No. 99-7000

In The

# Supreme Court of the United States

BOBBY LEE RAMDASS,

*Petitioner,*

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## REPLY BRIEF FOR PETITIONER

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## ARGUMENT IN REPLY

In contending that Ramdass seeks an extension of the rule in *Simmons v. South Carolina*, 512 U.S. 154 (1994), the respondent recasts Ramdass's submission as a claim that federal courts should second-guess state courts in determining whether state prisoners are ineligible for parole. This argument misconceives both Ramdass's claim and the rule in *Simmons*.

Ramdass seeks no review of Virginia's determination of his parole status at the moment of his capital sentencing trial. Rather, he merely invokes the federal rule, established in *Simmons*, that remote, "hypothetical future developments" that could conceivably lead to a prisoner's release are not sufficient to deny the jury accurate information on the impossibility, *under state law*, of the prisoner being paroled in the future. The Virginia Supreme Court's error was not in its interpretation of the state's "three strikes" statute, or in its determination that Ramdass was classifiable as parole-eligible and would remain so for 19 days after his capital sentencing trial. Its error was that it failed (a) to determine whether Ramdass's 19-day window of parole eligibility created any actual possibility that he would ever be paroled, and (b) to recognize that, if there was no such possibility, Ramdass was entitled under the clearly established rule of *Simmons* to inform the jury of "the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Simmons*, 512 U.S. at 162 (plurality opinion).

The constitutional violation in *Simmons* was that, despite the prosecution's claim that Jonathan Simmons

would be dangerous in the future unless he was executed, "the trial court precluded the jury from learning that [he] would never be released from prison." *Id.* at 176 (O'Connor, J., concurring). The trial judge in Ramdass's case, applying pre-*Simmons* Virginia law, did exactly the same thing. The respondent makes only a feeble attempt to deny that Ramdass "would never be released from prison" under state law. Instead, the respondent relies almost entirely on his claim that *Simmons* affords no protection – even to a defendant who can never be released from prison – unless the state has already affixed upon him the technical label of "parole ineligible" at the moment of his capital sentencing trial. This argument trivializes the rule of *Simmons*, and it should be rejected.

### 1. Under State Law, Ramdass Had No Possibility of Being Released on Parole

The respondent devotes only two pages of his brief to the issue that lies at the heart of this case: whether, under Virginia law, there remained any possibility that Ramdass could ever be released on parole. (Resp. Br. at 35-36). That was the question that the jury asked, and that *Simmons* required to be answered. Ramdass has already shown why the correct answer to the question was, "No." The respondent's arguments to the contrary only serve to bear this out.

First, the respondent suggests that the judge in the Domino's Pizza case in Alexandria might have concluded that, "in light of the death sentence already imposed, it



would have been overkill to convict him of the robbery."[1] (Resp. Br. at 36). Given the significance of this "third strike" in extinguishing any possibility of parole, the respondent's suggestion that the Alexandria court might have casually decided to toss out the jury's guilty verdict on the Domino's Pizza robbery as "overkill" is not plausible. Equally strained is the respondent's speculation that the prosecutor might have simply dismissed the Domino's Pizza robbery case, *after* a jury had rendered a verdict of guilty, and after the trial judge had denied Ramdass's post-trial motions. Although the respondent describes such inexplicable derelictions of duty as within the discretion of the Alexandria court and prosecutor, they had no such discretion under Virginia law.[2] Even if they did, the likelihood that any prosecutor or judge would behave in this way is obviously negligible, and did not create, at the time of Ramdass's capital sentencing, any genuine possibility that Ramdass would ever be considered for parole. The respondent's inability to propose

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[1] In making this argument, the respondent has apparently forgotten that the issue is whether the Alexandria court would have reduced the third strike to judgment, thereby sealing Ramdass's lifelong parole ineligibility, had the capital murder jury sentenced him *to life imprisonment*, rather than to death.

[2] Prosecutors have no authority to nolle prosse a charge unilaterally, and a trial court has discretion to nolle prosse a charge only on the Commonwealth's showing of good cause. Va. Code Ann. § 19.2-265.3 (Michie 1995) (unchanged since 1979) ("Nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefore shown"). Except on motion of the Commonwealth under § 19.2-265.3, or on motion of the accused under Virginia Supreme Court Rule 3A:15(b), trial courts have no authority to decline to enter judgment following a jury's verdict.

any less fanciful route by which Ramdass might have averted parole ineligibility is proof that, at the time of his capital sentencing, no such escape hatch existed.

Despite its failure to identify any real possibility of parole, the respondent warns that a truthful parole instruction would necessarily have been laden with elaborate qualifications. (Resp. Br. at 37). This concern is unfounded.[3] Although the prosecution is *entitled* to inform the jury of even remote possibilities of eventual release, *California v. Ramos*, 463 U.S. 992, 1002-04 (1993), in this case the trial judge could have accurately answered the jury's question about whether parole was possible for Bobby Lee Ramdass with a simple "No." As in *Simmons*, such an answer would not have included all the remote "hypothetical future developments" that might conceivably lead to a defendant's eventual release. But it would certainly have been far less misleading than the trial court's refusal to answer the jury's parole question at all, especially after the prosecution had repeatedly informed the jury that Ramdass was on parole at the time of the capital murder.[4] *Simmons*, 512 U.S. at 166 (plurality

[3] The respondent's proposed instruction (Resp. Br. at 37) is a red herring. It erroneously presumes that a jury, rather than a court, would determine whether state law allows any possibility of the defendant being considered for parole in the future. Juries, of course, are finders of fact, not of law.

[4] Given that the jury was struggling with whether Ramdass posed a future danger, and if so, whether that danger justified his execution, it must have been especially bewildered by the court's instruction, given in response to the jury's question about parole, that "[Y]ou are not to concern yourselves with what may happen afterwards." (JA 91).



opinion) ("Certainly, such an instruction is more accurate than no instruction at all, which leaves the jury to speculate whether 'life imprisonment' means life without parole or something else").

Although the respondent warns of grave consequences from instructing juries on the practical realities of a defendant's situation, as *Simmons* requires, the real danger is posed by the respondent's effort to restrict *Simmons* to the defendant's technical parole status at the moment of sentencing. For if what happened in this case comports with *Simmons*, any state wishing to deny both parole consideration and accurate jury instructions to capital murder defendants need only declare that an inmate's ineligibility for parole begins when he is formally classified as "ineligible" by executive officials on admission to prison, and thus avoid the *Simmons* rule without actually extending parole consideration to even a single convicted capital murderer. In fact, the now-superseded South Carolina procedure involved in *Simmons* itself could provide the model for such a post-*Ramdass* rejiggering of state sentencing procedures, because if Virginia is right about what *Simmons* requires, this Court would have to have denied rather than granted relief in *Simmons*.[5]

[5] South Carolina's post-*Simmons* revision to its capital sentencing statute, S.C. Code Ann. § 16-3-20 (Law Co-op. Supp. 1999), provides another potential model for states that want to avoid the rule in *Simmons* without allowing for the possibility of parole, as Ramdass detailed in his Petition for a Writ of Certiorari at 20-21.

**2. *Simmons* Established That Ephemeral "Parole-Eligible" Status on the Day of Sentencing Does Not Extinguish a Defendant's Right To Rebut a Claim of Future Dangerousness by Informing the Jury of the Actual Unavailability of Parole**

Because he cannot identify any real possibility that Ramdass could ever have been released on parole, the respondent is left to argue that the reality of Ramdass's situation does not matter. Rather, the respondent urges that the federal constitutional right identified in *Simmons* begins and ends with what amounts to a freeze-frame determination of how a single state statute characterizes a defendant's parole status at the moment of his capital sentencing trial. The respondent does this simply by stressing, out of context, the Court's unremarkable use of the term "parole ineligibility" in *Simmons*, and on that basis alone insists that *Simmons* protects only that subset of non-parolable capital defendants who have already been labeled as such on the day the instruction is given.

If the respondent were correct, *Simmons* itself would have to have been decided differently. As Ramdass already has pointed out (Pet. Br. at 40-43), at the time of Jonathan Simmons's capital sentencing trial, his parole status remained to be determined in the future by the South Carolina Board of Probation, Parole and Pardon Services, and under South Carolina law, the trial court had no authority to make any binding determination of whether Simmons qualified for a statutory exception to the recidivist no-parole provision. *State v. McKay*, 386 S.E.2d 623, 623-24 (S.C. 1989). Indeed, in announcing the rule that *Simmons* would later partially invalidate, the South Carolina Supreme Court noted that its own prior



decisions permitting courts to instruct juries about restrictions on parole "present practical problems in their application," and explained:

> [t]he trial court is, in effect, required to rule upon a particular defendant's eligibility for parole before sentence has even been imposed. This determination may involve novel issues of law, or statutory provisions which have not been interpreted. Moreover, there is no way to be assured that the Parole Board would reach the same conclusion as the court.

*State v. Torrence*, 406 S.E.2d 315, 323 (S.C. 1991) (Chandler, J., concurring, for a majority of the court). The state brought *McKay* and *Torrence* to this Court's attention, Respondent's Brief in *Simmons v. South Carolina*, No. 92-9059, 1993 WL 669003, at 95-96, and the South Carolina Supreme Court's decision in *Simmons* was itself replete with references to *Torrence*. *See State v. Simmons*, 427 S.E.2d 175 (S.C. 1993). Nevertheless, the Court found no reason to doubt that "the operation of South Carolina's sentencing law" ensured that Simmons would "never be released from prison," *Simmons*, 512 U.S. at 177-78 (O'Connor, J., concurring), and held that the trial court's concealment of this fact from the sentencing jury was fundamentally unfair.[6]

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[6] Although a plurality of the Court stated that South Carolina "admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate," *Simmons*, 512 U.S. at 166, neither South Carolina's brief nor the transcript of oral argument in this Court contains any such admission respecting Jonathan Simmons's parole status at the time of his sentencing trial. The plurality may have been referring to

That is not to say that parole or other release would have been an absolute impossibility. Indeed, South Carolina pointed to several possible post-trial developments – including "legislative reform, commutation, clemency, and escape" – that might have resulted in Simmons's release.[7] *Id.* at 166 (plurality opinion). However, the *Simmons* plurality dismissed these "hypothetical future developments" as insufficient to justify South Carolina's blanket refusal to inform capital sentencing juries of the unavailability of parole. *Id.* The extremely remote possibility that Ramdass's third strike might not be reduced to judgment shortly after his sentencing trial is in the same category of "hypothetical future developments," and it does not remove this case from the clearly established ambit of the *Simmons* rule.

*Simmons* safeguards the right to rebut the prosecution's claim of *future* dangerousness.[8] The rule of *Simmons*

testimony in the *Simmons* record by an attorney for the state Department of Corrections who described the operation of South Carolina's recidivist statute. However, even this testimony included the caveat that a repeat violent offender would be classified as ineligible for parole only if his offenses did not involve "the same series of events." Joint Appendix in *Simmons v. South Carolina*, No. 92-9059, at 11-12; 1993 WL 669003 at *11a-*12a. As the Court clearly understood, South Carolina law consigns this question to a post-trial determination by the executive branch.

[7] Legislative reform might include, for example, a modification of the state's parole law that resulted in the defendant being reclassified from ineligible to eligible for parole.

[8] If the prosecution argues only that the defendant is dangerous on the single day of the capital sentencing trial,



could not accomplish this purpose if it depended on a freeze-frame assessment of the defendant's eligibility for parole on the single day of his sentencing trial. Just as the prosecution's dangerousness claim necessarily looks to the future, so too must the defendant's right of reply. What the jurors wanted to know, and what *Simmons* entitled Ramdass to tell them, was whether there was a possibility he could be released on parole in the months and years *after* his trial, at any point before the end of his natural life. The Virginia Supreme Court failed to address this question, and thus also failed to consider, under *Simmons*'s clearly established rule, the federal constitutional implications of the only answer that Virginia law and the facts of Ramdass's case permit. The district court remedied this error, as 28 U.S.C. § 2254(d)(1) required it to do, and its judgment granting the writ should be reinstated.[9]

rather than that the defendant will be dangerous in the future, the right of rebuttal under *Simmons* does not arise. "[I]f the prosecution does not argue *future* dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death is life imprisonment without possibility of parole." *Simmons*, 512 U.S. at 176-77 (O'Connor, J., concurring) (emphasis added).

[9] For the same reason that the writ was properly granted by the district court under 28 U.S.C. § 2254(d)(1), relief is not barred by the new rule doctrine of *Teague v. Lane*, 489 U.S. 288 (1989).

## CONCLUSION

For the foregoing reasons, and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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