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O'DELL v. NETHERLAND 95 F.3d 1214 (4th Cir. 1996) United States Court of Appeals, Fourth Circuit

III. Conclusion

The practical result of *Bennett* is depressing. The Commonwealth's attorney acted unethically in his use of inflammatory argument at least in that he did not "avoid any . . . conduct calculated to gain special consideration."[51] While he will never be punished for attempting to create unwarranted prejudice in the defendant's trial, the Commonwealth will probably execute Bennett as the law requires, unless the United State Supreme Court grants a writ of *certiorari*.

Summary and Analysis by:
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[51] Va. Code of Professional Responsibility EC 7-13. Other professional responsibility norms may also be implicated. Va. Code of Professional Responsibility DR 7-105(C)(3) and (4) (In appearing in his professional capacity before a tribunal, a lawyer shall not assert his personal knowledge of the facts in issue or assert his personal opinion as to the justness of a cause); Va. Code of Professional Responsibility EC 7-21 (The expression by a lawyer of his personal opinion as to the justness of a cause . . . is not proper subject for argument to the trier of fact); Va. Code of Professional Responsibility EC 7-33 (Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings); Va. Code of Professional Responsibility EC 8-10 (The responsibility of a public prosecutor . . . is to seek justice . . . during trial the prosecutor is not only an advocate but he also may make decisions . . . and those affecting the public interest should be fair to all). *See also*, ABA Standards for Criminal Justice 3-5.8(c)&(d) (The prosecutor should not use arguments calculated to appeal to the prejudices of the jury. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence); ABA Model Rules of Professional Conduct Rule 3.4(e) (a lawyer shall not in trial, allude to any matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . or state a personal opinion as to the justness of a cause).

O'DELL v. NETHERLAND

95 F.3d 1214 (4th Cir. 1996)
United States Court of Appeals, Fourth Circuit

FACTS

On February 6, 1985, Helen Schartner's body was found in a field across the street from a nightclub which she and Joseph O'Dell had left at approximately the same time the previous night. Schartner had died from manual strangulation and had suffered eight head wounds which had bled extensively. About two hours after leaving the nightclub, O'Dell appeared in a convienience store. He was covered in blood. He phoned his girlfriend who allowed him to sleep at her home after he told her that the blood came from his own regurgitation. After reading about Helen Schartner's murder in the local newspaper, O'Dell's girlfriend went to her garage and discovered a brown bag full of bloody clothes which she turned over to the police.[1]

On October 10, 1986, Joseph O'Dell, who proceeded *pro se*, was convicted of capital murder for the killing of Helen Schartner.[2] The jury found both vileness and future dangerousness and sentenced O'Dell to death. O'Dell appealed, but the Supreme Court of Virginia affirmed the trial court.[3] Subsequently, the Supreme Court of Virginia granted O'Dell's petition for rehearing, considered and rejected a claim it had previously found barred, and again affirmed his conviction and death sentence.[4] On October 3, 1988, the United States Supreme Court denied *certiorari*.[5]

O'Dell next filed for a writ of *habeas corpus* in state court. His petition, as amended, was denied. O'Dell again sought relief from the Supreme Court of Virginia; however, he misnamed his appeal "Assignments of Error" as opposed to "Petition for Appeal." Although O'Dell attempted to correct his mistake, by then the time to file had expired. Consequently, the Supreme Court of Virginia dismissed his appeal. The United States Supreme Court denied *certiorari* on December 2, 1991 with three Justices noting that the case "should . . . receive careful consideration."[6]

O'Dell filed a federal *habeas* petition on July 23, 1992.[7] The United States District Court for the Eastern District of Virginia vacated O'Dell's sentence. O'Dell argued that he was entitled to the benefit of the rule handed down in *Simmons v. South Carolina*.[8] *Simmons* held that a defendant has a constitutional right to rebut the Commonwealth's evidence of future dangerousness with the fact of the defendant's parole ineligibility if sentenced to life in prison instead of death.[9] To find for O'Dell, the district court initially had to determine whether the doctrine first announced in *Teague v. Lane*[10] denied O'Dell the benefit of *Simmons*. *Teague* held that, with narrow exceptions, *habeas* petitioners will not be entitled to the benefit of favorable United States Supreme Court decisions that impose constitutional obligations that state courts could not have reasonably anticipated.[11] In other words, if *Simmons*

[1] *O'Dell v. Netherland*, 95 F.3d 1214, 1218-19 (4th Cir. 1996).

[2] Va. Code Ann. § 18.2-31(5) (killing in the commission of rape or attempted rape).

[3] *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988).

[4] *O'Dell v. Commonwealth*, Record No. 861219, slip op. (Va. April 1, 1988).

[5] *O'Dell v. Virginia*, 488 U.S. 871 (1988).

[6] *O'Dell*, 95 F.3d at 1218, 1219 (citing *O'Dell v. Thompson*, 502 U.S. 995 (1991)).

[7] *Id. at 1219*.

[8] 114 S. Ct. 2187 (1994).

[9] *Id.* at 2193. Because of his prior record, O'Dell would have been sentenced to life in prison, and he would have been ineligible for parole under former Va. Code Ann. § 53.1-151. *O'Dell*, 95 F.3d at 1220.

[10] 489 U.S. 288 (1989).

[11] *Id.* at 310.

announced an unforeseeable rule, a "new rule," then O'Dell was not entitled to its benefit.

The district court found that *Simmons* did not announce a "new rule"; consequently, O'Dell was entitled to its benefit. Thus, the court held that O'Dell was denied due process of law and subjected to cruel and unusual punishment under the Fifth, Eighth, and Fourteenth Amendments to the Constitution because the trial court prevented him from presenting the fact of his parole ineligibility to rebut the Commonwealth's evidence of future dangerousness.[12] The district court also granted O'Dell relief on the Supreme Court of Virginia's denial of his appeal as time-barred. The court held, relying on *James v. Kentucky*,[13] that the distinction between assignments of error and petitions for appeal was not "firmly established" in capital cases; thus, the Supreme Court of Virginia's decision that O'Dell was procedurally barred was not an adequate state ground to bar federal *habeas* review.[14] The Commonwealth appealed.

HOLDING

In a seven to six split, the Court of Appeals for the Fourth Circuit, *en banc*, reversed the district court and held that the rule announced in *Simmons* was a new rule.[15] Interpreting the *Teague* doctrine, the court found that at the time O'Dell's conviction and sentence became final, a reasonable jury could have found that the law then in existence did not compel the rule announced in *Simmons*.[16] Moreover, the rule of *Simmons* did not fit within either of two narrow exceptions provided for in *Teague*. The court found that there was no question that the rule of *Simmons* did not place O'Dell's conduct outside that which is criminal, one such exception, and that the *Simmons* rule was not a watershed rule of due process akin to that of *Gideon v. Wainwright*,[17] the second exception. Hence, O'Dell was not entitled to the benefit of *Simmons*.[18] The court also reversed the district court's finding that no adequate state ground existed to bar federal *habeas* review.[19] Finally, the court rejected O'Dell's claims of actual innocence.[20]

ANALYSIS/APPLICATION IN VIRGINIA

I. *Simmons* Is a New Rule

As the dissent's analysis makes clear, the contested issue in O'Dell's case was whether the rule of *Simmons* was a new constitutional requirement unavailable to O'Dell or whether it was the application of existing due process law to a new factual setting in which case O'Dell must be accorded a new sentencing hearing.[21] The majority's analysis is a life or death game of semantics—in which the court expands and contracts precedent to achieve its desired result. Nowhere in this fifty-page opinion does anyone suggest that it might be bizarre to kill a man when there is no dispute over the fact that his trial was infected with fundamental constitutional error.

A. The Basics of *Teague v. Lane*

As noted, *Teague v. Lane* held that a defendant may not benefit retroactively from a new constitutional rule after his conviction becomes final,[22] unless the new rule falls within one of two exceptions.[23] The court of appeals explained that any analysis under *Teague* requires three steps: (1) determining the date on which the defendant's conviction and sentence became final, (2) surveying the legal landscape as of this date to determine whether a state court at that time would have felt compelled by existing precedent to conclude that the rule the defendant seeks was required by the Constitution, and (3) even if the court finds that the rule is new and the defendant may not benefit by it, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

The court emphasized that under the second prong of analysis, a rule is **not new** under *Teague* only if it was **compelled** by existing precedent at the time a defendant's conviction became final.[24] "Compelled" is the operative word; it is not sufficient that precedent "dictated" or that a petitioner's challenge was "predicated upon" precedent.[25] To reach this conclusion, the court overruled its own precedent which was decided as recently as one year ago—*Turner v. Williams*,[26] and *Ostrander v. Green*.[27] The court reasoned that the very purpose of *Teague* was to bar federal review of state decisions even if proven incorrect as long as they were reasonable. Because the *Turner* and *Ostrander* tests would not achieve that goal, the cases were in error to the extent that they suggested that *Teague* was inapplicable to cases to which these tests applied.[28] Now the query in the Fourth Circuit is as follows: unless it would have been objectively unreasonable for a state court in [insert date conviction became final] to conclude the Constitution did not require that [insert rule defendant seeks], [insert new case law] must be held to have announced a new rule.[29]

B. *Simmons* Is a New Rule Not an Old Rule Applied to New Facts

The majority opinion revealed a resolve to affirm O'Dell's death sentence by acknowledging that its conclusion (*Simmons* was a new rule) depended entirely upon the level of generality with which its analysis under *Teague* was conducted:

> In making this determination, of course, the "rule" [here, the holding of *Simmons*] must be identified at the appropriately specific level of generality. The appropriate level of generality for identifying the rule is that level represented by the narrowest principle of law that was actually applied in order to decide the case in question.[30]

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12 *O'Dell*, 95 F.3d at 1218.

13 466 U.S. 341 (1984).

14 *O'Dell*, 95 F.3d at 1240-41.

15 *Id.* at 1218.

16 *Id.* at 1238.

17 372 U.S. 335 (1963) (requiring the appointment of counsel to indigent criminal defendants).

18 *O'Dell*, 95 F.3d at 1238-39.

19 *Id.* at 1244.

20 *Id.* at 1254.

21 *Id.* at 1255-61.

22 "Final" is generally accepted as the date the United States Supreme Court denies *certiorari* on direct appeal from state court. *Id.* at 1221.

23 489 U.S. at 307, 310.

24 *O'Dell*, 95 F.3d at 1221-22.

25 *Id.*

26 35 F.3d 872 (4th Cir. 1994) (stating that a rule "dictated" by precedent was not new).

27 46 F.3d 347 (4th Cir. 1995) (stating that a rule "predicated upon precedent" was not new).

28 *O'Dell*, 95 F.3d at 1222.

29 *Id.* at 1223-24.

30 *Id.* at 1223.

The court proceeded with its *Teague* analysis, interpreting precedent with an accordion-like approach, placing a narrow reading on all precedent that might have benefited O'Dell, while broadly interpreting precedent adverse to him.

1. Law Beneficial to O'Dell Read Narrowly

It was, of course, critical to the court's analysis that it not reach the level of generality that would require seeing *Simmons* for what it was: the application of a well-settled due process principle to new facts. The due process rule was that in the penalty phase, a criminal defendant must be given a meaningful opportunity to explain or deny evidence presented against him. The new facts created the question of whether a state's refusal to permit the sentencing jury to hear the fact of the defendant's parole ineligibility violated this due process rule. In *Simmons*, the United States Supreme Court said that it did. To avoid this logical conclusion, the court of appeals limited the "rule" of *Simmons* to the narrowest principle from Justice O'Connor's concurrence:

> "Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible."[31]

According to the court of appeals, this language meant that *Simmons*, did **not** apply the well-settled rule that a defendant has a constitutional right to a meaningful opportunity to rebut evidence of future dangerousness to a new set of facts; instead, *Simmons* narrowly held that a defendant could tell a jury if he was in fact parole ineligible, either through closing argument or a jury instruction.[32] The court was then able to discuss whether state court jurists who "surveyed the legal landscape" in 1988 when O'Dell's conviction became final would find this narrowly-drawn rule.

Looking at the 1988 legal landscape, the court stated that jurists would have first found the precedent upon which the court understood *Simmons* to have "principally relied":[33] *Skipper v. South Carolina*[34] and *Gardner v. Florida*.[35] In *Skipper*, the defendant was not permitted to rebut the prosecutor's evidence of future dangerousness with evidence of his prior good behavior while in jail. In other words, the defendant could not put forward factual evidence that argued against his being a future danger to others. Both the majority and all three concurring Justices found that this bar created by the state court constituted a due process violation.[36] The facts of *Simmons* present the same scenario: the defendant was not allowed to put forth factual evidence that he did not pose a future danger to others. Nevertheless, the court in *O'Dell* ruled that a jurist could reasonably find that *Skipper* did not "compel" the narrowly-drawn rule of *Simmons*.

The court explained that because the Supreme Court's grant of certiorari in *Skipper* was framed "solely" as an Eighth Amendment issue while *Simmons* rested on a due process grounds, jurists could reasonably conclude that *Skipper* did not compel the result in *Simmons*.[37] It remains plain, however, that the concern in *Skipper* was the same concern the Supreme Court later addressed in *Simmons*: the defendant's constitutional right to a meaningful opportunity to explain or deny the state's case of future dangerousness cannot be impeded by the state, and this rule against state impediment includes the rule that the state cannot refuse to permit the defendant's introduction of factual evidence about himself, either his good behavior while incarcerated or his parole ineligibility.

In addition to *Skipper*, stated the court, jurists would also have found *Gardner v. Florida*.[38] In *Gardner*, the Supreme Court vacated a death sentence because the sentencing court had violated the defendant's constitutional rights when it relied upon a secret report that the defendant never had the opportunity to rebut. The court dismissed *Gardner* as compelling precedent on the same ground that it had dismissed *Skipper*, contending that because *Gardner* rested on Eighth Amendment grounds, a jurist could not have found that it compelled the result in *Simmons*, a due process case. The court was able to draw this conclusion by again looking to the most narrow language of the opinion. In *Gardner*, it was Justice White's concurrence. Justice White concurred in the judgment on the fact-specific ground that state reliance on secret information to sentence a man to death violates the Eighth Amendment, although not necessarily due process.[39] Hence, a reasonable jurist looking at *Gardner*, like *Skipper*, could conclude that it did not "compel" *Simmons*.

Nevertheless, it remains apparent that *Gardner* too is founded on the same principle as *Skipper*. If the state's evidence is secret, the defendant cannot rebut it with accurate information of his own because the state has prevented him from doing so by keeping the information from him. Both cases explain that if a state court denies the defendant the ability to rebut the state's case at sentencing, that denial violates his constitutional rights.[40] More importantly, it is plain that *Gardner* and *Skipper* compelled the result in *Simmons*. The same issue was before the Court: whether the state court's obstructing the defendant's ability to accurately rebut the prosecution's case at sentencing violated the Constitution. It did. In fact, the *O'Dell* court even grudgingly admitted that "[w]ere *Gardner* and *Skipper* the totality of the 'legal landscape' in 1988, the claim that *Simmons* was not a new rule, might, at least at first blush, have considerable force."[41] However, *Gardner* and *Simmons* did not constitute the whole of the legal landscape in 1988.

2. Law Adverse to O'Dell Read Broadly

The court explained that reasonable jurists in 1988 would not only have found *Gardner* and *Skipper*, but would also have found *California v. Ramos*,[42] a decision which would have allowed them to conclude that *Simmons* announced a "new rule."[43] Unabashed, the court accorded its analysis of *Ramos* a level of generality not accorded to *Gardner* or *Skipper*:

> No doubt, a reasonable jurist in 1988, considering whether the Constitution necessarily required the rule of *Simmons*, would also have focused immediately upon the **broad principles of deference** to state decisions regarding the substantive factors that juries may consider during sentencing, which underlay the [*Ramos* decision].[44]

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31 *Id.* (quoting *Simmons*, 114 S. Ct. at 2201. (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in the judgment)).

32 *Id.*

33 *Id.* at 1224.

34 476 U.S. 1 (1986).

35 430 U.S. 349 (1977).

36 *Skipper*, 476 U.S. at 5 n.1, 9.

37 *O'Dell*, 95 F.3d at 1225.

38 430 U.S. 349 (1977).

39 *O'Dell*, 95 F.3d at 1224.

40 Moreover, the Eighth Amendment cruel and unusual punishment clause has been incorporated into Fourteenth Amendment due process. *Robinson v. California*, 370 U.S. 660 (1962).

41 *O'Dell*, 95 F.3d at 1225.

42 463 U.S. 992 (1983).

43 *O'Dell*, 95 F.3d at 1225-26.

44 *Id.* at 1227. (emphasis added).

In *Ramos*, the trial court had refused to allow the defendant to present to the jury the fact that the Governor could commute a death sentence where California state law required that the jury be told of the Governor's same power to commute a life imprisonment-without-parole sentence. The Supreme Court held that this refusal did not violate the defendant's constitutional rights **because the state had not "preclude[d] the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence."**[45]

Yet, the *O'Dell* court did not limit *Ramos* to this language, or its most narrow rationale. Adhering to its own principle here would mean that *Ramos* did not conflict with *Gardner*, *Skipper*, and most importantly, *Simmons*. If *Ramos* was not conflicting, then *Simmons* did not announce an unforeseeable, new rule and O'Dell would be entitled to its benefit. Thus, the court read *Ramos* broadly and found that the general argument forwarded by Ramos was essentially the same as that argued by Simmons: the information not brought before the jury was necessary to rebut the mistaken impression that only a death sentence would prevent defendant's return to society.[46]

The majority did note that since the Supreme Court did not overrule *Gardner* or *Skipper* and since *Simmons* came after *Ramos*, the Court must have viewed these cases as compatible. Finding itself compelled to so conclude, the court reconciled the two lines of cases by drawing this distinction: *Gardner* and *Skipper* concerned a defendant's right to rebut the prosecution's claims with factual evidence, while *Ramos* concerned a defendant's right to rebut the prosecution's claims with arguments from state law.[47] Accordingly, *Simmons* contradicted *Ramos* because it allowed argument based on state law in "the narrow circumstance of capital cases where future dangerousness is argued and the defendant is parole ineligible."[48] In other words, because the fact of the defendant's parole ineligibility arose from state law, to argue it constituted an argument based on state law. Finally, the court concluded that because it would not have been objectively unreasonable for a jury to draw this same distinction and thereby to conclude that *Simmons* announced a new rule, *Simmons* did announce a new rule.[49]

Ultimately, the court has created a distinction without a difference. The court stated that *Simmons* allows a defendant to argue from state law as to his parole ineligibility in order to rebut the prosecution's evidence of future dangerousness, while *Gardner* and *Skipper* allow a defendant to argue from facts. Yet, the law is what creates the **fact** that a defendant is parole ineligible. In either case, the defendant will argue facts relevant to his defense against the prosecution's case, and it is his ability to argue these facts that a state court cannot impede without violating the Constitution. Ironically, the *O'Dell* court itself points to this central principle of justice, quoting *Jurek v. Texas*:[50] "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."[51] However, the court is quick also to contend that while *Jurek* is still good law, its roots are in the Eighth Amendment, not due process; hence it is distinct from *Simmons*.[52] But again the court is forced to recognize that this conclusion is empty:

> [I]t was factual evidence about the Eighth Amendment factors relevant to the individual defendant which *Gardner* and *Skipper* had held defendants had a **due process right** to introduce in rebuttal of prosecution arguments concerning these factors.[53]

Faced with its own accurate characterization of *Gardner* and *Skipper*, the court was forced to distinguish *Simmons* as the first instance where the Supreme Court held that there was a due process right to rebut prosecution arguments with evidence unrelated to the defendant's character and crime.[54] Hence, according to the court, the fact of the defendant's parole ineligibility is unrelated to his character and crime. For if it were deemed a relevant fact about the defendant, then the rule of *Simmons* must have sprung from *Gardner* and *Skipper* as a due process right, and again, O'Dell would be entitled to its benefit.

Moreover, the fact that the court does not even address the relevance principle established by *Gardner* and extended in *Skipper* and then in *Simmons* underscores its weak position on this matter. Without such analysis on the part of the court, the reader is left with this notion: the **facts** of a secret report and good behavior while in jail are relevant to the defendant's character and crime, but the **fact** of his parole ineligibility is not. This reasoning ignores the principle at stake here, a principle we have known since *Gardner*: the state may not infringe on a criminal defendant's constitutional right to a meaningful opportunity to deny or explain evidence of future dangerousness offered against him. The idea is straightforward: how can a defendant have a meaningful opportunity to rebut the prosecution's argument about what the future will bring without the ability to present all evidence **relevant** to the future?

3. *Simmons* not a watershed rule

Having concluded that *Simmons* announced a new rule, the court further found that the new rule did not fit within either exception to the non-retroactivity principle of *Teague*. First, it did not place any of the defendant's conduct beyond that which the criminal law proscribes.[55] Second, the court rejected the argument that *Simmons* is a watershed rule of criminal procedure. Without discussion, the court merely announced that *Simmons* is not akin to *Gideon*; thus, it is not a bedrock procedural element necessary to our understanding of fundamental fairness.[56] But a simple, yet powerful contention remains.

Simmons, it can be strongly argued, is as basic to our understanding of a fair trial as is *Gideon*. *Simmons* held that due process gives a defendant the right to be heard (as to parole ineligibility) in his defense, either through argument or instruction. *Gideon* gave a defendant the right to be heard in his defense through counsel. Certainly, the right to be heard at all is as fundamental if not more fundamental than the right to be heard through counsel, or even as later Supreme Court precedent has prescribed, the right to be heard through effective counsel.[57]

Unless and until the United States Supreme Court grants *certiorari* on this issue, practitioners in Virginia must accept that *Simmons* did announce a new rule and relinquish hope for those cases decided as of October 1988. For cases where convictions became final post October 1988, there may be arguments that remain based on other precedent. One tactic that counsel may consider is requesting a rehearing on direct

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45 *Ramos*, 463 U.S. at 1004. (emphasis added).
46 *O'Dell*, 95 F.3d at 1226.
47 *Id.* at 1232.
48 *Id.* at 1234.
49 *Id.*
50 428 U.S. 262, 276 (1976).
51 *O'Dell*, 95 F.3d at 1234.
52 *Id.*
53 *Id.* (emphasis added).
54 *Id.*
55 *Id.* at 1238-39.
56 *Id.* at 1239.
57 Judge Ervin, in dissent, noted that had he agreed that *Simmons* was a new rule, he would have also found a strong argument in O'Dell's claim that the rule was a watershed rule of criminal procedure. *O'Dell*, 95 F.3d at 1261 n.11.

appeal, so that defendants may have the benefit of any new constitutional law handed down post-conviction and sentence but prior to a denial of *certiorari* by the United States Supreme Court.

Although the most careful lawyering cannot protect against unfavorable rulings under the *Teague* doctrine, it can make the difference with regard to procedural default. Even though it remains highly unlikely that counsel will face the unique issues presented in *O'Dell* as they arose from O'Dell's decision to proceed *pro se*, the opinion still serves as another reminder that procedural default requires counsel to always proceed with caution. The difficulty in avoiding default is illustrated by two recent cases: *Barnabei v. Commonwealth*[58] and *Clagett v. Commonwealth*.[59] This difficulty, in some cases, may warrant actions that add delay. For example counsel may have to prolong trial proceedings by making every conceivable argument to the judge for each objection initially, and by renewing motions and objections, as well as making proffers, late in the trial as new grounds and arguments come to mind.[60]

4. The dissent finds that *Simmons* was not a new rule

In his dissent, Judge Ervin found that even the "narrowest grounds" of *Gardner* and *Skipper* were broad enough to include the due process principle of a meaningful opportunity to defend against the prosecution's case for future dangerousness. He noted that, logically, the same Constitution that entitled a defendant to rebut future dangerousness with evidence of his good behavior in jail (*Skipper*) must also entitle him to rebut with evidence of parole ineligibility.[61] If so, then *Simmons* sprang from not only *Skipper* but the equally normative rule of *Gardner* which held that a defendant is entitled to present all relevant evidence in rebuttal.[62]

Moreover, explained Judge Ervin, when *Ramos* is read for its specific holding, it is clear that it too dealt with the defendant's ability to get accurate, relevant evidence before the sentencing jury. Judge Ervin explained that the *Ramos* Court specifically rested its refusal to find a constitutional violation on the fact that the state court did not prevent Ramos from presenting to the sentencing jury the fact of the Governor's ability to commute a death sentence. *Gardner*, *Skipper*, and *Simmons* presented the same concern: did the state prevent the sentencing jury from hearing accurate, relevant information? In all four cases, there is no suggestion that any of the factual evidence at bar was not relevant. Hence, in this way, *Ramos* does not conflict with *Simmons*.[63]

In other words, the Court since *Gardner* has held that a defendant has a constitutional right to get accurate, relevant information before the jury so as to rebut the prosecution's case at sentencing. *Skipper* extended this fundamental constitutional rule to new facts and made clear that this information includes good behavior while in jail. *Simmons*, like *Skipper*, is an extension of this rule to another set of facts, making clear that the defendant is entitled to present parole ineligibility evidence; after all, it too is relevant evidence in rebuttal of future dangerousness.

Ramos is not in conflict with these decisions because it presented a different factual problem to the Court. There, as Judge Ervin explained, unlike the situation in *Simmons*, the state court had given the sentencing jury accurate information and the defendant was not precluded from presenting additional accurate information.[64] Hence, in finding no constitutional violation, the Court remained true to the due process rule it laid down in *Gardner* and its progeny: it is unconstitutional for a state to **prevent** a defendant from presenting accurate, relevant evidence to his sentencing jury.

II. Procedural Bars

After the state *habeas* court dismissed O'Dell's petition, he filed a document with the Supreme Court of Virginia entitled "Assignments of Error."[65] However, Virginia law requires that an appeal from a denial of the writ of *habeas corpus* must be entitled "Petition for Appeal." By the time O'Dell tried to correct his error, the time for filing had expired and the Supreme Court of Virginia dismissed his Petition for Appeal as untimely under Va. S. Ct. Rule 5:17(a)(1).[66] Because O'Dell, who had moved *pro se*, mistitled his document, his claim was barred. Thus, so long as the dismissal rested on "adequate and independent state grounds,"[67] it was sufficient to bar federal *habeas* review. To pass this test, the state ground must have been "firmly established and regularly followed."[68] The court of appeals found that it was.[69]

To defend this conclusion which amounted to a "death by technicality," the majority explained at length that O'Dell **really did** file the wrong paper and that there really is a distinction between appeal and petition.[70] Although it required a recitation of some length to analyze and explain the law in Virginia, including the difference between direct appeal and collateral review, the court, nonetheless, found that the law lacked ambiguity.[71] Moreover, despite acknowledgment that the error was certainly inadvertent, the court rested its conclusion on the importance of state procedural rules, and found that O'Dell's claim was completely barred.[72]

By contrast, the court did not discuss whether this case was the first in which the court found that this type of mistake by a *pro se* capital defendant amounted to a default. Nor did the court discuss why the Supreme Court of Virginia could not have taken the route that courts often do when faced with a misnamed document where the author is a prisoner proceeding *pro se*. The Supreme Court of Virginia could have acknowledged that O'Dell did not have the right to a direct appeal ("Assignments of Error" is the wrong document; these are filed only on direct appeal of a conviction and sentence) but nonetheless stated that the court would treat his document as a petition for appeal and hear his case.

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58 1996 WL 517733 (Va. 1996) (rejecting several different claims as procedurally defaulted on various grounds). *See also* case summary of *Barnabei*, Capital Defense Journal, this issue.

59 252 Va. 79, 472 S.E.2d 263 (1996) (finding assignment of error defaulted where counsel properly objected at trial but advanced different argument on appeal than that presented to trial judge). *See also* case summary of *Clagett*, Capital Defense Journal, this issue.

60 For a thorough treatment of Virginia's default and waiver doctrine *see* Groot, *To Attain The Ends of Justice: Confronting Virginia's Default Rules in Capital Cases*, Capital Defense Digest, Vol. 6, No. 2, p. 44 (1994).

61 *O'Dell*, 95 F.3d at 1258.

62 *Id.* at 1257-59.

63 *Id.* at 1259-61.

64 *Id.* at 1259-60.

65 *Id.* at 1240.

66 *Id.*

67 *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977).

68 *James*, 466 U.S. at 348.

69 *O'Dell*, 95 F.3d at 1244.

70 *Id.* at 1239-44.

71 *Id.* at 1243.

72 *Id.* at 1245-46.

Hence, the court's reliance on O'Dell's error constituting a failure to properly invoke the Supreme Court of Virginia's jurisdiction is questionable.[73]

III. New Evidence of Innocence

Having decided that O'Dell "inadvertently" had defaulted his claims, the court of appeals went on to decide whether the federal *habeas* court could have heard his claims on the merits despite the default.[74] In order for the federal court to hear claims procedurally defaulted at the state level, the defendant must either show cause for the default and actual prejudice from the alleged violation of federal law or show that the court's refusal to hear the claim will result in a "fundamental miscarriage of justice."[75] O'Dell argued that the court must hear his claim because it was a claim of actual innocence and the failure to hear it would result in a fundamental miscarriage of justice. Specifically, O'Dell's claim was grounded upon new DNA evidence that conflicted with the evidence presented at trial which tended to show that the blood on O'Dell's clothes was consistent with Helen Schartner's but not with his own. In assessing whether O'Dell had made a colorable showing of innocence through the new evidence, the court credited much of the serology evidence at trial and dismissed the impact of the later DNA testing as minimal.[76]

For a defendant to succeed on a claim of actual innocence which otherwise is procedurally defaulted, he must show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[77] The court rejected O'Dell's claim under this standard, concluding that at most O'Dell's new evidence showed only that "one of the many blood stains on his clothing did not come from either himself or Helen Schartner."[78] This rejection was primarily based on the court's reliance upon the evidence adduced at trial and its disregard of the flaws in the trial evidence and its rejection of later favorable DNA evidence offered by O'Dell to rebut the Commonwealth's case.[79] Not only did the court acknowledge that this type of review requires it to substitute itself for the jury and conclude what the evidence showed, the court also acknowledged that it was forced to "guess" as to how a jury would vote in light of this conclusion.[80] Here, the court suggested that it was powerless to abate this obvious difficulty. However, the court was not powerless; it could have remanded for a new sentencing hearing and found out exactly what a jury would have done with the new evidence. The Commonwealth would not have lost its conviction and the defendant would have been accorded a determination made by the factfinding body. Our system would function as it promises. One would think that doing so is completely justifiable considering that a life is at stake.

Perhaps more important, however, is the court of appeals' sidestepping a remand to the district court because the district court had evaluated O'Dell's innocence evidence under the wrong standard of review. The trial court had used the standard established in *Sawyer v. Whitley*[81] when the appropriate standard, adopted after the district court's decision, was that established by *Schulp*.[82] The *Sawyer* standard required that the defendant show "by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner" guilty of murder.[83] The *Schulp* standard is not as stringent and requires only a "more likely than not" showing.[84] The court decided that because the district court had made factual findings "that are peculiarly within its province," a remand was not necessary.[85] This decision was contrary to Supreme Court action in several reversal cases, suggesting that a remand is appropriate even where the factual record to decide the issue appeared fully developed below, a situation not present in O'Dell's case. For example, in *United States v. Bagley*,[86] the Court remanded to the district court to apply the appropriate standard the Court established therein for the materiality of exculpatory material, although the nature and character of that material was known to the court. And in *United States v. Cronic*,[87] the Court remanded to the court of appeals for a finding as to whether the defendant had an ineffective assistance of counsel claim based on specific errors made at trial, although the trial record was before the Court. Again in *Gray v. Netherland*,[88] the Court remanded to the district court for a finding where the facts showed an obvious effort on the part of the prosecution to mislead the defendant. Hence, although the court of appeals' decision here is not extraordinary, it certainly is unusual. Some readers may even find it a disturbing conclusion where a life depends on the balance struck by a court that is twice removed from presentation of the facts.

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[73] The court also went to great length to explain that O'Dell's ability to proceed *pro se* was closely scrutinized and he had done well representing himself. This portion of the opinion is hauntingly reminiscent of *Betts v. Brady*, 316 U.S. 455 (1942) (ruling that appointment of counsel is not required if defendant is able to adequately defend himself)(overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963)); the court stated: "[A]n independent and thorough examination of the record reveals that O'Dell, who was 'very intelligent,' had a college equivalency education, and 'exhibit[ed] tremendous courtroom skills,' defended himself far more ably than many practicing attorneys could." *O'Dell*, 95 F.3d at 1244 n.24. This idea also appeared in the court's opinion. *Id.* at 1219.

[74] *Id.* at 1246.

[75] *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

[76] *O'Dell*, 95 F.3d at 1246-54.

[77] *Schulp v. Delo*, 115 S. Ct. 851, 867 (1995).

[78] *O'Dell*, 95 F.3d at 1254.

[79] *Id.* at 1247-54. The court's discussion of the DNA evidence as presented by the Commonwealth and by O'Dell's expert can be found within these pages. The details are not particularly informative and are too lengthy to repeat for the purpose of this summary. Of more interest, is that the court affirmed the district court's grant of only a limited evidentiary hearing on the matter, and then rejected the credibility of one of O'Dell's witnesses because that witness was not subject to cross-examination. *Id.* at 1254-55.

[80] *Id.* at 1250.

[81] 505 U.S. 333 (1992).

[82] 115 S. Ct. at 867.

[83] *Sawyer*, 505 U.S. at 336.

[84] *Schulp*, 115 S. Ct. at 867.

[85] *O'Dell*, 95 F.3d at 1249.

[86] 473 U.S. 667 (1985).

[87] 466 U.S. 648 (1984).

[88] 116 S. Ct. 2074 (1996).