

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 c-2

PLACE: Washington, D.C.

DATE: Tuesday, April 18, 2000

PAGES: 1-53

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THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ROBBY LEE RAMDASS BELLER V. RONALD J. ...
ANGPHONE DIRECTOR, VIRGINIA DEPARTMENT OF
CORRECTIONS
CASE NO: 99-7007
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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 BOBBY LEE RAMDASS, :

4 Petitioner :

5 v. : No. 99-7000

6 RONALD J. ANGELONE, DIRECTOR, :

7 VIRGINIA DEPARTMENT OF :

8 CORRECTIONS. :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, April 18, 2000

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:12 a.m.

15 APPEARANCES:

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

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

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1 P R O C E E D I N G S

2 (11:12 a.m.)

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

6 ORAL ARGUMENT OF DAVID I. BRUCK
7 ON BEHALF OF THE PETITIONER

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

10 In Simmons v. South Carolina, this Court held
11 that a capital defendant may rebut the State's allegation
12 of future dangerousness by showing, if it is so, that he
13 could never be paroled from prison on a life sentence if
14 the jury gave him a life sentence.

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

18 The issue now presented is whether the Virginia
19 Supreme Court erred when it effectively engrafted onto
20 this Court's holding in Simmons an additional requirement
21 that, in order to come within the ambit of Simmons, a
22 defendant must not only have no possibility under State
23 law of being released on parole throughout his entire
24 lifetime, but also that that ineligibility have been
25 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 --

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MR. BRUCK: No.

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

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

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

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

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

MR. BRUCK: Nothing is absolute except death.

QUESTION: Well, no.

QUESTION: Taxes.

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

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

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

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 sentenced 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.)