be  
5 no doubt whatsoever. Indeed, this issue can no longer  
6 arise under Virginia law.

7 QUESTION: -- the issue of law. Ordinarily you  
8 don't speak of an issue of law as being decided on a basis  
9 of beyond a reasonable doubt.

10 MR. BRUCK: Well, we did not use that term in  
11 our -- in our brief. We took --

12 QUESTION: But I thought you agreed with Justice  
13 Souter.

14 MR. BRUCK: Well, I -- I think that is -- that  
15 is one way of looking at it. The question is any  
16 possibility, excepting remote hypothetical -- remote  
17 hypothetical possibilities.

18 QUESTION: Why don't -- why don't we say that  
19 the determination is a determination which depends both on  
20 law and on fact?

21 MR. BRUCK: It does.

22 QUESTION: And in making that next  
23 determination, we require a very high standard of  
24 probability?

25 MR. BRUCK: I -- I would be quite comfortable

1 with that.

2 Finally, before I sit down, I -- I would just  
3 like to say that this -- this would be a different case  
4 had Virginia engaged that analysis, but they did not. A  
5 State court's determination -- a State charges us with  
6 arguing about State law. That's not right at all. Had  
7 Virginia asked that question, the Simmons question, in  
8 effect the jury's question, and answered it based on State  
9 law, it would be a very unusual case in which a Federal  
10 court could go behind that. It would really require I  
11 think a showing that the State court's answer was in some  
12 sense a deliberate evasion of the -- of the Federal right.

13 But Virginia did not address, let alone answer,  
14 that question. And that is why the decision here is  
15 contrary to Simmons because that is the -- the question in  
16 Simmons.

17 If I may, I'd like to reserve --

18 QUESTION: Just one -- one question. The -- the  
19 question presented to us and the State's submission do not  
20 quarrel with the fact that you -- or your -- your -- the  
21 petitioner's counsel at the trial submitted a suggestion  
22 -- suggested response to the jury's question that, it --  
23 it seems to me, almost takes away your argument in this  
24 case.

25 MR. BRUCK: Well, let -- let us recall that he

1 was working under the strictures of Virginia law, which  
2 were absolutely settled. He was -- he was floundering  
3 trying to fashion something --

4           QUESTION: And it was -- and it was pre-Simmons.

5           MR. BRUCK: And it was pre-Simmons.

6           QUESTION: Still, it -- it seems to me the --  
7 the answer that the -- that the trial counsel suggested  
8 contradicts most of the arguments you're making here.

9           MR. BRUCK: He was halfway through, thinking on  
10 his feet about how he could fashion something that  
11 wouldn't contradict Virginia law, which is contrary to  
12 Simmons.

13           QUESTION: I understand. But the point is, it  
14 seems to me, not very well preserved in the record.

15           MR. BRUCK: Of course, the Virginia Supreme  
16 Court did not, in any sense, base its decision on that,  
17 but reached the merits.

18           If I may.

19           QUESTION: Very well, Mr. Bruck.

20           Ms. Baldwin, we'll hear from you.

21           ORAL ARGUMENT OF KATHERINE P. BALDWIN

22           ON BEHALF OF THE RESPONDENT

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

25           The question before the Court is not whether the

1       Virginia Supreme Court erred, as was stated this morning.  
2       The question is not even whether Ramdass' claim could  
3       possibly fall within the ambit of the sentence. The only  
4       question before the Court is whether, under 2254(d), the  
5       Virginia Supreme Court's decision was an unreasonable  
6       application of clearly established law.

7                   So, unless Ramdass' claim of functional review  
8       of parole ineligibility is somehow clearly established  
9       Federal law, unless in other words, it falls within the  
10      four corners of Simmons, then he is not entitled to relief  
11      in this collateral case. And that's -- that's an  
12      important distinction here. He cannot meet that  
13      requirement for several reasons.

14                  First of all, look at Simmons. In the four  
15      corners of Simmons, nowhere in any way, shape, or form,  
16      implicitly or explicitly, is this functional view of  
17      parole eligibility voiced or discussed.

18                  QUESTION: In this connection, would you comment  
19      on -- on your brother's argument that this case is like  
20      Simmons because in neither case was there a decree in so  
21      many words by a court that the individual was parole  
22      ineligible? In Simmons, the -- I guess the parole board  
23      had -- had never come to that conclusion, and in this case  
24      the -- the judgment had not been entered in the third  
25      case. So, he said it's on par with Simmons. Would you

1 comment on that?

2 MS. BALDWIN: Justice Souter, the reason why we  
3 can't even consider that argument under 2254(d) is because  
4 it's not contained in Simmons. That argument has been  
5 gleaned from the briefs that were -- that were submitted  
6 by South Carolina and by the transcript of the oral  
7 argument in the case. Nowhere in the case --

8 QUESTION: Well, but there was -- there was no  
9 -- I think maybe he would say, even -- even accepting your  
10 response, there's no -- there's no statement in Simmons to  
11 the effect that there had been an entry of -- of a -- a  
12 kind of definitive order. And so, if one wasn't required  
13 in Simmons, wasn't -- one isn't required here.

14 MS. BALDWIN: I think a reasonable jurist and -  
15 - and objectively reasonably could have looked at the  
16 opinion in Simmons and determined, because of the  
17 tremendous repetition of the phrase, ineligible under  
18 State law, almost -- the word parole ineligible was almost  
19 never standing alone. It's always coupled, multiple  
20 times, in -- in both the concurring opinion of Justice  
21 O'Connor and in the plurality opinion, over and over of  
22 ineligible under State law. And that can only have one  
23 meaning in Virginia, and that means upon entry of a  
24 judgment order.

25 Nowhere else --

1                   QUESTION: But the question -- the question is  
2 what it -- what that phrase means as a matter of Federal  
3 law. And -- and his argument is that it -- it can't mean  
4 that a -- a definitive decree, stating in exactly those  
5 words, parole ineligible, must have been entered because,  
6 number one, the Simmons opinion didn't say so, and number  
7 two -- I think this is correct -- the record in Simmons  
8 indicated that there had been no such decree entered.

9                   MS. BALDWIN: Correct, but we cannot --

10                  QUESTION: But that's -- but that's a question  
11 of Federal law.

12                  MS. BALDWIN: Well, we cannot -- first of all,  
13 we cannot impute anything in the briefs or the oral  
14 argument to the Virginia Supreme Court. And the  
15 determination under 2254(d) is whether the Virginia  
16 Supreme Court's decision was a reasonable application of  
17 Simmons. So, right there, we cannot look at what --  
18 unless this Court is going to rule, which I don't it  
19 possibly could, that a -- that a State supreme court not  
20 only is now responsible for reasonably applying the  
21 opinion from this Court, but also must go behind that to  
22 determine what implicitly the Court meant by reference to  
23 the briefs, et cetera.

24                  QUESTION: Let -- let me ask you this. For  
25 example, suppose the judge on the third case here had

1 taken the order form home in order to sign it. He's  
2 overworked and had a lot to do, and he takes a lot of  
3 homework home. He signed it but failed to get it back to  
4 the clerk or got it back to his clerk 2 days later, and so  
5 it wasn't formally entered in the docket by the clerk, by  
6 the stamp until after Ramdass had been sentenced. Now,  
7 covered by Simmons or not?

8 MS. BALDWIN: Not covered by Simmons, Justice  
9 O'Connor?

10 QUESTION: Why not?

11 MS. BALDWIN: Because in that case, I think it  
12 would present a different case, one in which once  
13 presumably the defendant found out about this, it would be  
14 his duty to bring that to the attention of a court. And  
15 if some error of State law occurred -- for instance, let's  
16 -- let's assume that actually the order had been entered  
17 on that third case and the judge in Ramdass' capital case  
18 didn't even know about it. Let's assume that there was a  
19 clear error of State law. That would be the defendant's  
20 duty to bring that to the attention of the court, take it  
21 up on appeal and get reversed.

22 QUESTION: What happens if it's subject to  
23 appeal?

24 MS. BALDWIN: I don't understand the question.

25 QUESTION: I mean, we have Mr. Simmons back, and

1       Mr. Simmons says, you know, there's something you didn't  
2       know about, although I've been convicted and the  
3       conviction had been entered, it could have been reversed  
4       on appeal. He doesn't say that. The State says it.

5           MS. BALDWIN: It would --

6           QUESTION: Now does he get -- we're going to  
7       execute him now?

8           MS. BALDWIN: It would depend on what the State  
9       law is on the --

10          QUESTION: Well, I mean, all right, fine. Let's  
11       suppose the State said the following. In our State -- and  
12       here -- here's it goes. Right? The prosecutor says, this  
13       is a very dangerous person. You better execute him. The  
14       defendant says, judge, I would like to tell the jury that  
15       I happen to be in jail forever. I can't get out on  
16       parole. And the rule is -- the rule is he has a right to  
17       tell him that if, under State law, he's ineligible for  
18       parole. All right?

19          Well, why isn't he ineligible for parole? You  
20       say, well, because although the jury had convicted him,  
21       the judge hadn't yet done the ministerial thing of putting  
22       the order down. Well, I say all the time people convict  
23       somebody. They may be ineligible for parole. Maybe there  
24       would be an appeal. Maybe he would be reversed on appeal.  
25       Maybe they'd be -- maybe they would decide the prisons

1        were overcrowded, let them all out. Maybe they would  
2        decide -- maybe there would be a war and everybody would  
3        get an amnesty.

4                Now -- now, suppose a State said, by the way, in  
5        our State we consider a person ineligible for parole only  
6        when it's really definite, only when we can be really  
7        certain that they won't be reversed on appeal, that there  
8        won't be a general amnesty given by the governor, that  
9        there will not be a declaration of war, and so we have to  
10      get everybody out to fight in the armed services. In our  
11      State, we consider all those things have to happen.  
12      Should a Federal court say, oh, that's very different from  
13      Simmons?

14                MS. BALDWIN: Well, Justice Breyer, is your  
15      question that under that particular State's law, those are  
16      factors that go into the State's determination --

17                QUESTION: I'm just saying --

18                MS. BALDWIN: -- of parole eligibility?

19                QUESTION: -- on your --- on your view of it --  
20      you know, what we're imagining is ridiculous  
21      possibilities. In fact, the possibility of reversal on  
22      appeal is a lot less ridiculous than the possibility that  
23      this judge wouldn't enter the order. But what we're  
24      considering are fairly ridiculous possibilities, and a  
25      State court that happens to announce under our State law a

1 person is really ineligible for parole only when all those  
2 ridiculous possibilities are negative. I'm saying I think  
3 -- and your view is if the State court says that, what?

4 MS. BALDWIN: If the State law is -- and -- and,  
5 Justice Breyer, I disagree that the entry of a judgment  
6 order on conviction is anything technical or -- or  
7 formalistic --

8 QUESTION: That would be a different question.  
9 Fine. That would be a different question.

10 MS. BALDWIN: -- whatsoever. The Fourth Circuit  
11 rule -- and I -- and I think it's correct, that the entry  
12 of a judgment order making someone -- divesting someone of  
13 eligibility for parole is not a trivial matter. It's a  
14 very -- what the Fourth Circuit termed an age-old rule,  
15 that before --

16 QUESTION: You know, but what I'm doing is I'm  
17 not being clear myself. You see, I'm trying to find out  
18 what your argument is. Is your argument that if a State  
19 court were to say, in our State you're not -- the law is  
20 identical to what it is in Virginia but for one thing.  
21 The State court announces, we consider you ineligible for  
22 parole only when all appeals have been terminated. We  
23 consider you ineligible for parole only when the Governor  
24 announces he's not going to give you a pardon, et cetera.  
25 What's your view of how that works?

1 MS. BALDWIN: My view is that under the laws  
2 that exist today, under the four corners of Simmons, that  
3 if he is ineligible under State law, he gets the Simmons  
4 instruction, and if he is eligible under State, he does  
5 not.

6 Now, if this Court wants to extend that due  
7 process right by some extra considerations of other  
8 procedures or taking into account some other State's  
9 procedures and wants to expand on Simmons, then it must do  
10 so in that case on direct appeal, not collateral review.

11 QUESTION: So -- so, in your -- in your view, if  
12 the State court were to say, we consider our people  
13 ineligible for parole only when the Governor announces  
14 he's not going to give a pardon. In your view, that  
15 person would not qualify for the instruction under  
16 Simmons.

17 MS. BALDWIN: Under -- currently under Simmons,  
18 yes, Justice Breyer. And of course, there's -- to my  
19 knowledge there's no such State that has that type of  
20 parole law.

21 QUESTION: If I -- if I believe that you were  
22 wrong about that, would you lose?

23 MS. BALDWIN: Wrong about my interpretation.

24 QUESTION: If I believed that Simmons -- that  
25 would be so far from what Simmons intended, that --

1       that --

2                  MS. BALDWIN: No, I would not lose in this case  
3 because my does not prevent those facts. My case -- I  
4 don't think under any interpretation of 2254(d), it could  
5 be said that the Virginia Supreme Court's interpretation  
6 -- application of Simmons was unreasonable, objectively or  
7 otherwise.

8                  QUESTION: Well, except for the fact that the  
9 entry of the judgment may have been a purely ministerial  
10 thing.

11                MS. BALDWIN: It --

12                QUESTION: It was not -- it was not in any way a  
13 situation where it wouldn't be entered in the --

14                MS. BALDWIN: Justice O'Connor, it was not.  
15 Ramdass' argument on that point is -- is completely wrong  
16 on Virginia law.

17                QUESTION: Tell us why.

18                MS. BALDWIN: He has conceded that -- that the  
19 authority in Virginia gives to a circuit court the  
20 authority to vacate or set aside a jury's conviction  
21 before entry of judgment. He has conceded that point.

22                QUESTION: Sua sponte -- sua sponte the judge  
23 can do that?

24                MS. BALDWIN: He certainly may, yes, Your Honor.  
25 It's -- it's --

1                   QUESTION: You have -- you have given us in your  
2 brief a couple of factual scenarios on which the judge  
3 might do that.

4                   MS. BALDWIN: And there are many more, Justice  
5 Souter.

6                   QUESTION: And -- no, but there may be many  
7 more, but I'd like you to comment on what seems to me the  
8 just total lack of reality of the suggestions you make.  
9 The judge -- one of your examples was, well, the judge in  
10 that case might say, look at this poor guy, he's just been  
11 convicted of murder, we -- he shouldn't have so many  
12 convictions against him. So, I'm going to vacate the  
13 judgment here. I mean, that's not a real world example.  
14 And if -- if that's the basis upon which you think  
15 something might happen other than the entry of judgment,  
16 then I -- I just don't think that you've got a realistic  
17 argument. Am I missing something?

18                  MS. BALDWIN: Justice Souter, I believe that  
19 it's -- it's Virginia Supreme Court 3A:15 gives a circuit  
20 court unfettered authority to set aside the judgment.

21                  Now --

22                  QUESTION: Have you ever known of a circuit  
23 court that said, gee, I feel so sorry for this fellow  
24 because he's got too many convictions against him, I think  
25 I won't enter judgment in this most recent one? Do you

1 have an example?

2 MS. BALDWIN: I -- I think that absolutely what  
3 could occur in that sentencing --

4 QUESTION: My question was whether you had an  
5 example. Do they do that in Virginia?

6 MS. BALDWIN: They certainly do.

7 QUESTION: They do? You have --

8 MS. BALDWIN: Now, it may not be --

9 QUESTION: -- you have examples in Virginia in  
10 which the judge says, too many convictions --

11 MS. BALDWIN: I do not have case examples,  
12 Justice Souter.

13 QUESTION: -- I won't enter judgment?

14 MS. BALDWIN: I think that what could go into a  
15 judge's thinking is when presented with some error of law  
16 that occurred at trial -- and we have -- this record in  
17 this case does not show what Ramdass was prepared to argue  
18 at that sentencing hearing in the Domino's Pizza case.  
19 But he could have --

20 QUESTION: -- the judge had turned down all  
21 post-trial motions --

22 MS. BALDWIN: No.

23 QUESTION: No?

24 MS. BALDWIN: No. He had -- what he had  
25 rejected -- and this is what has been kind of unclear from

1 Ramdass' argument. What he had rejected were your typical  
2 motions to strike on the basis of insufficiency of the  
3 evidence.

4           QUESTION: Have there been the equivalent of a  
5 -- whatever they call it these days -- a directed verdict,  
6 NOV?

7           MS. BALDWIN: No. He was -- he was set for a  
8 sentencing hearing, which meant at that hearing he could  
9 have filed a motion to set aside because of some legal  
10 error that occurred at trial. A judge and a prosecutor  
11 both could very well in that case, after he had already  
12 had a death sentence entered, decide that they do not  
13 want to risk having some bad legal ruling go up on appeal.  
14 That -- that's a perfectly -- that could happen anytime.

15           QUESTION: But the -- the legal rulings at the  
16 trial itself --

17           MS. BALDWIN: Correct.

18           QUESTION: -- those all would have had to have  
19 been made, wouldn't they?

20           MS. BALDWIN: No. No, Justice Ginsburg.

21           QUESTION: What --

22           MS. BALDWIN: In the -- in the sentencing  
23 hearing, he had a right under rule 3A:15 to file a motion  
24 to set aside --

25           QUESTION: Even though he --

1 MS. BALDWIN: -- for legal error.

2 QUESTION: -- even though he had made -- didn't

3 he make a motion --

4 MS. BALDWIN: To my knowledge, the only thing

5 that was --

6 QUESTION: Did he make a motion post-verdict?

7 MS. BALDWIN: I believe not at the sentencing

8 hearing. I believe he made --

9 QUESTION: No. I'm talking about what --

10 MS. BALDWIN: -- on sufficiency of the

11 evidence, as far as I know.

12 QUESTION: Yes.

13 MS. BALDWIN: But the record doesn't show what

14 other possible legal errors there are. We just don't know

15 what he could have done at that hearing. We have no idea.

16 QUESTION: No, but I suppose by a parity of

17 reasoning then, that the -- that the parole ineligibility

18 wouldn't have been certain upon entry of judgment by the

19 trial court because he could always appeal. An appeal

20 could always reverse it. I meant there's -- there's no

21 end --

22 MS. BALDWIN: But that's not the rule in

23 Virginia, Justice Souter.

24 QUESTION: Pardon me?

25 MS. BALDWIN: That's not the rule in Virginia.

1       The rule in Virginia, under the Virginia Supreme Court's  
2       ruling, is once the conviction order is entered, at that  
3       point then the Department of Corrections can consider that  
4       conviction.

5                   QUESTION: No. But our question is the Simmons  
6       question. The Federal law question is ineligibility  
7       certain to a very high degree. And -- and you're saying,  
8       no, it's not because under Virginia law, entry might not  
9       have been entered -- a judgment might not have been  
10      entered on this conviction, and the reason might be  
11      because the judge felt sorry for him or for some other  
12      reason or --

13                  MS. BALDWIN: Many other reasons.

14                  QUESTION: -- or because he made a -- a motion  
15      which we don't now have before us, a motion that might  
16      have led the judge to do that. And -- and my point is, if  
17      that possibility is sufficient for Simmons purposes to say  
18      that his parole ineligibility is uncertain, then the  
19      possibility of his appeal and some success on appeal  
20      should equally lead to an uncertainty that would bar the  
21      application of Simmons. Why -- why isn't that line of  
22      reasoning sound?

23                  MS. BALDWIN: Because that's not what the law in  
24      Virginia is on parole ineligibility.

25                  QUESTION: I -- I'm suggesting the -- the law of

1       the United States under Simmons, and you're saying that  
2       the -- the possibility that judgment may not be entered  
3       makes the ineligibility point too uncertain to apply  
4       Simmons. And all I'm saying is, if that is sound, then  
5       the possibility of an appeal in Virginia, upon which he  
6       might get relief, presumably also makes ineligibility too  
7       uncertain to apply Simmons. Isn't that right?

8                  MS. BALDWIN: No, I think that's not right  
9       because Simmons doesn't speak in terms, anywhere in the  
10      opinion, of -- of some separate Federal issue apart from  
11      what State -- State law defines as ineligible.

12                 QUESTION: Well, never mind even State law.  
13       Even if we were doing it on the basis of Federal law  
14       looking at Virginia, if the conviction were overturned on  
15       appeal, I assume what would happen is that the prior  
16       ineligibility for parole, which existed upon the  
17       conviction, would be eliminated. Isn't that right?

18                 MS. BALDWIN: It would be.

19                 QUESTION: But it wouldn't retroactively mean  
20       that he was not ineligible for parole. He is ineligible  
21       in Virginia from the time of conviction.

22                 MS. BALDWIN: That's correct.

23                 QUESTION: And should it be reversed later, he  
24       would then be -- he would then be eligible.

25                 MS. BALDWIN: That's correct.

1                   QUESTION: But he would have been ineligible at  
2 the time of this trial.

3                   QUESTION: May I ask you a question on this  
4 point? Is it not correct, whether we call it Federal law  
5 or State law, if we look at the concurring opinion in  
6 Simmons, that if the judge had given an instruction -- but  
7 as you say, he didn't really have to give -- saying that  
8 as things look right now, if that judgment is entered,  
9 he'll be ineligible for parole. The prosecutor would have  
10 been entirely free to ask the judge to say yes, but that  
11 judgment might be set aside on appeal. It might not be  
12 entered. He might escape. There might be commutation.  
13 There might be a change in the law, and there might be a  
14 pardon.

15                  So, the -- that even if the instruction had been  
16 given, to the extent that there is this uncertainty in the  
17 picture, it -- perhaps the prosecutor could easily have  
18 cleared that up and said nothing in life is certain  
19 because of all these factors.

20                  MS. BALDWIN: That's correct, Justice Stevens,  
21 but Simmons does not require the instruction unless he is  
22 ineligible.

23                  QUESTION: No, but one of the points that's made  
24 in Simmons is that the prosecutor has this option of being  
25 sure that the information is not misleading. See, that's

1       what -- the main thing we're looking for --

2           MS. BALDWIN: Correct, if he --

3           QUESTION: -- is not misleading the jurors.

4           MS. BALDWIN: If -- well, but Simmons tells  
5       State courts very clearly, expressly a very narrow  
6       exception to the general rule was carved out in Simmons.

7           QUESTION: The concurring opinion in Simmons  
8       pointed out that this is an exception to the general rule,  
9       that you ordinarily don't get into this subject because it  
10      can be so confusing to the jury.

11          MS. BALDWIN: Yes, yes, Mr. Chief Justice.

12          QUESTION: Of course, it also pointed out how  
13       unfair it is for the prosecutor to make an argument about  
14       future dangerousness and conceal the fact that he's not  
15       likely to get out of prison. It -- that argument is also  
16       in the concurring opinion.

17          MS. BALDWIN: Well, I would disagree with that  
18       because I think what Simmons expressly says is that's only  
19       unfair if he would be ineligible as a matter of State law.  
20       And you have to look at when a State court is reading  
21       Simmons, is it reasonable for them to rule and to decide  
22       -- read Simmons, look at this defendant. If he was  
23       eligible for parole, then Simmons simply doesn't apply.  
24       And there's nothing in Simmons to support this different  
25       type of nebulous standard that Ramdass is now proposing.

1           QUESTION: Well, I don't see why -- why exactly.

2       I mean, the -- the argument on the -- I think would be  
3       that -- that Simmons says when a person is ineligible for  
4       parole --

5           MS. BALDWIN: As a matter of State law.

6           QUESTION: -- as a matter of State law, you must  
7       tell the jury, let him tell the jury.

8           MS. BALDWIN: Correct.

9           QUESTION: Well, this person is. He simply is.

10          MS. BALDWIN: Well, the Virginia Supreme Court  
11       said not.

12          QUESTION: Now -- now, but they're not deciding  
13       the Federal question.

14          MS. BALDWIN: I believe --

15          QUESTION: I mean -- and Simmons itself -- see,  
16       it's a Federal question whether he -- and -- and they're  
17       not deciding that Federal question. And Simmons itself  
18       understands that there is some uncertainty as to whether  
19       the person really will get out. The conviction could be  
20       reversed on parole.

21          MS. BALDWIN: That's right. That's irrelevant.

22          QUESTION: And there's no difference between  
23       that kind of uncertainty, like reversal on parole, and the  
24       kind of uncertainty that consists of whether the judge  
25       will perform a ministerial act.

1               Now, that's -- that's -- I'm recasting it  
2 because --

3               MS. BALDWIN: Simmons --

4               QUESTION: -- I want to get your response to the  
5 recasting of it.

6               MS. BALDWIN: Simmons set -- Simmons set a  
7 threshold. It was a very bright line rule for State  
8 courts. And -- and I believe that that is -- some of the  
9 members of the Court this morning have said Ramdass'  
10 proposed standard -- there's no way -- this Court would  
11 have to take every case to decide on the facts of that  
12 case --

13               QUESTION: Why -- why?

14               MS. BALDWIN: -- whether beyond a reasonable  
15 doubt.

16               QUESTION: Since there -- why -- why would you?  
17 Suppose you simply said where they're ineligible and they  
18 are ineligible where there has been an authoritative  
19 determination that they are guilty of the crime.

20               MS. BALDWIN: Well, this --

21               QUESTION: I mean, that's it.

22               MS. BALDWIN: This Court may --

23               QUESTION: Clear, bright line, and I don't think  
24 anybody could say that there has not been an authoritative  
25 determination that he was guilty of the crime that -- that

1 led to no parole. Now --

2 MS. BALDWIN: This Court may want to say that.

3 QUESTION: Yes.

4 MS. BALDWIN: But it would have to say that in  
5 that case on direct appeal because Simmons doesn't say  
6 that.

7 QUESTION: Well, but wouldn't that be implicit  
8 in Simmons? I mean, the issue didn't come up in Simmons  
9 as to -- I agree with you. It didn't come up because  
10 everyone knew that he was ineligible, but if you were to  
11 ask a lawyer what does it mean, they'd say, well, where  
12 there has been an authoritative determination, nobody  
13 would think that the court of appeals had to decide an  
14 appeal that wasn't gotten there. Everybody would think  
15 there has to be some judicial determination.

16 MS. BALDWIN: But, Justice Breyer, the -- the  
17 issue is not what is implicit in Simmons under 2254(d).  
18 The issue is was it clearly established, and -- and for  
19 that matter -- and looking at whether it was clearly  
20 established or not, even 3 years after Simmons, this Court  
21 was debating in Brown v. Texas. Three members of the  
22 Court joined Justice Stevens' statement regarding denial  
23 of cert -- as to whether Simmons might -- should apply to  
24 defendants who are eligible for parole after serving --

25 QUESTION: No, no, but that I grant --

1 MS. BALDWIN: -- ineligible after serving --

2 QUESTION: -- is absolutely not decided in

3 Simmons.

4 MS. BALDWIN: And --

5 QUESTION: It's the question of the

6 authoritative --

7 MS. BALDWIN: -- that's -- but that's

8 essentially the issue that Ramdass is making now. I think  
9 Simmons should apply to me despite the fact that I am  
10 eligible for -- that I am eligible for parole as opposed  
11 to ineligible for parole. If that -- if that issue was  
12 debatable on this --

13 QUESTION: Surely you're not eligible for parole

14 if you haven't been convicted. I mean, if the judge is  
15 going to set aside the jury's conviction, you're not  
16 eligible for parole.

17 MS. BALDWIN: That's correct.

18 QUESTION: Parole doesn't enter into it.

19 MS. BALDWIN: If that Domino's Pizza case had  
20 not been entered -- and it may not have been at that time.  
21 We're now looking with hindsight, so we know what  
22 happened. But at that time, no one could say with  
23 certainty that would happen. And if that had not been  
24 entered, you can be sure that Ramdass would have been  
25 fighting tooth and nail to have been found eligible for

1 parole. I mean, his argument would have been completely  
2 different. He would not have an argument at all today.  
3 His argument is based upon a misapprehension of State law,  
4 and we know that because the Virginia Supreme Court has  
5 said it.

6 The -- in Simmons, this Court repeatedly used  
7 the phrase, ineligible under State law. This Court, 3  
8 years after Simmons in Brown v. Texas, was telling State  
9 courts it's debatable on the courts still as to pretty  
10 much the extent of the Simmons rule as applying to  
11 eligibles or ineligibles for parole. You cannot,  
12 therefore, go back and say that the Virginia Supreme  
13 Court's decision was in any way objectively unreasonable.

14 In O'Dell, this Court defined Simmons as that  
15 narrow exception carved out of the general rule. It's a  
16 bright line rule. The Court found under State law and --  
17 and Ramdass does not take exception with the State law  
18 ruling that he was eligible for parole. There was --  
19 there is nothing in Simmons to say that there is some  
20 separate standard.

21 And in fact, as the Fourth Circuit said -- and I  
22 think they were correct -- anytime we get into a  
23 discussion of parole eligibility, it necessarily is going  
24 to collapse into a discussion of State law. It's not like  
25 a case where you have, oh, there's some subsidiary State

1 law kind of factual findings and then you make a Federal  
2 law determination. Simmons is uniquely dependent,  
3 completely, unless this Court is going to change it and  
4 extend it -- completely dependent on what State law is.  
5 That's the way Simmons was written.

6               If the Court doesn't like it and wants to extend  
7 it, it needs to do that in a case on direct appeal. It  
8 cannot do it in a collateral case under 2254(d) because  
9 you cannot, in this case, look at Simmons, read Simmons,  
10 and say that what the Virginia Supreme Court did was  
11 unreasonable.

12              QUESTION: Well, of course, that's true. I  
13 mean, you're absolutely right that it's dependent on what  
14 State law is. But is it dependent upon what the State law  
15 decides the Federal question to be?

16              MS. BALDWIN: According to Simmons, the State  
17 law determines whether he's eligible or not.

18              QUESTION: That's true, but here was the  
19 Virginia court doing anything other than deciding the  
20 Federal question of whether, for purposes of Simmons, he  
21 is eligible or ineligible for parole?

22              MS. BALDWIN: I think they're the same. Under  
23 the way that Simmons was written --

24              QUESTION: All right. Now, do we have to listen  
25 to a State court's determination of that Federal question?

1 MS. BALDWIN: If the Federal -- if you're saying  
2 the Federal question is whether he's eligible for parole  
3 or not, then yes. The answer is yes because Simmons, as  
4 currently written, would give a reasonable jurist reading  
5 it that impression.

6 QUESTION: If we're going to say that it's our  
7 decision, a Federal decision, whether he's eligible under  
8 -- whether he's eligible for parole, it would be a very  
9 strange way to describe it as saying it depends on whether  
10 he's eligible for parole under Virginia law or under South  
11 Carolina law. It seems to me meaningless to say -- to say  
12 that we're going to refer to South Carolina law, but the  
13 answer that South Carolina gives is not necessarily the  
14 right answer. I really don't understand how that argument  
15 goes. Do you understand how that argument goes?

16 MS. BALDWIN: No, I don't --

17 QUESTION: It depends on Virginia law, but it  
18 really doesn't depend on Virginia law.

19 (Laughter.)

20 QUESTION: I was trying --

21 MS. BALDWIN: I don't understand it.

22 QUESTION: The -- the -- this is very unusual.  
23 It's very complicated and philosophical in a sense. It's  
24 an unusual case where the legal situation in -- in  
25 Virginia is totally clear. There's no disagreement about

1 it.

2 MS. BALDWIN: Correct.

3           QUESTION: And the only thing that happens in  
4 that absolutely agreed upon legal situation is a Virginia  
5 court says, we are going to use these words, ineligible  
6 for parole, to apply to this situation simply because the  
7 judge hasn't yet come in yet. Now, I'd say that's the  
8 Federal question.

9 MS. BALDWIN: Well --

10          QUESTION: And -- and it's --

11          MS. BALDWIN: I'm not sure what the --

12          QUESTION: -- that's the Federal question, about  
13 whether you should use those words ineligible for parole  
14 in respect to Simmons on this absolutely agreed upon legal  
15 circumstance in Virginia.

16          MS. BALDWIN: But I don't see how -- how a State  
17 court, looking to see whether someone is eligible for  
18 parole or not under State law, can do anything else. I  
19 mean, they have to look at their own law --

20          QUESTION: No. We could easily do it.

21          MS. BALDWIN: -- and determine --

22          QUESTION: What you could say is, the matter of  
23 Federal law which is clear from Simmons is the following.  
24 Where there has been authoritative determination by the  
25 State that the person is ineligible for parole, or

1       convicted of the third crime that makes him ineligible,  
2       that's when Simmons cuts in. Now, I think maybe that's  
3       implicit in Simmons and -- and you would say --

4                  MS. BALDWIN: Well, I think --

5                  QUESTION: -- no, it isn't. But one thing I  
6       would be certain is I don't think that the State court's  
7       answer to that question would get deference from a Federal  
8       court.

9                  MS. BALDWIN: Well, then I think the Federal  
10      court then would be redetermining State law ineligibility  
11      for parole, and that is not contained anywhere in Simmons.

12                 What Ramdass --

13                 QUESTION: I guess we could have said in Simmons  
14      that the question is whether he is likely to be paroled by  
15      -- by South Carolina or -- or very likely to be paroled by  
16      Virginia.

17                 QUESTION: Beyond a reasonable doubt.

18                 QUESTION: Beyond a reasonable doubt.

19                 MS. BALDWIN: Yes. This Court could have said  
20      that.

21                 QUESTION: We didn't say that. We said whether  
22      he is eligible for parole under South Carolina --

23                 MS. BALDWIN: That's correct.

24                 QUESTION: -- or Virginia law.

25                 MS. BALDWIN: But what Ramdass' real complaint

1 here is simply that his order of convictions came  
2 different than what he wishes they were. That claim isn't  
3 before the Court. He never preserved that claim. If he  
4 wanted to have preserved that claim, he should have asked  
5 for a continuance or asked for something to make him  
6 ineligible under State law because that's his real  
7 complaint here --

8           QUESTION: May I ask --

9           MS. BALDWIN: -- one that was never made.

10          QUESTION: -- how -- is your answer to their  
11 argument that the same thing was really true in South  
12 Carolina because the parole board hadn't yet made him  
13 ineligible for parole, that that's not mentioned in the  
14 opinion? Is that your answer to that argument?

15          MS. BALDWIN: Well, but you can't impute that  
16 certainly to the Virginia Supreme Court reading Simmons  
17 because that entire argument --

18          QUESTION: But even though that's part of our  
19 holding, our opinion didn't explain that and therefore the  
20 State court wasn't on notice.

21          MS. BALDWIN: Justice Stevens, I don't believe  
22 it's in the opinion at all.

23          QUESTION: No, I know it isn't, but it was in  
24 the briefs.

25          MS. BALDWIN: Correct.

1                   QUESTION: And so you -- but if that fact had  
2   been spelled out, do you think Simmons would have been  
3   decided differently?

4                   MS. BALDWIN: No, I don't.

5                   QUESTION: No. So, then isn't -- isn't it fair  
6   to say even though that was the holding and the only  
7   unfairness for the Virginia Supreme Court is it wasn't  
8   spelled out in the opinion?

9                   MS. BALDWIN: No, no. Then at least he would  
10   have --

11                  QUESTION: If they had read the briefs and knew  
12   that was a fact, do you think they would have come out the  
13   same way in this case?

14                  MS. BALDWIN: If it was -- if that was -- if his  
15   claim of a different standard of reviewing parole  
16   eligibility, for whatever reason, because the parole board  
17   in South Carolina hadn't yet announced it or --

18                  QUESTION: Well, the argument would be the same  
19   argument you're making here, that he really was not yet  
20   ineligible for parole because the parole board had -- had  
21   not yet entered the order that made him so.

22                  MS. BALDWIN: I think then at least he'd have  
23   some argument here, but he has no argument here because  
24   Simmons doesn't say that. I mean, at least then he might  
25   have a basis for his claim.

1                   QUESTION: But Simmons decided that. Simmons  
2 decided that.

3                   MS. BALDWIN: To my knowledge --

4                   QUESTION: Because that argument was on the  
5 table and the Court didn't think it was strong enough even  
6 to mention in the opinion and yet rejected it.

7                   MS. BALDWIN: If that's true, if we have to  
8 impute that to State courts to go back and read the briefs  
9 to see what was rejected, Justice Stevens --

10                  QUESTION: Either that or we have to assume that  
11 most State courts would react to that argument the same  
12 way we reacted to that argument, that it's so obviously  
13 frivolous that to wait for that meaningless delay, that  
14 that shouldn't change the result.

15                  MS. BALDWIN: Well, I think absent it somewhere  
16 in the opinion, you simply can't say that the Virginia  
17 Supreme Court unreasonably applied Simmons.

18                  QUESTION: Thank you, Ms. Baldwin.

19                  Mr. Bruck, you have 7 minutes remaining.

20                  REBUTTAL ARGUMENT OF DAVID I. BRUCK

21                  ON BEHALF OF THE PETITIONER

22                  MR. BRUCK: If Your Honor please, really the  
23 only point I'd like to respond to is this idea of slippery  
24 slope that Virginia advances. I would suggest that if  
25 there is any slippery slope on this case, it is on the

1 other side of the issue.

2 If -- if the -- the due process rule, the right  
3 of rebuttal rule in Simmons were now to give way to  
4 something so constrained by formalism and an arid  
5 explication of what State law says parole eligibility  
6 means, to the exclusion of the Federal question, if  
7 Simmons is to be contracted in Ramdass v. Angelone to mean  
8 that, then States that no longer wish to be -- to abide by  
9 Simmons at all have a road map to opt out of the Simmons  
10 principle. And I think the South Carolina procedure is a  
11 perfect way of doing it, to delay the formal declaration,  
12 and there could be some sorts of factual determinations,  
13 none of which would be in doubt. There would be no  
14 suspense about any of it, but the time had not yet come  
15 when the jury wants to know the answer, so you never have  
16 to tell them.

17 QUESTION: Maybe we should reformulate Simmons  
18 then and say, you know, that issue is whether he is likely  
19 or overwhelmingly likely or beyond a reasonable doubt will  
20 be paroled by Virginia.

21 MR. BRUCK: One need not go so far.

22 QUESTION: That -- that would solve the problem  
23 that you're worried about. But unfortunately, that isn't  
24 what we said in Simmons.

25 MR. BRUCK: Well, I'm really not worried about

1 it because I don't think that -- that this Court will  
2 restrict South Carolina in such a way.

3                   QUESTION: Well, maybe Simmons itself was a  
4 mistake.

5                   MR. BRUCK: Well, that leads me to my last  
6 point, which is that Simmons has been accepted very  
7 comfortably by the States. In fact, even before Simmons,  
8 there were very few State courts that did not go further  
9 than what Simmons held was required by due process, and  
10 now there are almost none. Virginia itself no longer has  
11 this whole procedure. They now have eliminated parole for  
12 everybody and they tell everybody in every case whether  
13 future dangerousness is argued or not. *Yarborough v.*  
14 Commonwealth. They have gone beyond Simmons.

15                  So, the -- the issue of -- of what was a small  
16 change in the law at the time of Simmons is no longer  
17 controversial. It is in repose, and I would suggest that  
18 it would be most unwise and most unfortunate for this  
19 Court to reawaken what was a small controversy 4, 5, 6  
20 years ago and is now no controversy at all.

21                  Thank you.

22                  CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bruck.  
23                  The case is submitted.

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