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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: JONAS H. WHITMORE, INDIVIDUALLY AND AS
NEXT FRIEND OF RONALD GENE SIMMONS, Petitioner V.
ARKANSAS, ET AL.

CASE NO: 88-7146

PLACE: Washington, D.C.

DATE: January 10, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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JONAS H. WHITMORE, INDIVI- :
DUALY AND AS NEXT FRIEND :
OF RONALD GENE SIMMONS, :
Petitioner :

v. : No. 88-7146

ARKANSAS, ET AL. :

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Washington, D.C.

Wednesday, January 10, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
12:58 p.m.

APPEARANCES:

ARTHUR L. ALLEN, ESQ., Little Rock, Arkansas; on behalf
of the Petitioner.

J. STEVEN CLARK, ESQ., Attorney General of Arkansas; on
behalf of the Respondents.

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1 v. Georgia, Jurek v. Texas, Proffitt v. Florida, the
2 Arkansas Supreme Court found no constitutional requirement
3 of an appellate review.

4 And that trial and conviction occurred in 1988.
5 The trial in February of '89 had no appellate record made,
6 no -- or no transcript prepared for appellate review.
7 There was, in accordance with ruling of the Arkansas
8 Supreme Court, a hearing held in the trial court level to
9 determine Mr. Simmons' competency to waive appellate
10 review.

11 He was examined by a psychiatrist at the
12 Arkansas State Hospital and was determined to be competent
13 to make that waiver. Although in a later hearing there
14 was some reservation expressed by the examining
15 psychiatrist concerning some more recent expressions from
16 Mr. Simmons that may have expressed a degree of mental
17 disorder, neither the trial court nor the reviewing court
18 on appeal found these to be significant enough to make his
19 waiver involuntary.

20 QUESTION: Mr. Allen, you represent Jonas
21 Whitmore in this case?

22 MR. ALLEN: Yes, sir.

23 QUESTION: And what is Mr. Whitmore's standing
24 before this Court?

25 MR. ALLEN: Your Honor, his standing is

1 predicated upon several things. In the State of Arkansas,
2 although not constitutionally required to do so, our
3 supreme court has committed itself since the 1970s to a
4 system of comparative review in death penalty cases.

5 In other words, they have taken the issue that
6 this Court looked in Pulley v. Harris and made it a part
7 of state law to say that in each death penalty case they
8 will review that individual's crime against other capital
9 cases in the State of Arkansas.

10 In this instance, the state has not put Mr.
11 Simmons' conviction and the attendant facts within that
12 data pool that Mr. Whitmore is to be compared against.

13 QUESTION: But hasn't Mr. Whitmore's conviction
14 already been affirmed?

15 MR. ALLEN: It has -- it has been affirmed on
16 direct appeal. It has been affirmed in state post-
17 conviction proceedings, which have now been abolished in
18 the State of Arkansas, at -- and is currently in federal
19 habeas.

20 At the state post-conviction stage, the State of
21 Arkansas in its briefs conceded that Mr. Whitmore was
22 entitled to a hearing. Not a concession as to the merits,
23 but a concession as to a hearing on several grounds in his
24 case.

25 Mr. Whitmore's position is unlike all other

1 citizens of the state. He has a particular concrete
2 injury. If he, as a member of that much smaller subset of
3 people facing the possibility of a trial, is again
4 convicted, then Mr. Simmons --

5 QUESTION: Well, what do you mean? You mean if
6 he's convicted of a second capital murder?

7 MR. ALLEN: No, sir. If he obtains a new trial
8 and is again convicted. Of course, the state -- and this
9 is what the respondent has largely argued as their
10 position -- is that Mr. Whitmore does not have standing.

11 QUESTION: Well, have you been authorized to
12 represent him?

13 MR. ALLEN: Mr. Whitmore?

14 QUESTION: Yeah.

15 MR. ALLEN: Are you referring to Mr. Whitmore,
16 sir?

17 QUESTION: I'm referring to --

18 QUESTION: Simmons is the guy that --

19 QUESTION: Well, what is -- what is Mr.
20 Whitmore's standing to even be here?

21 MR. ALLEN: Mr. Whitmore, under the standing, of
22 course, to reach the Article III case for controversy, has
23 to show an injury. And of course, as the cases here have
24 held, with perhaps not --

25 QUESTION: Was he -- was he competent to waive

1 any appeal or --

2 MR. ALLEN: Mr. Simmons?

3 QUESTION: Yes.

4 MR. ALLEN: On the record before this Court I
5 cannot seriously dispute competency as it relates to
6 mental competency. Competency, though, is a two-part
7 question.

8 One is, of course -- or, a part of that question
9 is his mental competency. Despite some reservation
10 from --

11 QUESTION: But you say Whitmore has got a
12 separate interest?

13 MR. ALLEN: Yes, sir. He has a separate
14 interest. Now, concededly I -- I cannot present to this
15 Court that it is overwhelming, but I would suggest to the
16 Court that the proper test to apply is the one of Justice
17 Brennan's comments in his dissent to Valley Forge, which
18 is that the dividing line should be no injury and some
19 injury rather than asking the Court to get into weighing
20 and assessing the total weight of the injury.

21 To reach standing he needs to show a personal
22 injury to himself.

23 QUESTION: Well, of some substance. Not just a
24 trivial thing.

25 MR. ALLEN: Well, your Honor, again --

1 QUESTION: Certainly, that was -- that was the
2 rule of Valley Forge, was it not?

3 MR. ALLEN: It cannot be a hypothetical or --

4 QUESTION: No, but I mean, even if it's actual
5 it has to be something beyond a mere peppercorn, so to
6 speak.

7 MR. ALLEN: Oh, I don't think the Court used
8 that expression. One expression what was used in a
9 slightly earlier case, the Scrap case, was that a mere
10 trifle may be sufficient.

11 QUESTION: And your claim here is that although
12 your client has already had his conviction affirmed and
13 the proportionality review conducted by the Supreme Court
14 of Arkansas he -- and has lost in state post-conviction
15 remedies, he is now in Federal habeas and he might obtain
16 a new trial there and then he would go through the
17 proceeding again and would be affected by the fact that
18 Mr. Simmons' capital case was not in the pool from which a
19 proportionality review is convicted?

20 MR. ALLEN: Yes, Your Honor, that's correct.
21 And, of course --

22 QUESTION: Why isn't that hypothetical? You --
23 you -- you had just finished saying that the injury has to
24 be something more than hypothetical. Why isn't it
25 hypothetical that your -- that your client will get his

1 conviction set aside and be tried again?

2 MR. ALLEN: Your Honor, the difference there is
3 the difference between future or threatened injury and
4 hypothetical.

5 Hypothetical assumes all facts, whereas -- and
6 again, the Court has in a number of decisions, including
7 O'Shea, and in fact in a footnote to Valley Forge, looked
8 at threatened injury. So, it's clear that the injury can
9 be a future injury.

10 That's Mr. Whitmore's personal interest in this.
11 There are other reasons, as cited in the brief, for
12 allowing standing to Mr. Whitmore.

13 QUESTION: Well, I assume the difference between
14 future and hypothetical is sort of the difference between
15 standing under a chandelier whose -- whose connection has
16 broken and is -- is -- is in the process of descending on
17 your head. That's a future injury.

18 And a hypothetical injury would be standing
19 under a chandelier that is perfectly well-attached to the
20 ceiling. Now, why isn't your client in the latter case?

21 MR. ALLEN: Because --

22 QUESTION: In the latter situation? There is
23 nothing happening -- about to happen to him. It all
24 depends on his getting his conviction set aside. That's
25 purely hypothetical that it'll do that.

1 If and when it's aside, then I suppose you can
2 say it's -- it's sure that Mr. Simmons' case will be left
3 out of the pool. That's in the future to be sure, but not
4 hypothetical.

5 At this stage it's still hypothetical, though,
6 isn't it?

7 MR. ALLEN: No, Your Honor. I would suggest
8 that it's not hypothetical. It is perhaps slight.
9 But there is a threatened injury to Mr. Whitmore of a
10 right asserted to him by the State of Arkansas. However
11 slight that may be, whether in fact the Court might
12 consider it to be a trifle. Within the context of Eighth
13 Amendment death penalty considerations, virtually anything
14 that influences the ultimate decision to impose a penalty
15 of death should not be considered merely trifling or even
16 hypothetical.

17 The other reasons for standing as regards Mr.
18 Whitmore again go back -- to look at earlier cases of this
19 Court. A part of the ability to proceed in behalf of a
20 third person is the adequacy or inadequacy of the waiver
21 made.

22 As the Arkansas court's opinion, as set out in
23 the joint appendix, shows, they used the Rees v. Peyton
24 test, which is the functional equivalent of competency to
25 stand trial, to waive a jury.

1 What they did not look at was the adequacy of
2 how knowingly and intelligently Mr. Simmons has made this
3 waiver. Who, for example, has said to him: you may not
4 be eligible for the death penalty?

5 The only advice he has had as regards to this
6 case is the advice of the trial counsel who have adamantly
7 and vigorously advocated that their own client be put to
8 death, who have filed as Respondent briefs in this Court
9 statements which say that they are not familiar enough
10 with the death penalty laws in the State of Arkansas to
11 present that issue as opposed to the Attorney General for
12 the State of Arkansas.

13 QUESTION: Well, you're not arguing that the
14 Simmons' waiver was invalid, are you?

15 MR. ALLEN: I seriously question the validity of
16 that waiver under those circumstances. The advice that he
17 has had in this case, distinguishing it from his earlier
18 conviction -- no one other than the trial counsel have
19 advised him as to trial errors.

20 Now, the trial judge, based upon representations
21 made by trial counsel, has advised him of potential error.

22 Now, in Simmons I, the earlier case that was
23 tried in 1988, it went into Federal habeas. The Federal
24 district court appointed an independent attorney, ordered
25 a transcript to be prepared -- and, in fact, I think had

1 to threaten the court reporter with contempt to get a
2 transcript prepared.

3 There was then a lengthy report filed with the
4 Federal court outlining various potential errors. And, in
5 fact, that independent report on the first conviction
6 showed at least seven grounds of reversible error, one of
7 which would have negated the death penalty.

8 QUESTION: Well, does any case from our Court
9 require that extensive a proceeding as you've just
10 described in order that a waiver be deemed competent?

11 MR. ALLEN: Your Honor, this Court has only
12 addressed waivers in death penalty context after they have
13 reached habeas -- with the exception of Gilmore, which we
14 have yet to discuss. But this Court has never discussed
15 it in the context of waiving a direct first appellate
16 review.

17 You have looked at it in collateral proceedings,
18 post-conviction and Federal habeas, wherein the harm that
19 we are seeking to redress here did not occur because there
20 had been an appellate review.

21 The probably best analogy for another reason to
22 grant standing is a review of this Court's cases in the
23 area of the First Amendment, the heightened interest that
24 the Court has shown. For example, from cases going back
25 through Raines, through NAACP v. Alabama, Griswold,

1 Eisenstadt, the Court has not hesitated to allow -- I
2 shouldn't say has not hesitated because not all opinions
3 have been unanimous -- but certainly the gist and the
4 thrust of this is that the rights of third parties may in
5 fact be asserted.

6 QUESTION: By someone who himself has standing,
7 who himself has suffered an injury.

8 MR. ALLEN: Yes, sir.

9 QUESTION: Wouldn't you agree with that?

10 MR. ALLEN: Yes, sir. I would. And, of course,
11 to reach that point, to take it out of the realm of the
12 hypothetical, there has to be an injury, which is what we
13 are alleging on behalf of Mr. Whitmore. And the Court has
14 again --

15 QUESTION: (Inaudible) just any -- any person --
16 any member of the public can come in and say Simmons'
17 waiver was invalid and therefore I want to appeal his
18 case.

19 MR. ALLEN: Your Honor, as much, perhaps, as I
20 would like to advocate that, I think this Court's
21 decisions are uniform in showing that generalized
22 grievances are redressable through the political front
23 rather than through the judicial front.

24 That almost --

25 QUESTION: So the fact that -- so the fact that

1 the waiver, you say, is questionable really doesn't add
2 anything to Whitmore's standing, is it?

3 MR. ALLEN: It does -- it, of itself, doesn't
4 add anything more to his standing. In other words, his
5 injury is the first threshold that has to be addressed.
6 But in the presence of -- again, to use phrases from the
7 cases -- weighty countervailing policies, which there can
8 hardly be, even with the importance of the First
9 Amendment, a weightier issue than the imposition of the
10 death penalty, that the standing requirement, that
11 threshold requirement, may in fact be lowered almost on a
12 balancing basis. The importance of the interest, the
13 lowering of that first threshold question. That --

14 QUESTION: Mr. Allen, could I ask you --
15 assuming that you have standing, do you know any case
16 where we've allowed someone who would -- assuming he would
17 be injured by something that occurred at the trial level,
18 we've allowed someone not to intervene down there but to
19 bring an appeal here on the basis of that standing?

20 I mean, I -- I would think that if I sit out a
21 proceeding in the district court that might affect me, I'm
22 out of luck. I can't then come in at the court of appeals
23 level and say I want to appeal that.

24 Now, maybe I can bring a separate lawsuit --
25 maybe I can bring a separate lawsuit to set aside that

1 district court judgment, but this -- this seems to me a
2 very strange procedure.

3 Assuming you -- assuming there is a real
4 interest here that would confer standing, does it -- does
5 it enable you to sort of jump into a lawsuit, in the
6 middle of it, and appeal a -- appeal a suit that hasn't
7 otherwise been appealed?

8 MR. ALLEN: There is a strange -- or an
9 appearance of strangeness here, Your Honor, because of the
10 absence of Simmons I from being with this. In Simmons I,
11 the intervenor was a Catholic priest, Father Franz, who
12 filed at the trial court level to appeal and to order a
13 transcript prepared.

14 The trial court dismissed that appeal at the
15 trial court level and refused to have a transcript
16 prepared even though that intervenor was, as I understand
17 it, prepared to pay for the transcript. So --

18 QUESTION: He wasn't asserting his own standing.
19 He was -- he was asserting the standing of the -- of the
20 convicted person himself, wasn't he? Wasn't he just
21 trying to come in as next friend?

22 MR. ALLEN: Yes. And that's --

23 QUESTION: So that's quite different from what
24 you're trying to do here.

25 MR. ALLEN: Well, that's the reason I believe

1 that Franz v. State failed on its face, is that it did not
2 express more than a generalized grievance over a
3 constitutional defect.

4 That's what distinguishes Mr. Whitmore's
5 position, is that rather than a generalized grievance
6 saying the State of Arkansas, nor any other state, should
7 execute an individual who has not had the full continuum
8 of rights guaranteed under the Eighth Amendment.

9 The state would ask that the appeals process be
10 looked at as a separate and discrete part of the process.
11 You go to trial and from whatever happens through that
12 point on is separate.

13 That's, I believe, not a correct position in the
14 context of death penalty cases, partially because death is
15 in fact different. It's entitled to higher safeguards, to
16 perhaps unique procedures to ensure that it's not unfairly
17 imposed; that -- excuse me -- that it relates to
18 appropriate penalties for certain crimes, as in Coker, for
19 example; that it only is imposed on deserving defendants,
20 as in Jurek v. Texas; that mitigation is allowed in its
21 full scope -- Lockett, Skipper.

22 And the importance -- the constitutional
23 importance of the appellate review has been addressed in a
24 number of cases in this Court -- that -- I won't go back
25 through at any length. As early as Gregg, of course, the

1 Court has said that the presence of a mandatory appeal was
2 an important component of allowing a state's death penalty
3 statute to stand.

4 More recently, the Court has looked at other
5 statutes and has upheld them in part based upon the
6 presence of that mandatory appeal feature. Arkansas, of
7 course, is the only one of 37 states that impose the death
8 penalty that do not have this requirement of a non-
9 waivable death penalty, either by statute or by case
10 law.

11 Even the State of Utah that carried out the
12 execution of Mr. Gilmore amended its laws within six
13 months after that execution so that it could not be
14 carried out today in Utah without mandatory appellate
15 review.

16 The -- excuse me -- the absence of that feature
17 renders the Arkansas death penalty statute
18 unconstitutional, unconstitutional as applied to Mr.
19 Simmons. Mr. Simmons and the State of Arkansas will
20 assert some right to personal autonomy, that Mr. Simmons'
21 wishes should be respected.

22 The problem with that is that we're dealing with
23 something or right that also exists for the benefit of
24 society as a whole. We're --

25 QUESTION: Well, what if -- what if there isn't

1 mandatory appeal? How would that -- how do the other
2 states handle this when, if it ever happens, the -- the
3 condemned person doesn't want to appeal. Do they just --
4 don't they just appoint a lawyer --

5 MR. ALLEN: Yes, sir.

6 QUESTION: -- for him?

7 MR. ALLEN: Yes, sir.

8 QUESTION: That doesn't mean that any third
9 person, cellmate or otherwise, could come in and appeal
10 it.

11 MR. ALLEN: No. But, of course, that would not
12 be necessary in any of those 36 states since --

13 QUESTION: Well, I --

14 MR. ALLEN: -- they have a procedure in place.

15 QUESTION: I know, but that doesn't help.

16 Having a mandatory appeal doesn't help Whitmore very much.

17 MR. ALLEN: Your Honor, it only -- that feature
18 of it goes to the weight of the countervailing policy,
19 which in turn affects the threshold of injury that Mr.
20 Whitmore must show in this Court to achieve his standing.

21 QUESTION: Well, I'm just saying it doesn't help
22 him very much. Even if there -- there were a mandatory
23 appeal, he wouldn't have any more standing to exercise
24 that right to appeal.

25 MR. ALLEN: If there were a mandatory appeal, of

1 course, Your Honor --

2 QUESTION: You would be --

3 MR. ALLEN: -- we would not be -- be before the
4 Court on this issue.

5 QUESTION: In the -- the contingency I think the
6 remote contingency that Whitmore is retried and sentenced
7 to death again -- couldn't he at that time argue that it's
8 the state's burden to show that his sentence is
9 proportional and the state has in effect, by its own
10 procedures, denied him the right to have a pool of cases
11 and just put the burden on the state.

12 MR. ALLEN: Arkansas does not place the burden
13 in that regard upon either the state or the convicted.
14 They do an independent review themselves.

15 QUESTION: Well, but I mean, if by the state's
16 own actions that independent review is somehow inadequate,
17 it seems to me that Whitmore again has no injury because
18 then he's going to be able to raise the very contention
19 that you say he can't make.

20 MR. ALLEN: Your Honor, if I understand you
21 correctly, I don't believe it would be a matter of him not
22 having an injury, but it would be a matter of could he
23 address it in another forum at that time.

24 QUESTION: He -- he wouldn't have an injury
25 because he tells the state that you have to show that my

1 death penalty is proportional and you can't do it. So
2 you're not being injured by what's happening here.

3 MR. ALLEN: Of course, at that time Mr. Simmons
4 would have been long since executed. That might --

5 QUESTION: Well, but we're talking about
6 Whitmore's injury by hypothesis.

7 MR. ALLEN: Yes, sir. And that might at that
8 point be more closely attuned to the hypothetical question
9 that Justice Scalia raised. Mr. Simmons gone, no longer
10 in the picture, was he hypothetically harmed? That, at
11 that point, might become hypothetical.

12 If there are no other questions, may I reserve
13 my remaining time for rebuttal?

14 QUESTION: Yes, you may, Mr. Allen.
15 General Clark.

16 ORAL ARGUMENT OF J. STEVEN CLARK
17 ON BEHALF OF THE RESPONDENTS

18 MR. CLARK: Mr. Chief Justice, and may it please
19 the Court:

20 The position of the State of Arkansas in this
21 case is simple and direct.

22 First of all, Jonas Whitmore, the petitioner,
23 does not present this Court a case in controversy, as
24 required under Article III, Section 2 of the Constitution,
25 simply because Ronald Gene Simmons is not a minor. As to

1 the issue of his competency, he has been found competent
2 by trial counsel and also by counsel who -- psychiatry --
3 a psychiatrist who examined him on behalf of his own
4 retained counsel. He has never used incompetency as a
5 defense. He pled not guilty in either Simmons I and
6 Simmons II.

7 And, thirdly, the protected right that Jonas
8 Whitmore so allegedly advances to this Court, or the right
9 that should be protected by this Court that gives him
10 standing, is one that clearly is speculative or conjecture
11 or hypothetical because, as you have heard, in his
12 conviction for a capital offense he was sentenced to die
13 by injection.

14 He had a direct appeal. In that direct appeal
15 there was a proportionality review made by the Arkansas
16 Supreme Court. In its opinion, it told us specifically
17 how it did that. It contrasted Jonas Whitmore against
18 other death row inmates who were guilty of crimes similar
19 to his.

20 He took the life of one individual in a robbery.
21 His proportionality study was against two other death row
22 inmates, Mr. Woodward and Mr. Fretwell, who also took one
23 life in the perpetration of a robbery. They did not
24 contrast him against a mass murderer, but they contrasted
25 him against someone on death row who received the penalty

1 of death similar to the circumstances in the case in which
2 it was imposed against him.

3 I submit to you that simply what we have here
4 after the post-conviction relief was denied was a
5 situation where Mr. Whitmore is before this Court for the
6 reason that he would love to frustrate the death penalty
7 process in Arkansas because by frustrating it he slows its
8 implementation against him.

9 But he has no standing here, none whatsoever.
10 He has not alleged or articulated one fact that shows that
11 he has any particular legal interest that is at risk or at
12 jeopardy by the state going forward with the execution of
13 Ronald Gene Simmons.

14 But, secondly, if this Court should find for
15 some reason that there is standing in this case, I further
16 submit to you that the State of Arkansas' death penalty
17 procedures are constitutional and are not violative of the
18 Eighth Amendment, and we do not impose the penalty of
19 death in an arbitrary, capricious or freakish manner.

20 This Court has said since the trilogy of cases
21 of Proffitt and Jurek and Gregg that when you decided the
22 case in Spaziano that there was not one right way -- you
23 didn't single out that there was one right way to have the
24 death penalty process applied.

25 You further said in Pulley that when you looked

1 at this process you looked at the whole of the process. I
2 submit to you that the Arkansas death penalty procedures
3 provide more than adequate safeguards to ensure that there
4 is no arbitrary or capricious application of this penalty
5 of death by simply providing the following.

6 First, in Arkansas you can only have the penalty
7 of death imply -- applied against you by a jury. You
8 cannot come forward and plead guilty and have that penalty
9 applied by a sitting trial judge. Only by a jury.

10 In our bifurcated system, in terms of death
11 penalty cases, we must first adjudicate guilt beyond a
12 reasonable doubt, and then we move to the sentencing
13 phase. Additional safeguards that we find there are
14 these.

15 First of all, the state must prove guilt beyond
16 a reasonable doubt of one of seven aggravating
17 circumstances, and the jury must unanimously concur in
18 that and sign that they are of that opinion. We are bound
19 by strict rules of evidence in that phase of the
20 sentencing.

21 Secondly, in that sentencing phase, the
22 defendant is allowed to offer any evidence of mitigation
23 that he would like to offer against the state's
24 aggravating circumstance. He is not bound by strict rules
25 of evidence. And the jury must conclude, again

1 unanimously, that the aggravation beyond a reasonable
2 doubt outweighs the mitigation.

3 Thirdly, the State of Arkansas then is required
4 to prove to that same jury that beyond a reasonable doubt
5 the only proper punishment that can be assessed is the
6 penalty of death, having a jury instructed that they are
7 permitted to impose the sentence of life without parole.

8 Meeting all of that burden, there is one
9 additional safeguard in the Arkansas death penalty
10 procedures, and that is one that simply says that the
11 trial judge, after hearing -- yes, Your Honor.

12 QUESTION: I'm -- I'm just curious. How many do
13 you have on death row in the State of Arkansas?

14 MR. CLARK: Thirty-two people on death row,
15 Justice Blackmun.

16 QUESTION: Any females among them?

17 MR. CLARK: There was one, but her case was
18 overturned and she's now serving life without parole.
19 There are 32 males on death row, 11 of which are black,
20 and the remainder are white or Hispanic.

21 The final safeguard, though, in the instance of
22 a death penalty procedure in Arkansas is that once the
23 trial judge hears the implementation of the sentence, the
24 trial judge on his own motion can set aside the penalty of
25 death and order the penalty of life without parole.

1 And so I'll simply say to you that those
2 safeguards rise to a standard that ensures that the Eighth
3 Amendment is not violated in the sense that it is
4 arbitrarily or capriciously applied or in some freakish
5 fashion.

6 QUESTION: Well, I suppose we don't have to even
7 get to that point if there's no standing here.

8 MR. CLARK: Justice O'Connor, I agree. If there
9 is no standing, you do not need to get to those issues,
10 and I submit there is no standing.

11 THE WITNESS: So probably that's the first thing
12 we look at, isn't it?

13 MR. CLARK: Yes, Your Honor. I submit that that
14 is the first thing you look at. In this instance, Jonas
15 Whitmore has failed to give this Court any indication that
16 he has standing by decisions that you have articulated.

17 Simply, he has no right to be protected. It is
18 purely speculative that at some point in the future in his
19 petition at habeas where he alleges a state of
20 incompetence that he might -- he might -- get a court to
21 set that aside and get a new trial in Arkansas and not
22 have a proportionality review that includes Simmons.

23 QUESTION: Do you think he would have standing
24 if he were here in a situation where his own
25 proportionality review had not been conducted yet?

1 MR. CLARK: No, Your Honor, I do not. I think
2 in the instance of Jonas Whitmore, had he not taken a
3 direct appeal at this point, he still would not have
4 standing before this Court because the proportionality
5 review process in Arkansas is one that has never been
6 articulated by rule by our Arkansas Supreme Court, though
7 -- or mandated by a public policy from the legislature.

8 The court simply says we do this and doesn't
9 outline for us the practice in which or the procedure in
10 which they do conduct this review independently and on
11 their own.

12 There is nothing to ensure, even if he had not
13 taken a direct appeal that, when they contrasted the
14 proportionality review with Jonas Whitmore, that they
15 would include the crimes involving Ronald Gene Simmons.

16 We do know, as a matter of fact, that when he
17 did take it to direct appeal they contrasted him by stated
18 public opinion against people who were guilty of similar
19 types of crimes, robbery and murder. Not those involved
20 in crimes in which he took the deaths of 16 individuals,
21 which took place over a 24- or 48-hour period.

22 So, our supreme court at least has given us some
23 insight to say they contrast people on death row with
24 similar type crimes, although there is not an articulated
25 procedure.

1 Thirdly, I would say to this Court, if there is
2 some troublesome issue to this Court concerning waiver, I
3 submit to you that there has been a clearly knowing and
4 intelligent waiver and that the standard is actually
5 higher than that in Arkansas, which is additional
6 safeguards in the application of the penalty of death.

7 Please understand that after Simmons I was
8 decided and Mr. Simmons said, "I want to die," his case
9 did go forward to the Arkansas Supreme Court, advanced by
10 Father Franz as next friend, and the Arkansas Supreme
11 Court found no standing. And, in fact, that case went
12 forward on habeas to the United States District Court,
13 Eastern District of Arkansas, and Judge Isley found no
14 standing.

15 QUESTION: Isn't that case on appeal now in the
16 Eighth --

17 MR. CLARK: Yes, Your Honor, it is on appeal to
18 the Eighth Circuit.

19 QUESTION: -- Circuit?

20 MR. CLARK: Yes, it is. It's on appeal to the
21 Eighth Circuit. Being stayed, waiting the decision of the
22 Court in this case.

23 But in the issuance of waiver, when the first
24 decision was made in Simmons, the Arkansas Supreme Court
25 articulated a new rule. It said in the instance of

1 waiving the right of appeal -- and the right of appeal is
2 automatic in Arkansas and if Ronald Gene Simmons changed
3 his mind this very day, appeal moved forward. If he
4 changed his mind the hour before his execution, an appeal
5 would move forward.

6 But it said -- you know, it's not just knowing
7 an intelligent waiver that's enough. It must also be the
8 appreciation of the difference between life and death.
9 So, in Simmons II it was a two-pronged standard that was
10 applied.

11 And to ask whether Mr. Simmons actually
12 knowingly and intelligently waived, the transcript of the
13 record indicates his trial counsel pointed out seven
14 issues for which he could potentially be successful on
15 appeal. Each one separately, distinctly given to him. He
16 answered he was willing to waive.

17 In the conclusion of that evidence, which
18 included speedy trial, double jeopardy, suppression of a
19 search, separation -- severance of trials, court-appointed
20 counsel versus retained counsel, a whole series of --

21 QUESTION: (Inaudible) willing? Or did he say,
22 "I want to waive"? Is that it?

23 MR. CLARK: He said, "I want to waive." I
24 understand --

25 QUESTION: And he doesn't want -- and he turns

1 down any -- has he turned down any kind of representation
2 by anybody else?

3 MR. CLARK: Yes, Your Honor. He has simply said
4 at the conclusion of both of his two trials, "I am willing
5 to accept the verdict. I believe in the penalty of death.
6 I think it is just and proper in my case, and I ask no
7 one, no one, to come forward to try to intervene, delay or
8 stop this process."

9 QUESTION: And has he purported to forbid Mr.
10 Whitmore to represent him?

11 MR. CLARK: He has indicated in letters that are
12 not a part of the record, Your Honor, that --

13 QUESTION: I -- was this briefed? Did he file a
14 brief in this case?

15 MR. CLARK: Yes, Your Honor, he did. He
16 describes Mr. Whitmore and others as interlopers in a
17 decision that he has a right to make. He is not, in that
18 brief and in other documents we've seen before that he has
19 published, that he indicates that he is not pleased that
20 anyone is trying to frustrate this process for him.

21 QUESTION: And has he -- has he read that brief?

22 MR. CLARK: Yes, Your Honor, he has read the
23 briefs.

24 In the instance of the seven issues, though,
25 that were brought to Mr. Simmons' attention in Simmons II,

1 the case at bar, the trial judge even went further than
2 his own counsel, and his own counsel did have affidavit of
3 record saying they had encouraged him repeatedly to
4 appeal. The trial counsel said, "Please, Mr. Simmons,
5 understand so I know that you're making a knowing and
6 intelligent waiver -- please understand, all you have to
7 do is decide one of these issues is worthy of appeal and
8 your sentence of death will be stayed for weeks or months
9 or years, or perhaps longer than the lives of all of us
10 collectively in this courtroom."

11 And he said, "I understand that. I waive." And
12 then he simply said to him, "Mr. Simmons, understand, the
13 state is sincere about this -- the implementation of this
14 penalty of death. If you waive and do not appeal, you
15 will die."

16 He accepted all of that. And so there is
17 clearly a knowing and intelligent waiver in this instance.

18 So this case, I think, fails from the
19 petitioner's standpoint for several reasons. But the
20 first and most important is he has no standing. Jonas
21 Whitmore has no right to be here in this courtroom today
22 because he has no standing. He's advanced no issue of a
23 legally protected interest that needs to be guarded by
24 this Court.

25 But, secondly, even if he did, the death penalty

1 procedures in Arkansas don't violate the Eighth Amendment.
2 Clearly, they rise to a level to afford the protection to
3 ensure there is no arbitrary, capricious or freakish
4 application of this penalty in our state.

5 And so I submit to you for all those reasons
6 that this Court should affirm the decision of the Arkansas
7 Supreme Court.

8 QUESTION: Let me ask you one question, if I
9 might, Counsel.

10 MR. CLARK: Yes, sir, Justice Stevens.

11 QUESTION: It's running through my mind.

12 Supposing the case were different and that this
13 man had -- did not have clear access to the courts -- and
14 you demonstrate that he did have access to the courts.
15 But, say, you had a case in which an allegation by a
16 stranger like the petitioner here came in and said, my
17 only relationship with him is I'm in the same death row
18 that he's in and I'd like to have standing to assert on
19 his behalf a claim that he's been denied access to the
20 courts because he's been kept in a dungeon without being
21 able to get to a lawyer or something of that kind.

22 Would he have standing then?

23 MR. CLARK: No, Your Honor, I think not. I
24 think in the instance of this third person that you've
25 used as the hypothetical, who really is quite similar to

1 Jonas Whitmore -- the only similarity between Ronald Gene
2 Simmons and Jonas Whitmore is they both are death row
3 inmates and reside in the State of Arkansas.

4 That if he said, well, he's been denied a
5 fundamental safeguard in the process, he's been kept in a
6 dungeon, I don't think that third person has the standing
7 that this Court requires to create a case of controversy.

8 QUESTION: Would any person -- just a citizen of
9 Arkansas who says, we don't really like having the state
10 behave in this fashion -- would any -- would anybody have
11 standing to bring that matter to the attention of a
12 Federal court?

13 MR. CLARK: In your hypothetical, Your Honor, in
14 this case, I think no.

15 QUESTION: How about a public defender who says,
16 I want to go ahead and talk to this inmate?

17 MR. CLARK: Justice White, I think the answer to
18 that is no also. The fact that a public defender would
19 like to speak to this death row inmate who desires to die,
20 who has knowingly and intelligently waived his right to
21 appeal --

22 QUESTION: Oh, no. No. That isn't --

23 MR. CLARK: Oh, I'm sorry.

24 QUESTION: It's on the standing argument.

25 QUESTION: Take Justice Stevens' question. Here

1 is a public defender that represented him all up and down
2 the line in the -- in the proceedings and he shows up at
3 the prison and he finds out that the fellow is in a
4 dungeon and they won't let -- and they won't let him talk
5 to him.

6 MR. CLARK: Well, --

7 QUESTION: Could he get into court?

8 MR. CLARK: In the instance -- if, in your
9 hypothetical the defendant is sentenced to die and has
10 decided to accept that sentence and done so knowingly and
11 intelligently and waived such and with the standard of
12 Arkansas with the appreciation between life and death,
13 though represented by a public defender through the entire
14 process, and then the public defender shows up to the
15 Department of Corrections and finds he's in the hole, if
16 you will, and is not permitted to talk to him, I don't
17 think that public defender has standing to raise this
18 issue.

19 QUESTION: Well, I know, but you say that -- you
20 say that if this fellow changed his mind an hour before
21 his execution was scheduled, he'd get an appeal.

22 MR. CLARK: That's correct, Your Honor.

23 QUESTION: Well, then the public defender wants
24 to be able to talk to him up till the minute of the
25 execution and the people -- and the prison says, sorry,

1 the fellow's waived and that's the end of it.

2 MR. CLARK: Well, in the instance, Your Honor, I
3 think in terms of the waiver. I submit to you that it's
4 the position of the State of Arkansas, once waived, as the
5 case is now with Ronald Gene Simmons, that's not absolute.
6 That's not -- it is revokable.

7 He revoke that up until the hour before his
8 execution. That revocation, obviously, Your Honor, comes
9 upon a knowledge and understanding on his own. I don't
10 think that constitutionally is predicated on the right to
11 give him particular access to a public defender or other
12 counsel.

13 Your hypothetical is distinct from the case at
14 bar because in this instance Mr. Simmons has retained
15 counsel, and they were to be present the night of his --
16 what would have been his execution on March the 16th --
17 March the 15th. They were there that night in 1989 before
18 this Court stayed that execution.

19 QUESTION: The only thing I am suggesting,
20 Counsel, is that perhaps you're right on the merits with
21 the waiver and all the rest of it, but the standing
22 position could be quite extreme in some -- in some cases,
23 I think.

24 MR. CLARK: Justice Stevens, I --

25 QUESTION: Of course, maybe that doesn't mean

1 that it isn't -- it isn't --

2 MR. CLARK: -- I've asked myself that question
3 and there is the potential that you can create, certainly
4 in hypothetical --

5 QUESTION: Yeah.

6 MR. CLARK: -- and it seems grossly extreme.

7 QUESTION: Yeah.

8 MR. CLARK: But in the instances, I think this
9 Court is bound by that standing provision of the
10 Constitution. And in this instance, this petitioner
11 woefully is inadequate in his ability to rise to the level
12 to show standing.

13 QUESTION: He has appointed counsel now?

14 MR. CLARK: He has retained counsel, Justice
15 Kennedy.

16 QUESTION: Or retained counsel.

17 MR. CLARK: Yes, sir.

18 QUESTION: Do -- do we know that that retained
19 counsel will remain with him throughout the period during
20 which the sentence is being executed, up to the last hour?

21 MR. CLARK: We knew in the instance of the first
22 case. I can't tell you -- it -- assuming the practice is
23 what it was the first time, Justice Kennedy, in order to
24 ensure that retained counsel was at the prison at the
25 point where the execution would take place, my office was

1 prepared to drive counsel from their residence some 150
2 miles to the prison so they would be there.

3 In addition, there were other safeguards added
4 to ensure -- in consultation with my governor, Governor
5 Clinton, that we could ensure right up to the last minute
6 because counsel was there, if he changed his mind and had
7 access to his counsel, he could say, I change my mind, and
8 it would stop.

9 QUESTION: If he does, what's the state of
10 preparation of the trial transcript?

11 MR. CLARK: In Simmons II there is no trial
12 transcript. We would have to stay the execution back with
13 the Governor. We would have to then file petition for
14 belated appeal or the transcript and move forward that
15 way.

16 QUESTION: What -- what does the transcript
17 consist of? Or, what's the record of the trial consist
18 of? Of recorded notes or reporter's notes?

19 MR. CLARK: The reporter's note. Yes, Justice
20 Kennedy. The Simmons II trial, which involves the 14
21 deaths, is the court reporter's transcript -- records, but
22 not transcribed.

23 There is in Simmons II the transcribed record of
24 the knowing and voluntary waiver of the right to appeal.

25 QUESTION: Well, you're not at all disturbed

1 that there's no extant record of this trial?

2 MR. CLARK: I am not disturbed by that at all,
3 Justice Kennedy. The fact that I know that in the
4 instance of the waiver, the knowing waiver, that Mr.
5 Simmons was given ample opportunity to discuss
6 specifically deficiencies in the state's case.

7 He had been given that private consultation by
8 his retained counsel. He had been given that consultation
9 advise once again in a hearing conducted by the trial
10 court. And that was reviewed one more time by the
11 Arkansas Supreme Court, in which specific points for
12 appeal were enumerated. And he said, "I knowingly and
13 intelligently waive." That does not trouble me
14 whatsoever.

15 I think in this instance that a criminal
16 defendant in the process who can make a knowing and
17 intelligent waiver, and with the additional standard from
18 Arkansas with the appreciation of the difference between
19 life and death, can take that action.

20 I ask --

21 MR. CLARK: Thank you -- thank you, General
22 Clark.

23 Mr. Allen, do you have rebuttal? You have two
24 minutes remaining.

25 REBUTTAL ARGUMENT OF ARTHUR L. ALLEN

1 ON BEHALF OF THE PETITIONER

2 MR. ALLEN: Very briefly. In response to
3 Justice Kennedy's question, it bothers me very much, Your
4 Honor, particularly when that answer is related back to an
5 earlier statement of the Attorney General that there were
6 seven issues presented that might have successfully set
7 aside the death penalty. There were that many issues
8 presented in Simmons I. Respondent has said there were
9 that many in Simmons II.

10 What that is saying is that this may in fact be
11 a person who is not eligible for the death penalty under
12 the law. And Respondent is not bothered with that.

13 The question of retained counsel -- and coming
14 back to the adequacy of that waiver -- and I believe Mr.
15 Justice Kennedy asked about whether counsel would stay on
16 the case. There is no indication of that. In fact, there
17 has been some published comments made recently that would
18 suggest they probably will not, other than perhaps a book
19 deal coming through on this.

20 I would direct the Court's attention to page 17
21 of those counsel's Respondent's brief only to give the
22 Court a feel for the representation that Mr. Simmons
23 received at his trial.

24 The counsel in there who speak of penumbras
25 emanating from the Third Amendment in cases from this

1 Court, who, as I said a moment ago, on that same page
2 indicated that they were not familiar enough with the
3 death penalty procedures in the State of Arkansas to
4 present -- to present argument on that point in this
5 Court.

6 Thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Allen.

8 The case is submitted.

9 (Whereupon, at 1:46 p.m., the case in the above-
10 entitled matter was submitted.)

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CERTIFICATION

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

#88-7146 - JONAS H. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF RONALD
GENE SIMMONS, Petitioner V. ARKANSAS, ET AL.

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

BY Judy Freilicher

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