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## A RAREFIED KIND OF DREAD

David I. Bruck\*

There's always anxiety involved in representing death-row inmates. But when the Supreme Court grants certiorari in a death-sentenced client's case, nightmare scenarios begin to loom.

Of course, there's the fear of losing, and in a capital case, that's no small matter. But if the legal claim that the Supreme Court has agreed to consider seems very strong, you're likely to encounter a different, more rarefied kind of dread. After all, your claim only seems strong because Supreme Court precedent suggests that you're going to win. But what if the Court took your case not simply to apply its own precedents (as you claim the lower courts had boneheadedly refused to do), but to overrule or weaken them? Then your Supreme Court case will turn out not only to have been a personal disaster for your client, but also to be a historic catastrophe for scores, even hundreds, of other death row inmates.<sup>1</sup>

In *Skipper v. South Carolina*<sup>2</sup> the Supreme Court had granted review (I hoped) to consider whether South Carolina was violating the Court's most well-established Eighth Amendment protection—the right to have sentencing juries or judges consider all the reasons why the death penalty should *not* be imposed.<sup>3</sup> The South Carolina Supreme Court had held that

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1. *Wainwright v. Witt*, 469 U.S. 412 (1985) was such a setback. By repudiating the rule of *Witherspoon v. Ill.*, 391 U.S. 510 (1968), that any ambiguity about the propriety of excluding jurors who oppose capital punishment required reversal of the death penalty, *Witt* doomed jury-selection claims in capital cases, and contributed to the upsurge in executions during the late 1980s and early 1990s.

2. 476 U.S. 1 (1976).

3. See *Lockett v. Ohio*, 438 U.S. 586 (1978).

juries deciding whether to sentence a convicted murderer to death should not be allowed to consider evidence that he'd make a well-adjusted, non-violent prisoner if sentenced to life imprisonment instead. It seemed obvious to me that a jury could reasonably decide not to impose the death penalty simply because the defendant had shown that he'd do all right in prison if allowed to live, but the state supreme court found it just as obvious that a capital defendant's post-trial behavior was "irrelevant," and that his jury could be prevented from hearing evidence bearing on that issue.<sup>4</sup>

At the time (and for many years before and since) I devoted most of my solo law practice to defending capital clients at trial and on appeal. Of course, after I had repeatedly failed to persuade the state supreme court that its peculiar rule violated the *Lockett* principle,<sup>5</sup> I was gratified and excited when the Court granted my certiorari petition.<sup>6</sup> And the cert grant in *Skipper* was all the sweeter because exactly six months earlier, the Court had denied the cert petitions I'd filed on behalf of two other death-row clients raising the identical claim.<sup>7</sup>

As I worked on the merits brief, writing and circulating draft after draft to about a dozen members of an informal network of capital defense attorneys and law professors around the country, I tried to reassure myself that the Court had simply granted review to straighten out an aberrant state court that had not read its previous death-penalty decisions closely enough. But those earlier Supreme Court decisions were life-lines to which hundreds of death-row inmates were clinging. So I couldn't help brooding over the fact that the more obviously the state court's decision seemed at odds with Supreme Court precedent, the more disastrous a Supreme Court loss would be. A win for my client would help maybe half a dozen other inmates. But a loss would greatly weaken one of the few constitutional protections—the right to present mitigating

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4. *State v. Koon*, 298 S.E.2d 769, 773-774 (S.C. 1982).

5. *See id.*; *State v. Elmore*, 332 S.E.2d 762 (S.C. 1985); *State v. Koon*, 328 S.E.2d 625 (S.C. 1985); *State v. Chaffee*, 328 S.E.2d 464 (S.C. 1984); *State v. Patterson*, 327 S.E.2d 650 (S.C. 1984).

6. *Skipper v. S.C.*, 474 U.S. 900 (1985).

7. *Patterson v. S.C.*, *Koon v. S.C.*, 471 U.S. 1036 (1985) (Marshall & Brennan, JJ., dissenting from denial of certiorari).

evidence—that the Supreme Court had not already watered down.

What's more, just six weeks before the *Skipper* argument, I had seen first-hand what it means to lose a capital case. Terry Roach was a mentally impaired South Carolina prisoner who'd been sentenced to death for his part in two murders committed when he was 17.<sup>8</sup> I had not been one of his lawyers, but I spent the final six hours keeping him company before he was electrocuted early on the morning of January 10, 1986. After his body had been hoisted from the electric chair onto a gurney and rolled out of the death chamber, I took a small bundle of his belongings (a comb, a Bible, some flip-flops) to his family, who had been waiting in a borrowed apartment a few miles from the prison. Anyone who doubts that there are innocent victims on *both* sides of every death-penalty case would have been convinced by the scene of stunned devastation that greeted me that morning.

So as the Supreme Court argument approached, I began to feel a little like someone who'd staked his family's life savings on a risky stock in hopes of a three-percent return. I was reasonably sure the Court would rule for my client. But for everyone except him and his family, a loss would hurt a lot more than a win would help. Of course a lawyer puts his own client first, but one can't (and shouldn't) handle a death-penalty case in the Supreme Court without giving a lot of thought to how many people will be hurt (killed, actually) if the case goes bad.

Once the briefs were done, the only way to channel all that anxiety into something constructive was to do a couple of moot argument sessions. I doubted that anything I said or didn't say at oral argument was likely to affect the outcome; whatever the Court's reason for granting review was probably how the case would come out. But I wasn't going to turn down a chance to get grilled by some of the most experienced capital litigators and appellate advocates in the country (including several former Supreme Court law clerks), and after two such sessions, I'd had my chance to stammer through responses to just about every question that would come up during argument before the Court.

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8. *Roach v. Aiken*, 474 U.S. 1039 (1986) (Brennan & Marshall, JJ., dissenting from denial of stay).

February 24, 1986, was a day of brilliant sunshine on newly fallen snow. Shoes freshly shined, I picked my way through the drifts and slush outside the Court, hoping that the unexpected snowfall didn't foreshadow any other obstacles that I'd failed to foresee.

Nowadays, the Clerk, William Suter, conducts a helpful (and reassuring) orientation *cum* pep-talk for all arguing counsel just after nine o'clock in the lawyer's lounge off the Courtroom. But in the mid-1980s, counsel's only initiation was a sign-in at the Clerk's ground-floor office, followed by a brief introduction to Mr. Spaniol, then the Clerk of the Court, and as much small-talk as the Clerk and eight nervous lawyers on both sides of four unrelated cases could manage (which, as I recall, wasn't much). Then it was on into the Courtroom, where (since I had the third argument), my co-counsel Jack Boger and I waited till about 11:00 to take our places at the "on-deck" table on the petitioner's side of the aisle.

The longest part of the wait was the last minute or so. As counsel for the petitioner, I'd been instructed to take my place at the podium and then to stand and wait for as long as it took the Courtroom to quiet down after the previous case, at which point the Chief Justice would recognize me and I could begin. I was surprised at how intimate the courtroom seemed: The lawyers are just a few feet from the bench and the Justices, and I stood and gazed up at the Chief Justice in a state of suspended animation for what seemed like a very long time. It reminded me of the ski racing I'd done as a kid, standing in the gate waiting for the signal at the top of the slalom course. The trick, our coach had told us, was not to forget to breathe. So I took deep breaths until Chief Justice Burger intoned in his deep baritone voice, "We will hear arguments now in Skipper against South Carolina. Mr. Bruck, I think you may proceed when you are ready."

After that, it was a pretty easy run. The state had set up some procedural defenses rather than engage the merits of the South Carolina rule at issue, so I plodded through those, helped by some gentle questioning from Justice O'Connor. At one point I started to insist that there were two things wrong with the state's procedural argument, and the first thing was . . . .

“That it is *wrong*,” Justice White interjected with a smile. There was laughter in the courtroom behind me, and I knew that this was not going to be nearly as hard as I’d feared.

Ten minutes into my argument, the Court recessed for its one-hour lunch break. The sensation was like a time-out in the middle of an Olympic bobsled run. Nothing could provide any greater advantage to one side in a Supreme Court argument. (It’s an advantage that no one gets anymore, because with only half as many cases on the Court’s current argument calendar as in the mid-1980s, the Court almost never hears more than two arguments on any given day, and both arguments are almost always over by lunch.) Now I had a whole hour to sit with Jack Boger (a brilliant lawyer and gentle soul who then directed the NAACP Legal Defense Fund’s Capital Punishment Project), and get his take on how things were going (fine, he thought) and whether I’d answered the Chief’s hypothetical questions well enough. By the time the argument resumed, I felt sure the votes were there to reverse, and the rest of my half hour felt like a high-powered but enjoyable (albeit, on my side, slightly manic) conversation with the Justices.

After the argument was over, Jack and I headed out into the first floor hallway where there were congratulations to be had and some decompressing to do, while Court officers patiently but firmly tried to get everyone quieted down and moving towards the exits. But as soon as I could, I needed to get to a pay phone to call my client and let him know how the argument had gone.

The officers on South Carolina’s death row had assured me that they’d get Ronnie Skipper to the phone when I called from Washington, and when the time came, they did. I tried not to be overconfident in predicting the outcome, and I’d watched enough Supreme Court arguments by then to know that Justices’ questions and comments don’t always reveal how a case will turn out. But this argument *had* gone well, and while I no longer remember exactly what we said, I must have sounded reassured, and I know that I tried to be reassuring.

What I do recall was the sense of incongruity between the majesty and pageantry of the Supreme Court proceedings and the dingy squalor of the death-row cell-block on the other end of

the line. It was hard to believe that one could be so intimately connected to the other.

My client's mother had come to Washington for the argument, and I felt almost embarrassed that she was there to witness the elegant, dignified spectacle to which the ruinous calamity of her son's crime and sentence had somehow given rise. I don't encourage family members of condemned clients to attend appellate arguments, because I worry about how it must feel to realize that a son's or a brother's fate turns on the sorts of arcane legal points that are usually at issue. But this time it turned out okay, because when the argument was over and we headed out into the snowy city, we all felt pretty sure that her son was going to get another chance at life.<sup>9</sup> What's more, after having endured a South Carolina prosecutor's shouting and hollering about how Ronnie ought to die, and a jury agreeing, now she'd seen the Supreme Court of the United States calmly considering whether he had been treated fairly, and I suppose there must have been some comfort in that.



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9. Sure enough, the Court unanimously reversed the death sentence nine weeks later, Justice White's opinion for the majority sustaining both the Eighth Amendment and due process claims. *Skipper*, 476 U.S. at 2-9. Justice Powell's concurrence, joined by the Chief Justice and Justice Rehnquist, rejected the Eighth Amendment claim but agreed that the death sentence had been obtained in violation of the Due Process Clause. *Id.* at 9-15 (Powell, J., Burger, C.J., & Rehnquist, J., concurring). That November, Ronnie Skipper was re-sentenced to life imprisonment by a South Carolina court.