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One for the Price of Two: How the Supreme Court Got it Half Right in Ramdass v. Angelone

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ONE FOR THE PRICE OF TWO: HOW THE SUPREME COURT GOT IT HALF RIGHT IN RAMDASS V. ANGELONE

Ramdass v. Angelone, 120 S. Ct. 2113 (2000)

I. INTRODUCTION

In *Ramdass v. Angelone*,[1] the United States Supreme Court declined to extend its ruling in *Simmons v. South Carolina*[2] to allow parole–eligible defendants in state capital cases to inform the sentencing jury of their parole–eligibility status. In *Simmons*, the Court ruled that if a defendant facing the death penalty in a state trial is parole ineligible under that state's three strikes statute, and if the state argues that the death penalty is appropriate based at least in part on the defendant's future dangerousness, the defendant has a federal Due Process right to inform the jury that he is parole ineligible.[3] Bobby Lee Ramdass sought to extend the right to this "Simmons Instruction" to defendants who, though technically parole eligible, are for all practical purposes ineligible.[4] In rejecting his argument, the Court reiterated that the *Simmons* right does not attach until the defendant is technically parole ineligible as a matter of state law.[5]

This Note argues that there were really two questions at issue in *Ramdass* and that both the plurality and the dissent failed to separate them. As a result, the plurality correctly held that *Simmons*' applicability turns on state law, but failed to identify the constitutional flaw in the Virginia regime. Conversely, Justice Stevens' dissent properly identified that the Virginia law violated Due Process, but incorrectly suggested that because the Virginia law was unconstitutional, *Simmons* must never turn on state law. In reality, *Simmons* properly turns on state law, but the Virginia law at issue violates the Due Process requirement that a defendant be allowed to rebut the case against him. The flaw in

[1] 120 S. Ct. 2113 (2000).
[2] 512 U.S. 154 (1994).
[3] *Id.* (plurality opinion).
[4] 120 S. Ct. at 2117-19 (plurality opinion).
[5] *Id.* at 2121-22.

the Virginia regime has nothing to do with *Simmons*, however, because it can be fixed without changing the plurality's interpretation of *Simmons*.

II. BACKGROUND

States have significant discretion in determining appropriate sentences for criminal offenses.[6] Because capital punishment is "qualitatively different from a sentence of imprisonment, however long[,]"[7] the Court has restricted state discretion in capital cases with specific Due Process guarantees which it has expanded over time.

A. SUPREME COURT CASELAW BEFORE SIMMONS

The Court's modern capital punishment jurisprudence evolved from the 1972 case *Furman v. Georgia*.[9] *Furman* struck down several state capital punishment regimes as violative of the Eighth and Fourteenth Amendments.[10] In addition, *Furman* gave rise to a series of five cases in 1976,[11] in which the Court examined both the extent of state discretion and the specific Due Process restrictions on that discretion. The Court decided all five cases on July 2, all by plurality opinion. Justices Stevens, Powell, and Stewart authored the plurality opinion in each of the cases, discussing various aspects of state discretion and Due Process requirements in state capital cases.[12]

In *Gregg v. Georgia*,[13] the joint opinion emphasized that states are entitled to substantial discretion in designing their capital sentencing regimes.[14] The plurality stated that a capital jury should be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing deci-

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[6] *See* Gregg v. Georgia, 428 U.S. 153, 174-76 (1976).

[7] Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion).

[9] 408 U.S. 238 (1972) (plurality opinion).

[10] *Id.*

[11] Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) (plurality opinion).

[12] *See* discussion *infra*.

[13] 428 U.S. 153 (1976).

[14] *Id.* at 192-93.

sion."[15] It also specifically acknowledged that states are entitled to enhanced deference "where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy'".[16] Despite this broad language, however, the decisions in *Gregg*'s companion cases significantly restricted state death penalty discretion. For example, Florida's death penalty law survived the Court's scrutiny in *Proffitt v. Florida*[17] primarily because the law was so restrictive.[18] States like North Carolina and Louisiana, whose death penalty regimes were more expansive, found themselves severely curtailed.[19]

In *Woodson v. North Carolina*[20] and *Roberts (Stanislaus) v. Louisiana*,[21] the Court ruled that no state law offense can carry a mandatory penalty of death.[22] The plurality concluded that such laws violated the Eighth and Fourteenth Amendments because "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[23] Finally, in *Jurek v. Texas*,[24] the Court allowed Texas to impose the death penalty based on future dangerousness[25] provided that a jury considering such an argument also be presented "all possible relevant information about the individual defendant whose fate it must determine."[26]

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[15] *Id.* at 192.

[16] *Id.* at 176.

[17] 428 U.S. 242 (1976) (plurality opinion).

[18] *Id.* at 249-250. A Florida court could sentence a defendant to death only when (1) a statutorily prescribed aggravating circumstance was present; (2) the jury recommended death; (3) "'the facts suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person could differ[.]'" [citations omitted]; (4) the trial judge independently considered "the statutory aggravating and mitigating circumstances[;]" and (5) the trial judge set forth in writing particularized findings of fact and law demonstrating the appropriateness of capital punishment.

[19] *See infra* notes 20-21 and accompanying text.

[20] 428 U.S. 280 (1976).

[21] 428 U.S. 325 (1976).

[22] *See id.*

[23] *Woodson*, 428 U.S. at 303.

[24] 428 U.S. 262 (1976) (plurality opinion).

[25] *Id.* at 276.

[26] *Id.*

A year later, in *Gardner v. Florida*,[27] the Court explicitly brought state capital sentencing procedures under the thumb of the Due Process Clause. "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."[28] *Gardner* involved a defendant whom the trial judge had sentenced to death based in part on a confidential pre-sentence report to which the defendant did not have access.[29] In vacating the sentence, the Court noted that Due Process does not permit a defendant to be put to death based, "at least in part, on the basis of information which he had no opportunity to deny or explain."[30] The Court's next two cases addressing this issue, *Lockett v. Ohio*[31] and *Eddings v. Oklahoma*,[32] required "that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[33] *Lockett* struck down a state statute which prevented the trial judge, in imposing a capital sentence, from considering as mitigating factors the defendant's lack of specific intent[34] and the defendant's role as an accomplice.[35] Similarly, *Eddings* invalidated a state law prohibiting the court from considering as a mitigating circumstance the defendant's unhappy upbringing[36] and emotional disturbance.[37]

The trend toward increased restrictions on state discretion seemed to slow in 1983, when the Court decided *California v. Ramos*.[38] The state law at issue in *Ramos* required the Court to instruct a capital jury that the governor had the power to commute a sentence of life without parole.[39] The petitioner argued, *inter alia*, that he had a Due Process right to rebut that instruc-

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[27] 430 U.S. 349 (1977).
[28] *Id.* at 358.
[29] *Id.* at 352-54.
[30] *Id.* at 362.
[31] 438 U.S. 586 (1978).
[32] 455 U.S. 104 (1982).
[33] *Lockett*, 438 U.S. at 604.
[34] *Id.* at 592-94; 608.
[35] *Id.*
[36] 455 U.S. at 107, 116.
[37] *Id.* at 107-08, 116.
[38] 463 U.S. 992 (1983).
[39] *Id.* at 995-96.

tion by telling the jury that the governor could also commute a death sentence.[40] Writing for the majority, Justice O'Connor rejected the defendant's argument on the grounds that the mandatory instruction did not run afoul of any of the specific Due Process requirements articulated in the 1972 cases.[41] She reiterated that, subject to the specifically articulated requirements of Due Process, "the Court has deferred to the State's choice of substantive factors relevant to the penalty determination."[42]

Despite the broad language in *Ramos*, however, the Court quickly returned to curtailing state discretion.[43] In *Skipper v. South Carolina*,[44] it concluded that a defendant's good behavior in prison constituted a relevant mitigating circumstance which the jury must be allowed to consider.[45] In a footnote, the Court also noted that, even if good behavior did not qualify as a mitigating circumstance, the defendant was equally entitled to present the jury with evidence of good behavior because such evidence was an essential part of the defendant's ability to rebut the case against him.[46] Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, argued in concurrence that states should retain discretion to decide whether good behavior constituted relevant mitigating evidence.[47] Justice Powell suggested that the decision should be based solely on the fact that the defendant was not allowed to rebut the case against him, leaving state discretion regarding mitigating evidence intact.[48] In *Blystone v. Pennsylvania*,[49] the Court upheld Pennsylvania's capital sentencing system both because it did not "limit the types of mitigating evidence which may be considered,"[50] and because it included a "'catchall' category providing for the consideration of 'any other evidence of mitigation concerning the character

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[40] *Id.* at 996-98.

[41] *Id.* at 999-1012.

[42] *Id.* at 1001.

[43] *See* Blystone v. Pennsylvania, 494 U.S. 299 (1990); Skipper v. South Carolina, 476 U.S. 1 (1986).

[44] 476 U.S. 1 (1986).

[45] *Id.* at 2-4, 8-9.

[46] *Id.* at 5, n.1.

[47] *Id.* at 11 (Powell, J., concurring).

[48] *Id.* at 10-11.

[49] 494 U.S. 299 (1990).

[50] *Id.* at 305.

and record of the defendant and the circumstances of his offense.'"[51]

Thus, when Bobby Lee Ramdass was put on trial for the murder of Mohammed Kayani, the Court's broad declarations of state discretion amounted to a jurisprudence which used Due Process to impose severe restrictions on state capital punishment regimes.[52] Specifically, the Court had carved out two major enclaves of Due Process protection: "[r]elevant mitigating evidence;" and "[d]efendant's ability to rebut the case against him."[53] The Court had not yet considered whether either of these enclaves prevented states from keeping parole-eligibility evidence from capital juries. It addressed that question in *Simmons v. South Carolina.*[54]

1. The Simmons Decision

In *Simmons,* the Court considered the case of a defendant who had been convicted of murder and sentenced to death, based largely on the prosecutor's argument that he posed a future danger.[55] Simmons had sought to answer this argument by presenting evidence that he was parole ineligible under South Carolina's three strikes statute, which instructed the state Board of Probation, Parole and Pardon Services not to grant parole to any individual serving a sentence for a second violent crime conviction.[56] The trial judge refused to permit this argument on the grounds that South Carolina did not allow capital juries to hear evidence regarding parole eligibility.[57]

On appeal to the United States Supreme Court, the state suggested that Simmons was parole eligible because future hy-

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[51] *Id.*

[52] *See supra* notes 13-51 and accompanying text.

[53] *Blystone,* 494 U.S. at 305.

[54] *Simmons,* 512 U.S. 154 (1994).

[55] *Id.* at 160 (plurality opinion).

[56] *Id.* at 157-58. The statute read in relevant part:

> The board must not grant parole nor is parole authorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.

S.C. CODE ANN. § 24-21-640 (Supp. 1993).

[57] 512 U.S. at 159-160 (plurality opinion).

pothetical developments, such as a change in the law or a gubernatorial pardon, could trigger Simmons' eventual release.[58] It also argued that Simmons was not technically parole ineligible because the South Carolina Board of Probation, Parole and Pardon services, vested with authority to make final parole-eligibility decisions, had not declared him ineligible.[59] Simmons argued that he must be allowed to present evidence of parole ineligibility because such evidence was a mitigating factor and because it rebutted the state's future dangerousness argument.[60] This argument drew on both the *Skipper* and *Gardner* Due Process doctrines.[61]

In a fractious plurality decision, a majority of the Court agreed only that when a defendant is parole ineligible and the state argues for the death penalty based on future danger, the defendant has a Due Process right to rebut the state's argument by presenting evidence of his parole ineligibility.[62] The Court rejected the state's argument regarding hypothetical future developments largely because, given the defendant's legal status when the jury instruction was given, an instruction that he was parole ineligible was "legally accurate."[63] Speculation as to the defendant's future eligibility status was considered irrelevant.[64]

Consistent with the Court's previous decisions, the plurality acknowledged *Ramos*' "broad proposition that we generally will defer to a State's determination as to what a jury should and should not be told about sentencing,"[65] but justified this latest departure from that guideline on the grounds that parole ineligibility was essential to the defendant's ability to rebut the prosecution's case for future dangerousness.[66]

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[58] *Id.* at 166.

[59] *Ramdass*, 120 S. Ct. at 2130 (Stevens, J., dissenting opinion) (citing Brief for Respondent at 95, Simmons v. South Carolina, 512 U.S. 154 (1994) (No. 92-9059)).

[60] *Simmons*, 512 U.S. at 161, n.3.

[61] *See supra* notes 27-30 and accompanying text; notes 44-46 and accompanying text.

[62] *Simmons*, 512 U.S. at 161 (plurality opinion); *id.* at 172 (Souter, J., concurring); *id.* at 174 (Ginsburg, J., concurring); *id.* at 175 (O'Connor, J., concurring).

[63] *Simmons*, 512 U.S. at 166.

[64] *Id.*

[65] *Id.* at 168.

[66] *Id.* at 168-169.

2. *The Virginia Parole–Eligibility Law*

The Virginia statute requires that one of two aggravating circumstances, either future dangerousness or outrageous vileness, be demonstrated in any case before the death penalty may be imposed.[67] In determining future dangerousness, "the fact-finder may consider a defendant's past criminal record, a defendant's prior history, the circumstances surrounding the commission of the offense under consideration, and the heinousness of the crime."[68] Subject to federal Due Process restrictions, capital juries in Virginia are not allowed to consider parole eligibility.[69] The relevant statute for purposes of determining parole eligibility is Virginia's three strikes statute, which specifies that a person convicted of three separate felonies is not eligible for parole.[70]

It is important to note, however, that Virginia does not consider a person legally convicted of a crime until a judgment of conviction has been entered.[71] Consequently, a jury conviction does not count as a predicate strike for purposes of the three strikes statute until the judge has actually entered judgment, an event which may not occur until several weeks after the jury verdict.[72] The question posed in *Ramdass* was whether a defendant who has been convicted of two previous violent crimes, but against whom judgment has been entered only in one, can invoke federal Due Process protection to override the state law which prohibits a sentencing jury from considering evidence of parole eligibility. In other words, does the *Simmons* right depend on a state–law determination of parole ineligibility, or can a defendant with the requisite number of predicate jury verdicts

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[67] VA. CODE ANN. § 19.2-264.2 (1977).

[68] Atkins v. Commonwealth, 534 S.E.2d 312, 317 (Va. 2000).

[69] *See* King v. Commonwealth, 416 S.E.2d 669, 677 (Va. 1992), *cert. denied*, 506 U.S. 957 (1992).

[70] The statute provides in part:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i) (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

VA. CODE ANN. § 53.1-151(B1) (1993).

[71] *See* Smith v. Commonwealth, 113 S.E. 707 (Va. 1922).

[72] In *Ramdass*, the court entered judgment two months after the sentencing phase of the trial was completed. *See infra* notes 102-106 and accompanying text.

against him invoke *Simmons* even if he is still technically parole eligible?

III. FACTS AND PROCEDURAL HISTORY

A. FACTS AND TIMELINE

On the night of September 2, 1992, Bobby Lee Ramdass and a small group of accomplices entered a 7-11 convenience store in Fairfax County, Virginia.[73] Ramdass and one of his accomplices both drew guns, and ordered the customers to lie on the ground.[74] Ramdass went behind the counter and told the clerk, Mohammed Kayani, to open the safe.[75] Kayani tried unsuccessfully to open the safe, at which point Ramdass, with his gun pointed at Kayani's head, threatened to kill him if he did not open the safe.[76] Almost immediately thereafter, Ramdass pulled the trigger, but the gun did not fire.[77] He pulled the trigger a second time, and the gun fired, killing Kayani.[78] Testimony indicated that Ramdass then stood over Kayani's body laughing.[79] Before he left the store, Ramdass pointed his gun at the customers on the floor and pulled the trigger several more times, though the gun never fired.[80] The murder concluded a crime spree on which Ramdass had embarked almost immediately upon completing a prison term for a 1988 robbery.[81] The crime spree included another murder, an assault on a hotel clerk, armed robberies of a Pizza Hut and a Domino's Pizza, and the attempted murder of a taxi driver.[82] Ramdass was arrested for the Kayani murder on September 11, 1992.[83]

Because he had committed several crimes in a short period of time, Ramdass was a defendant in a number of trials, all of

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[73] Ramdass v. Angelone, 120 S. Ct. 2113, 2116 (2000) (plurality opinion).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] Ramdass v. Angelone, 120 S. Ct. 2113, 2116 (2000) (plurality opinion); Ramdass v. Angelone, 28 F. Supp. 2d 343, 348 (E.D. Va. 1998).

[80] *Ramdass*, 120 S. Ct. at 2116-17; *Ramdass*, 28 F. Supp. 2d at 348.

[81] *Ramdass*, 120 S. Ct. at 2116.

[82] *Id.*

[83] *Id.* at 2117.

which began at about the same time.[84] The chronology of verdicts and judgments in the various trials is significant. A jury found Ramdass guilty of the Pizza Hut robbery on December 15, 1992.[85] Another jury found him guilty of the Domino's robbery on January 7, 1993.[86] Judgment was entered on the Pizza Hut verdict on January 22, 1993.[87] Ramdass was convicted of the Kayani murder in January of 1993, and the sentencing phase of the trial was completed on January 30, with the jury recommending death.[88] Judgment was entered on the Domino's verdict on February 18, 1993,[89] and judgment was entered on the Kayani murder verdict six weeks later, on April 2, 1993.[90]

B. THE TRIAL

Before the Kayani trial, which involved multiple charges including murder, robbery, and weapons possession, Ramdass pled guilty to the robbery charge and asked the Court to find him guilty and sentence him immediately.[91] On objection by the Commonwealth, the trial court denied this motion and deferred both adjudication of guilt and sentencing on the robbery charge until after the trial on the remaining charges.[92] When the jury found Ramdass guilty of the murder and weapons charges, he again moved for immediate sentencing, and again was denied.[93]

At the sentencing phase of the Kayani trial, the prosecutor urged the jury to recommend a sentence of death, based on the future dangerousness aggravating circumstance.[94] Ramdass responded that, because of the additional sentences he would receive for the other crimes he had committed, including those for which he had not yet been tried, he would never be released from jail.[95] Among the offenses he cited in making this argu-

[84] *Id.*; Ramdass v. Angelone, 187 F.3d 396, 407 (4th Cir. 1999).
[85] 120 S. Ct. at 2117.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] 28 F. Supp. 2d at 350-51.
[91] Ramdass v. Commonwealth, 437 S.E.2d 566, 571 (Va. 1993).
[92] *Id.*
[93] *Id.*
[94] 120 S. Ct. at 2117.
[95] *Id.*

ment was the Domino's verdict, which neither side had previously mentioned.[96] He did not specifically invoke parole ineligibility under the three strikes statute.[97] In its closing argument, the state used testimony regarding the crime spree detailed above, including the Domino's verdict, to support its argument that "Ramdass could not live by the rules of society 'either here or in prison.'"[98]

During its deliberations, the jury sent a note to the judge asking: "'If the Defendant is given life, is there a possibility of parole at some time before his natural death?'"[99] Ramdass' counsel suggested that the Court respond: "You must not concern yourself with matters that will occur after you impose your sentence, but you may impose [sic] that your sentence will be the legal sentence imposed in the case."[100] The Court rejected this instruction, answering instead: "If you find the Defendant guilty, which you have in this case, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards."[101] The next day, the jury unanimously recommended that Ramdass be put to death.[102]

As noted above, judgment was entered on the Domino's conviction on February 18, nineteen days after the jury recommended death in the Kayani case.[103] When the Kayani trial court reconvened for a sentencing hearing, six weeks after entry of the Domino's judgment, Ramdass for the first time argued that his two prior convictions rendered him ineligible for parole under the three strikes statute.[104] He also noted that his counsel had contacted three of the jurors, all of whom indicated that the jury would have imposed a life sentence had they known Ramdass was parole ineligible.[105] The trial court rejected these arguments and, on April 2, 1993, sentenced Ramdass to death.[106]

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[96] *Id.*

[97] *Id.*

[98] *Id.* at 2117-18.

[99] *Id.* at 2118.

[100] *Id.*

[101] 28 F. Supp. 2d at 350.

[102] 120 S. Ct. at 2118 (plurality opinion).

[103] *See supra* note 89 and accompanying text.

[104] 120 S. Ct. at 2118 (plurality opinion).

[105] *Id.*

[106] 28 F. Supp. 2d at 350.

C. DIRECT APPEAL

On his direct appeal to the Virginia Supreme Court, Ramdass argued that the trial court erred in denying his two motions for immediate sentencing on the robbery charge.[107] He argued that if the motions had been granted, he could have informed the jury of his parole ineligibility based on the three armed robbery convictions (Pizza Hut, Domino's, and the Kayani robbery).[108] The Virginia Supreme Court found no error in the denial, and noted that even if his motions had been granted and the three strikes established, "[e]vidence of Ramdass's parole ineligibility was inadmissible in any event. We repeatedly have held that such evidence of parole ineligibility is inadmissible in capital murder cases."[109]

The court applied similar logic in rejecting Ramdass' argument that the trial court erred in not informing the jury of his parole ineligibility in answer to the jury's question regarding the possibility of parole.[110] "We have repeatedly held that a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence."[111]

Ramdass petitioned the United States Supreme Court for a writ of certiorari.[112] Three days after it decided *Simmons*, the Court granted Ramdass' petition and remanded the case to the Virginia Supreme Court for consideration in light of *Simmons*' requirement that a parole–ineligible defendant be allowed to use his ineligibility to rebut the prosecutor's future dangerousness argument.[113]

On remand, the Virginia Supreme Court upheld the conviction.[114] It concluded that *Simmons* applied "only if Ramdass was ineligible for parole when the jury was considering his sentence."[115] Citing *Smith v. Commonwealth*,[116] the court reasoned

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[107] 437 S.E.2d 566, 571 (Va. 1993).

[108] *Id.* at 571-72.

[109] *Id.* at 572.

[110] *Id.* at 573.

[111] *Id.*

[112] Ramdass v. Virginia, 114 S. Ct. 2701 (1994).

[113] *Id.*

[114] Ramdass v. Commonwealth, 450 S.E.2d 360 (Va. 1994).

[115] *Id.* at 361.

[116] 113 S.E. 707, 709 (Va. 1922).

that because the Domino's verdict had not been reduced to judgment, "it cannot be considered as a conviction . . .."[117] Consequently, the court said, Ramdass had only two predicate strikes under state law, the Pizza Hut conviction and the Kayani murder, when the jury was considering his sentence.[118] Because Ramdass was eligible for parole when the jury was considering his sentence, the court ruled that *Simmons* did not apply.[119] Ramdass again appealed to the United States Supreme Court for a writ of certiorari, but his petition was denied.[120]

D. PETITION FOR HABEAS CORPUS

Following the demise of his direct appeal, Ramdass filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia.[121] The District Court concluded that the Virginia Supreme Court's decision was "based on an 'unreasonable determination of the facts in light of the evidence presented in the State court proceeding' and involved an 'unreasonable application' of *Simmons* as determined by the Supreme Court of the United States."[122] The judge granted Ramdass a writ of habeas corpus and remanded the case for resentencing.[123]

With regard to the Virginia Supreme Court's determination of the facts, the District Court found unreasonable the court's conclusion that the absence of an entry of judgment prevented the Domino's verdict from qualifying as a conviction, since it considered the Kayani murder, also without an entry of judgment, a predicate strike conviction.[124]

With regard to the Virginia Supreme Court's application of *Simmons*, the District Court held that *Ramdass* and *Simmons* were factually indistinguishable, and that the court's reading of *Simmons* violated the constitutional requirements that the defendant be allowed "to introduce, and the sentencer to consider, all relevant evidence that may be viewed in a mitigating light by the

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[117] *Ramdass*, 450 S.E.2d at 361.
[118] *Id.*
[119] *Id.*
[120] Ramdass v. Virginia, 115 U.S. 1800 (1995).
[121] 28 F. Supp. 2d 343 (E.D. Va. 1998).
[122] *Id.* at 363.
[123] *Id.*
[124] *Id.* at 365.

sentencer," and that "a defendant must have both access to information upon which the sentencer relies in imposing the death penalty, and the opportunity to rebut the same."[125] This restricted interpretation, "concluding that Petitioner was parole eligible based on the lack of the ministerial act of a trial court entering judgment,"[126] allowed the [Virginia Supreme Court] to evade "the full import of *Simmons*[,]"[127] thus "'securing a death sentence on the ground of future dangerousness while at the same time concealing from the jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment [for Petitioner] [sic] means without parole.'"[128]

On appeal to the Fourth Circuit, Ramdass advanced a "functional" interpretation of *Simmons*, based on the District Court's opinion.[129] He suggested that he qualified for a *Simmons* instruction even though judgment had not been entered in the Domino's case because "the entry of judgment was nondiscretionary, purely ministerial, and legally insignificant."[130] In other words, Ramdass argued that *Simmons* protection was warranted because he was, for all practical purposes, parole ineligible.[131] A two–judge majority adopted a more restricted interpretation of *Simmons*, based on the Fourth Circuit's reasoning in *Townes v. Murray*,[132] a previous case which had dealt with *Simmons*:

> *Simmons* does not hold . . . that "due process requires that the sentencing jury be informed that the defendant is parole ineligible." It only holds more narrowly that "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 . . . that he is parole ineligible"[133]

It then held that "[p]arole eligibility is a state law question."[134] Because Ramdass was parole eligible as a matter of state law, life imprisonment without the possibility of parole was not

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[125] *Id.* at 363-64.
[126] *Id.* at 367.
[127] *Id.*
[128] *Id.*
[129] 187 F.3d at 405.
[130] *Id.*
[131] *Id.*
[132] 68 F.3d 840 (4th Cir. 1995).
[133] 187 F.3d at 404 (citation omitted).
[134] *Id.* at 405.

the only alternative to death, and consequently *Simmons* did not apply.[135] Put another way, the majority held that a defendant has a right to introduce evidence of parole eligibility only if he is parole ineligible as a matter of state law.[136] The majority dismissed Ramdass' functional interpretation, labeling it "a new interpretation of *Simmons* that is simply incompatible with the logic of *Simmons* itself."[137]

The dissent adopted, though not explicitly, a version of Ramdass' functionality argument.[138] "While [the Virginia Supreme Court's] result is sound under the legal technicalities of Virginia law, in practical reality it was a certainty that Ramdass would be parole ineligible upon entry of the Kayani conviction."[139] The dissent did not challenge the validity of Virginia's definition of "conviction," but argued that to the extent the Virginia law prevented Ramdass from using the Domino's conviction to rebut the future dangerousness argument, the state law violated the constitutional requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain."[140] In essence, the dissent adopted the District Court's position that state law may not abridge the *Simmons* right when a parole ineligibility argument would rebut the prosecution's case for future dangerousness.[141] The dissent also suggested that because no motions which could have overturned the Domino's conviction were pending, "only some hypothetical future development as remote as legislative reform, commutation, or clemency" could have prevented entry of judgment in the Domino's case.[142] "Formal entry of the conviction," therefore, "was merely a ministerial act."[143]

Following the Fourth Circuit's decision, Ramdass again petitioned the United States Supreme Court for a writ of certiorari.[144] The Court stayed his execution and granted review.[145]

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[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] 187 F.3d at 413 (Murnaghan, J., dissenting).
[139] *Id.*
[140] *Id.* at 414.
[141] *Id.* at 413.
[142] *Id.* at 415.
[143] *Id.*
[144] Ramdass v. Angelone, 120 S. Ct. 523 (1999).
[145] Ramdass v. Angelone, 120 S. Ct. 784 (2000).

IV. SUMMARY OF OPINIONS

Like *Simmons*, *Ramdass* was a plurality decision.[146] Justice Kennedy delivered the opinion of the Court for himself, Chief Justice Rehnquist, and Justices Scalia and Thomas.[147] Justice O'Connor filed an opinion concurring in the judgment.[148] Justice Stevens authored the dissent for himself and Justices Souter, Ginsburg and Breyer.[149] The plurality agreed with the Fourth Circuit's decision that *Simmons* is governed by state law, and declined to extend its protection to defendants who are parole eligible as a matter of state law.[150]

A. THE PLURALITY OPINION

The plurality first noted that *Simmons* had created a new rule that parole–ineligible defendants are entitled to an ineligibility instruction when the prosecution argues future dangerousness.[151] It immediately continued that, subject to the *Simmons* rule, "the States have some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case. . . . [T]he parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law."[152] *Simmons* can be distinguished from *Ramdass*, Justice Kennedy said, because the ineligibility instruction at issue in *Simmons* was "legally accurate" under state law, which was not the case in *Ramdass*.[153]

Next, Justice Kennedy addressed Ramdass' two key arguments analogizing his case to *Simmons*: that Simmons was not parole ineligible at the time of sentencing because the South Carolina Board of Probation, Parole, and Pardon Services had not formally determined that he was ineligible; and that the *Simmons* court allowed the instruction even though "hypothetical future events (such as escape, pardon, or a change in the

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[146] Ramdass v. Angelone, 120 S. Ct. 2113, 2116 (2000) (plurality opinion).

[147] *Id.*

[148] *Id.* at 2126 (O'Connor, J., concurring).

[149] *Id.* at 2128 (Stevens, J., dissenting).

[150] *Id.* at 2116-26 (plurality opinion).

[151] *Id.* at 2119.

[152] *Id.*

[153] *Id.* at 2120.

law) might mean the prisoner would, at some point, be released from prison."[154]

The plurality dismissed the first argument on the grounds that the state statute rendered Simmons parole ineligible regardless of whether the parole board had acted or not.[155] It rejected the second argument on similar grounds, noting that the Court should look only at the defendant's legal status when the jury is considering the verdict, disregarding future hypothetical developments that might change the defendant's parole status.[156] For Justice Kennedy, the relevant point was that Simmons was legally ineligible for parole when the jury was considering his sentence; Ramdass was not.[157]

In response to Ramdass' functional interpretation of *Simmons*, the Court concluded that such an interpretation would be "[n]either necessary [n]or workable[,]"[158] because it would require the trial court to consider numerous unrelated future possibilities, including "whether a trial court in an unrelated proceeding will grant postverdict relief, whether a conviction will be reversed on appeal, or whether the defendant will be prosecuted for fully investigated yet uncharged crimes."[159] States may reasonably assume, he concluded, that such inquiries would distract juries from the real issues in the case and trigger litigation peripheral to the central point.[160] Because he believed that states have a legitimate interest in preventing juries from getting caught up in such peripheral questions, Justice Kennedy concluded that the Virginia Supreme Court was correct when it decided that *Simmons* does not require states to allow parole-eligibility arguments by defendants who are not ineligible under state law.[161]

The plurality then noted that there was no error in allowing the prosecutor to use the as-yet unentered Domino's conviction in support of his future dangerousness argument because Virginia law allows the introduction of "unadjudicated prior bad

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[154] *Id.* at 2121.
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.* at 2121-22.
[161] *Id.* at 2122.

acts" to demonstrate future dangerousness.[162] The fact that Ramdass rather than the prosecutor introduced the Domino's robbery further supported its use in the future dangerousness argument.[163]

Ramdass submitted to the Court several public opinion polls indicating that jurors are more likely to sentence a defendant to death if they believe the defendant will be released on parole.[164] The plurality devoted a brief paragraph to dismissing the polls on the grounds that "[m]ere citation of a law review to a court does not suffice to introduce into evidence the truth of the hearsay or the so–called scientific conclusions contained within it."[165] Justice Kennedy highlighted some of the possible errors in methodology in the surveys, and then cited nine cases in which such polls have been dismissed for various methodological errors.[166]

Next, the plurality dismissed Ramdass' argument that entry of judgment in his case was a "'ministerial act whose performance was foreseeable, imminent, and inexorable.'"[167] Justice Kennedy discussed the significance of post–trial motions in Virginia criminal law practice, and noted that it is "well–established procedure in Virginia for trial courts to consider and grant motions to set aside jury verdicts."[168] He also suggested that verdicts are less certain than judgments, and cited Virginia caselaw to support the proposition that a jury verdict is "uncertain and un-

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[162] *Id.*

[163] *Id.* at 2122-23.

[164] *Id.* at 2123.

[165] *Id.*

[166] *Id.* (*citing* Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 264 (5th Cir. 1980) (inadequate survey universe); American Home Products Corp. v. Procter & Gamble Co., 871 F. Supp. 739, 761 (D. N.J. 1994) (respondents given extended time to answer); ConAgra, Inc. v. Geo. A. Hormel & Co., 784 F. Supp. 700, 726 (D. Neb. 1992) (survey failed to ask the reasons why the participant provided the answer he selected); Sterling Drug, Inc. v. Bayer AG, 792 F. Supp. 1357, 1373 (S.D.N.Y. 1992) (questions not properly drafted); Kingsford Products Co. v. Kingsfords, Inc., 715 F. Supp. 1013, 1016 (D. Kan. 1989) (sample drawn from wrong area); Gucci v. Gucci Shops, Inc., 688 F. Supp. 916, 926 (S.D.N.Y. 1988) (surveys should be conducted by recognized independent experts); Schering Corp. v. Schering Aktiengesellschaft, 667 F. Supp. 175, 189 (D.N.J. 1987) (attorney contact and interference invalidates poll); Dreyfus Fund, Inc. v. Royal Bank of Canada, 525 F. Supp. 1108, 1116 (S.D.N.Y. 1981) (unreliable sampling technique); General Motors Corp. v. Cadillac Marine & Boat Co., 226 F. Supp. 716, 737 (W.D. Mich. 1964) (only 150 people surveyed)).

[167] 120 S. Ct. at 2124 (citation omitted).

[168] *Id.*

reliable until judgment is entered."[169] Finally, Justice Kennedy noted that when the jury was considering the Kayani sentence, Ramdass still had time to file a motion to set aside the Domino's verdict.[170] For all these reasons, the plurality agreed with the Virginia Supreme Court that entry of judgment in the Domino's case was not a purely ministerial act.[171]

The penultimate section of the opinion rejected Ramdass' assertion that Virginia's use of entry of judgment rather than conviction as the moment at which a conviction becomes a predicate strike is arbitrary.[172] Here again, Justice Kennedy relied on state discretion in determining the point at which a conviction is a strike for purposes of the state statute.[173] While he acknowledged that the availability of postjudgment relief in state and federal forums renders even an entry of judgment uncertain, he did not consider this sufficient to invalidate the Virginia law.[174] "States may take different approaches and we see no support for a rule that would require a State to declare a conviction final for purposes of a three–strikes statute once a verdict has been entered."[175] By way of rationalizing the distinction, the plurality also returned to its suggestion that a judgment is more certain than a verdict.[176]

Justice Kennedy pointed out that Ramdass himself did not advance his *Simmons* argument until he realized that his 1988 robbery conviction did not count as a predicate strike.[177] He also noted that Ramdass had conceded in his brief that he was convicted of the Domino's robbery on February 18, the date judgment was entered, rather than January 7, the date the jury returned its verdict.[178] He noted that Ramdass' "change of heart on the controlling date appears based on a belated realization"

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[169] *Id.* (*citing* Smith v. Commonwealth, 113 S.E. 707, 708 (Va. 1922); Blair v. Commonwealth, 66 Va. 850, 858, 861 (1874); Davis v. Commonwealth, 2000 WL 135148, at *4, n.1 (Va. Ct. App. Feb. 8, 2000); Dowell v. Commonwealth, 408 S.E.2d 263, 265 (Va. Ct. App. 1991)).

[170] *Ramdass*, 120 S. Ct. at 2124-25.

[171] *Id.* at 2124.

[172] *Id.* at 2125.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

that he needed the Domino's conviction in order to be parole ineligible.[179]

Finally, the plurality pointed out that state courts are free to provide more protection than is constitutionally required, and noted that Ramdass was afforded such additional protection because the jury was not informed that he was eligible for parole.[180] It also noted that Virginia had expanded *Simmons* by allowing a parole–ineligibility instruction even when future dangerousness is not an issue,[181] and that in the time since Ramdass' conviction, the state eliminated parole for all defendants convicted of a capital crime, making the instruction available to all capital defendants.[182]

B. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor began her concurrence by restating the narrow holding of *Simmons* cited by the Fourth Circuit.[183] She also reiterated that, while the question of whether a defendant may inform the jury of his parole ineligibility is a federal question, "we look to state law to determine a defendant's parole status."[184] She devoted the rest of her concurrence to Ramdass' argument that entry of judgment is a ministerial act.[185] Justice O'Connor conceded that "[w]here all that stands between a defendant and parole ineligibility under state law is a purely ministerial act, *Simmons* entitles the defendant to inform the jury of that ineligibility, either by argument or instruction, even if he is not technically 'parole ineligible' at the moment of sentencing."[186] She defined "ministerial" as "foreordained."[187] However, she concluded that entry of judgment in this case was not a purely ministerial act because "as a matter of Virginia law, a guilty verdict does not inevitably lead to the entry of a judgment order."[188] Even if the chances of the Domino's verdict being set

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[179] *Id.*

[180] *Id.* at 2126.

[181] *Id.*

[182] *Id.*

[183] *Ramdass*, 120 S. Ct. at 2126 (O'Connor, J., concurring); *see also Simmons*, 512 U.S. at 178 (O'Connor, J., concurring).

[184] *Ramdass*, 120 S. Ct. at 2127 (O'Connor, J., concurring).

[185] *Id.* (O'Connor, J., concurring).

[186] *Id.* (O'Connor, J., concurring).

[187] *Id.* (O'Connor, J., concurring).

[188] *Id.* (O'Connor, J., concurring).

aside were, as Ramdass argued, "quite remote," she concluded such remoteness was insufficient to declare entry of judgment a foreordained, purely ministerial act.[189] She also found Ramdass' functionality argument inconsistent with *Simmons*, which "does not require courts to estimate the likelihood of future contingencies concerning the defendant's parole eligibility."[190]

C. JUSTICE STEVENS' DISSENT

Justice Stevens' lengthy dissent attacked both the Virginia law and the plurality's subordination of *Simmons* to state law generally.[191] He argued that the Due Process right articulated in *Simmons* should supercede Virginia's law because Virginia allowed the prosecutor to use a verdict which the defendant could not use in his reply.[192]

First, Justice Stevens pointed out that the plurality allowed the prosecutor to use the Domino's verdict in his future dangerousness argument even though Ramdass could not use the verdict to rebut that argument.[193] This, he said, denied Ramdass "'one of the hallmarks of due process in our adversary system,' namely the defendant's right 'to meet the State's case against him.'"[194] Because the plurality's reading of *Simmons* as contingent on state law permitted this violation, Justice Stevens concluded that state law must not be allowed to determine whether *Simmons* applies in any given case.[195]

Justice Stevens argued that *Simmons* and *Ramdass* were factually indistinguishable.[196] He pointed out that the relevant statute in *Simmons* left the determination of parole eligibility to the South Carolina Board of Probation, Parole, and Pardon Services.[197] He quoted the state's brief from *Simmons*, in which South Carolina argued that "'no state agency had ever determined that Simmons was going to be serving a sentence of life without the possibility of parole . . . [because] . . . the power to

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[189] *Id.* (O'Connor, J., concurring).
[190] *Id.* at 2127-28 (O'Connor, J., concurring).
[191] *Ramdass*, 120 S. Ct. at 2128 (Stevens, J., dissenting).
[192] *Id.* (Stevens, J., dissenting).
[193] *Id.* (Stevens, J., dissenting).
[194] *Id.* (Stevens, J., dissenting) (citation omitted).
[195] *Id.* at 2128-29, 2134 (Stevens, J., dissenting).
[196] *Id.* at 2130 (Stevens, J., dissenting).
[197] *Id.* (Stevens, J., dissenting).

make that determination did not rest with the judiciary, but was solely vested in an executive branch agency, ...'"[198] He also cited the South Carolina statute, which read in part:

> The board must not grant parole nor is parole authorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.[199]

Because the Board of Probation, Parole, and Pardon Services had not officially declared Simmons parole ineligible, Justice Stevens argued that both Simmons and Ramdass were parole eligible when the juries were considering their respective sentences.[200] Both merely "had all the facts necessary to be found ineligible at some future date."[201]

He suggested that the plurality then tried to distinguish the cases on the grounds that Simmons would inevitably be declared ineligible, which was not the case with Ramdass.[202] "In other words, the plurality says that Simmons applies when there is 'conclusive proof' at the time of sentencing that the defendant will (in the future) 'inevitably' be found parole ineligible."[203] This standard also failed to distinguish the two cases, he concluded, because both Simmons and Ramdass had access to post trial motions which could have overturned their convictions.[204]

The plurality did not, Justice Stevens argued, actually rely on either of these standards, but instead based its holding on the absence of an entry of judgment against Ramdass, which it incorrectly asserted to be "more certain" than a jury verdict.[205] Since the plurality could rely only on this "relative certainty" standard to distinguish *Simmons* from *Ramdass* (and to justify the Virginia law), he argued that the flaw in that standard was fatal

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[198] *Id.* at 2131, n.7 (Stevens, J., dissenting) (*quoting* Brief for Respondent at 95, *Simmons v. South Carolina*, 512 U.S. 154 (1994) (No. 92-9059)) (citation omitted).

[199] S.C. CODE ANN. § 24-21-640 (Supp. 1993).

[200] *Ramdass*, 120 S.Ct. at 2130-31 (Stevens, J., dissenting).

[201] *Id.* at 2131, n.8 (Stevens, J., dissenting).

[202] *Id.* at 2131 (Stevens, J., dissenting).

[203] *Id.* (Stevens, J., dissenting) (citation omitted).

[204] *Id.* (Stevens, J., dissenting).

[205] *Id.* at 2132 (Stevens, J., dissenting).

to the plurality's entire conclusion.[206] He reasoned that to the extent there is no certainty gap between verdict and judgment, the plurality's decision both allowed states to make arbitrary decisions regarding when a defendant may use a conviction to rebut a future dangerousness argument, and allowed them statutorily to eviscerate *Simmons*.[207]

He pointed out that the Virginia statutory standard for setting aside a conviction was the same both before and after judgment had been entered.[208] "In short, whether judgment has been entered on the verdict has absolutely no bearing on the verdict's 'certainty.'"[209] The plurality's only support for the relative certainty standard was a list of cases, none of which he believed indicated that a verdict was less certain than a judgment in Virginia.[210] Because no judicial or statutory authority supported the plurality's claim that a verdict was less certain than a judgment, he concluded that the relative certainty standard was invalid.[211]

Justice Stevens briefly discussed Ramdass' argument that entry of judgment is a ministerial task.[212] He cited *Rollins v. Bazile*[213] as authority that entry of judgment is a ministerial, and not a judicial task.

> The rendition of a judgment is to be distinguished from its entry in the records. The rendition of a judgment is the judicial act of the court, whereas the entry of a judgment by the clerk on the records of the court is a ministerial, and not a judicial act . . . . The entry or recordation of such an instrument in an order book is the ministerial act of the clerk and does not constitute an integral part of the judgment.[214]

He did not discuss the point further.[215]

Justice Stevens continued that because no valid standard could justify the Virginia law, "the question of *Simmons*' applicability must be an issue of federal due process law[]"[216] rather

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[206] *Id.* (Stevens, J., dissenting).
[207] *Id.* at 2132-36, 2139-42 (Stevens, J., dissenting).
[208] *Id.* at 2132 (Stevens, J., dissenting).
[209] *Id.* (Stevens, J., dissenting).
[210] *Id.* at 2132-33 (Stevens, J., dissenting).
[211] *Id.* at 2134, n.17 (Stevens, J., dissenting).
[212] *Id.* at 2133 (Stevens, J., dissenting).
[213] 139 S.E.2d 114 (Va. 1964).
[214] *Id.* at 117 (citation omitted).
[215] *Ramdass*, 120 S. Ct. at 2133 (Stevens, J., dissenting).
[216] *Id.* at 2134 (Stevens, J., dissenting).

than state law. This interpretation, he said, is more consistent with *Simmons* than the plurality's "state–law–first" approach.[217] He briefly recounted the legal and philosophical underpinnings of *Simmons* to support this conclusion.[218]

Justice Stevens began his discussion of *Simmons* by noting that the Court has previously deferred to state decisions regarding what issues a capital jury may consider.[219] Specifically, he discussed *California v. Ramos*[220] as an example of the Court's tendency to lean in favor of allowing state discretion in capital sentencing regimes, subject to Due Process restrictions, including the defendant's right to rebut the prosecution's case.[221] In *Ramos*, he said, the defendant's proffered instruction that the governor could commute a death sentence as well as a sentence of life imprisonment "'would not "balance" the impact'" of telling the jury that the governor could commute a life sentence.[222] By contrast, a defendant's argument that he would never be eligible for parole "quite plainly rebuts" an argument that the defendant will pose a future danger if he is not put to death.[223] Thus, Justice Stevens argued that *Simmons* carved out a specific Due Process exception to state discretion in that it prevented states from allowing prosecutors to use a defendant's prior conviction to prove future dangerousness when the defendant could not use the same conviction in his rebuttal.[224] He also cited the survey evidence, which the plurality had dismissed, to support the contention that, since juries are more likely to impose death if they believe the defendant will be released on parole, parole ineligibility directly counters the future dangerousness argument on which the prosecutor must rely to secure a death sentence.[225]

While Justice Stevens conceded that the *Simmons* right must refer to state law, he believed the plurality erred in allowing state law to control its applicability.[226] Not only was the plural-

[217] *Id.* (Stevens, J., dissenting).
[218] *See id.* at 2134-37 (Stevens, J., dissenting).
[219] *Id.* at 2135 (Stevens, J., dissenting).
[220] 463 U.S. 992 (1983).
[221] *Ramdass*, 120 S. Ct. at 2135 (Stevens, J., dissenting).
[222] *Id.* (Stevens, J., dissenting) (citation omitted).
[223] *Id.* (Stevens, J., dissenting).
[224] *Id.* (Stevens, J., dissenting).
[225] *Id.* at 2136 (Stevens, J., dissenting).
[226] *Id.* at 2137 (Stevens, J., dissenting).

ity's reading inconsistent with the plain meaning of *Simmons*,[227] he said, but it would allow states to craft their statutes so as to evade the right altogether, "convert[ing] the *Simmons* requirement into an opt–in constitutional rule."[228] This, he said, was an invalid reading of *Simmons*.[229] "The question in this case, then, boils down to whether the plurality's line between entry of judgment and a verdict is a demarcation of *Simmons*' applicability that is (1) consistent with *Simmons*; (2) a realistic and accurate assessment of the probabilities; and (3) a workable clear rule."[230]

First, he argued the plurality's reasoning was inconsistent with *Simmons* because it found "constitutionally significant uncertainty . . . [in] . . . a 'hypothetical future development[,]'"[231] specifically, the possibility that a postverdict motion, which Ramdass had not filed, could theoretically overturn the Domino's conviction before judgment was entered.[232] Since the *Simmons* Court explicitly refused to find uncertainty in hypothetical prognostication regarding changes in the law or a gubernatorial pardon, he argued that it was inconsistent to reject Ramdass' argument on the basis of equally hypothetical predictions about the certainty of the verdict.[233]

Second, he condemned the plurality's reasoning as "internally inconsistent" because it ascribed greater certainty to a judgment than to a verdict, despite the fact that "the standard for setting aside a verdict after the trial is the same regardless of whether judgment has been entered."[234] He pointed out that at the time of the capital sentencing hearing, Ramdass still had thirteen days to file a post-judgment motion in the Pizza Hut case.[235] The availability of such motions in both the Domino's and Pizza Hut cases should, he suggested, render both convictions equally uncertain.[236] Yet the plurality inexplicably found

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[227] *Id.* at 2138 (Stevens, J., dissenting).
[228] *Id.* (Stevens, J., dissenting).
[229] *Id.* at 2139 (Stevens, J., dissenting).
[230] *Id.* (Stevens, J., dissenting).
[231] *Id.* (Stevens, J., dissenting) (citation omitted).
[232] *Id.* (Stevens, J., dissenting).
[233] *Id.* (Stevens, J., dissenting).
[234] *Id.* at 2140 (Stevens, J., dissenting).
[235] *Id.* (Stevens, J., dissenting).
[236] *Id.* (Stevens, J., dissenting).

the Pizza Hut judgment certain and the Domino's verdict uncertain, based on the arbitrary entry of judgment standard.[237]

Either the Virginia law was arbitrary, Justice Stevens suggested, or the standard by which the plurality upheld it made *Simmons* inapplicable in any case involving a defendant whose predicate convictions could possibly be set aside.[238] This approach, he said, was "entirely boundless."[239] If uncertainty existed any time a hypothetical future development could change the defendant's parole eligibility status, the mere availability of post-judgment appeals or habeas proceedings must render an entered judgment on which all such remedies have not been exhausted just as uncertain as a naked verdict.[240]

> If *Simmons* is inapplicable because at least one of the defendant's prior convictions could be set aside before sentencing (or before the third strike becomes final, or before whatever time the plurality might think is the crucial moment), then it should not matter, under that reasoning, whether it is set aside by post-trial motion, on appeal, or through state (or federal) postconviction relief. What's more, the plurality's reasoning would hold true so long as these procedures are simply available . . . . So long as such procedures for setting aside old convictions exist and remain technically available prior to a defendant's capital murder sentencing phase, the defendant's eventual parole ineligibility is just as uncertain at the crucial moment.[241]

He concluded that the plurality's reasoning, and hence the Virginia law, either drew an arbitrary distinction between pre- and post-judgment avenues of relief, or eviscerated *Simmons* by preventing it from attaching to any defendant whose predicate convictions could be appealed in any forum.[242] Since either conclusion was untenable, he said, the plurality's reasoning was fatally flawed and the Virginia law was invalid.[243]

Finally, Justice Stevens asserted that the *Simmons* right should attach at the moment of conviction because "it is a natural breaking point in the uncertainties inherent in the trial process[,] . . . [and] . . . because the State itself can use the

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[237] *Id.* (Stevens, J., dissenting).
[238] *Id.* at 2140-41 (Stevens, J., dissenting).
[239] *Id.* at 2140 (Stevens, J., dissenting).
[240] *Id.* at 2140-41 (Stevens, J., dissenting).
[241] *Id.* (Stevens, J., dissenting).
[242] *Id.* (Stevens, J., dissenting).
[243] *Id.* at 2141 (Stevens, J., dissenting).

defendant's prior crimes to argue future dangerousness after a jury has rendered a verdict . . . ."[244]

In conclusion, Justice Stevens reiterated his positions that both the Virginia Supreme Court and the plurality erred in making the *Simmons* right dependant on state law, and that the use of judgment rather than verdict as the point at which a conviction becomes a strike was a convoluted, unreasonable application of *Simmons*.[245] This decision, he suggested, "turns on whether the hypothetical possibility that the trial judge might fail to sign a piece of paper entering judgment on a guilty verdict should mean that the defendant is precluded from arguing his parole ineligibility to the jury."[246] For Justice Stevens, the answer to that question was a definite "no."[247]

V. ANALYSIS

This case actually involved two separate constitutional questions: whether the *Simmons* right is contingent upon state law; and whether the Virginia regime is consistent with Due Process. Justice Kennedy was really arguing the first question, on which he correctly concluded that *Simmons* does turn on state law;[248] while Justice Stevens was primarily concerned with the second, on which he was correct that the Virginia law violates the "right to rebut" element of Due Process in capital cases.[249] This is not immediately obvious because all of the Justices confused the two questions, treating them instead as parts of a single issue.[250] Justice Kennedy found that *Simmons*' applicability turned on state law, and concluded that since state law in this case left the defendant technically parole eligible, *Simmons* did not apply and Due Process was not violated.[251] The question of whether the Virginia law was consistent with Due Process requirements other than *Simmons* occurred to him only in passing, and he dismissed it quickly on the grounds that "[s]tates may take different ap-

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[244] *Id.* (Stevens, J., dissenting).
[245] *Id.* at 2142-43 (Stevens, J., dissenting).
[246] *Id.* at 2142 (Stevens, J., dissenting).
[247] *Id.* at 2142-43 (Stevens, J., dissenting).
[248] *Id.* at 2116-26 (plurality opinion).
[249] *Id.* at 2128-43 (Stevens, J., dissenting).
[250] *Id.*
[251] *Id.* at 2116-26 (plurality opinion).

proaches."[252] Justice O'Connor's conclusion was similar to Justice Kennedy's, though she found that a state law would run afoul of *Simmons* if it imposed a purely ministerial task between a defendant and the parole–ineligibility argument.[253] Justice Stevens argued, seemingly in reverse, that since the Virginia law allowed the prosecutor to refer to a conviction which the defendant could not in rebuttal, the state law violated Due Process, and consequently *Simmons* could not be contingent on state law.[254]

When one separates the two questions, it becomes clear that *Simmons* is contingent on state law, but also that the Virginia law violates the right–of–rebuttal element of Due Process.[255] The fact that Virginia's law violates Due Process, however, does not mean that *Simmons* supercedes state law.[256] In fact, Virginia's violation has nothing to do with *Simmons*.[257]

A. SIMMONS IS CONTINGENT ON STATE LAW

The defendant in *Simmons* was parole ineligible as a matter of state law.[258] The only rule on which a majority of the Court agreed was that a parole–ineligible defendant has a right to rebut a future dangerousness argument by telling the jury that he is ineligible for parole, and consequently will not pose a future threat.[259] Justice O'Connor limited her concurrence to cases where "the State seeks to show the defendant's future dangerousness . . . in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole . . .."[260] The Court said nothing regarding the state's method of determining whether parole is available, nor did the Court give any indication of a scenario in which a parole-eligible defendant would be entitled to the *Simmons* Instruction.[261] On the contrary, the very language of the decision strongly sug-

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[252] Ramdass v. Angelone, 120 S. Ct. 2113, 2125 (2000) (plurality opinion).
[253] *Id.* at 2126-28 (O'Connor, J., concurring).
[254] *Id.* at 2128-43 (Stevens, J., dissenting).
[255] *See infra* notes 258-319 and accompanying text.
[256] *See infra* notes 302-05 and accompanying text.
[257] *See infra* notes 306-19 and accompanying text.
[258] *See* S.C. CODE ANN. § 24-21-640 (Supp. 1993).
[259] Simmons v. South Carolina, 512 U.S. 154 (1994).
[260] *Id.* at 177 (O'Connor, J., concurring).
[261] *Id.* at 154-71.

gested that such a scenario could not exist.[262] If the instruction is limited to cases in which the only alternatives are death or life without parole, a parole–eligible defendant is by definition prevented from receiving *Simmons* protection.[263]

B. THE STATE–LAW–FIRST INTERPRETATION OF SIMMONS IS CONSISTENT WITH DUE PROCESS

Justice Stevens was concerned that allowing state law to control *Simmons*' applicability posed Due Process problems because it would allow states to end–around the *Simmons* right with cleverly worded statutes.[264] This concern is unjustified for two reasons.[265]

First, other Due Process rights, such as the right of a defendant to be provided with copies of trial transcripts and other materials for state appeals, are equally contingent on state law.[266] The Supreme Court has recognized that indigent defendants have a Due Process right to be provided with trial transcripts to aid them in preparing their state appeals, even if they cannot afford to pay for the transcripts.[267] However, states are under no constitutional obligation to provide appellate courts or even the right to appellate review of a conviction, even in a capital case.[268]

> A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review.[269]

Thus, indigent prisoners have a Due Process right to the use of trial transcripts in their state appeals, but the state may eviscerate that right by refusing to provide any avenue of state relief.[270] Taking the comparison a step farther, if a state were to restrict appellate review of criminal convictions to specific classes of defendants (leaving aside the Equal Protection and

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[262] *Id.*

[263] *See Id.*

[264] Ramdass v. Angelone, 120 S. Ct. 2113, 2138 (2000) (Stevens, J., dissenting).

[265] *See infra* notes 266-83 and accompanying text.

[266] *See infra* notes 267-73 and accompanying text.

[267] Griffin v. Illinois, 351 U.S. 12 (1956).

[268] *Id.* at 17-18; *See also* McKane v. Durston, 153 U.S. 684, 687 (1894).

[269] *Griffin*, 351 U.S. at 18.

[270] *See infra* notes 266-69 and accompanying text.

Due Process implications of such a law), defendants not eligible for appellate review would have no right to free transcripts.[271] States have just as much ability to end-around this Due Process guarantee as they do the *Simmons* right.[272] Thus, the mere fact that a state could statutorily avoid *Simmons* does not violate Due Process.[273]

Second, even if the possibility of a state end–around of *Simmons* did pose Due Process problems, there is virtually no plausible scenario in which a state would exploit that possibility.[274] A state could only avoid *Simmons* in one of two ways: either it could repeal its three–strikes statute, leaving all capital defendants eligible for parole; or it would have to word its three–strikes statute such that a defendant was parole eligible until all possible avenues of post–conviction relief, including state relief and federal habeas relief, were exhausted.[275] Since no state is required to have a three–strikes statute, the former strategy would not be constitutionally suspect.[276] The latter is implausible because a state which adopted that strategy would eviscerate its own three–strikes statute in the process.[277] Such a statute would allow individuals with three or more criminal convictions to remain eligible for parole during the years in which their various appeals wound their way through state and federal courts.[278] Since the entire point of a three–strikes statute is to get repeat offenders off the street for good, it would make no sense for a state legislature to allow prisoners to remain parole eligible long after their third conviction, simply to prevent a fraction of offenders from

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[271] *See infra* notes 266-70 and accompanying text.

[272] *But see* Ramdass v. Angelone, 120 S. Ct. 2113, 2137-38 (2000) (Stevens, J., dissenting).

[273] *See infra* notes 266-72 and accompanying text.

[274] *See infra* notes 275-84 and accompanying text.

[275] *See Ramdass*, 120 S. Ct. at 2119-23; Simmons v. South Carolina, 512 U.S. 154, 161-74 (1994) (plurality opinion).

[276] As of 1997, only twenty-one states, the District of Columbia, and the Federal Government had passed three strikes statutes. *See* Martha Kimes, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against The Use Of Foreign Crimes In Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT'L L. 503, 504 (1997).

[277] *See infra* notes 278-84 and accompanying text.

[278] *See Ramdass*, 120 S. Ct. at 2140-41 (Stevens, J., dissenting).

offering parole–ineligibility rebuttals to future dangerousness arguments.[279]

Such a scenario becomes even more implausible when one considers that the parole–ineligibility instruction is far from a talismanic shield against the death penalty.[280] Due Process simply requires that the jury take rebuttal arguments into account; nowhere does it imply that such arguments must alter the sentence the jury chooses to impose.[281] The parole–ineligibility argument also does not prevent the prosecution from arguing that the defendant poses a future danger.[282]

Of course, the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. "The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff."[283]

Since a state could end–around *Simmons* only by destroying its own three–strikes statute, and because no state is required to have such a statute, Justice Stevens' concerns are unwarranted.[284]

C. JUSTICE STEVENS FAILED TO IDENTIFY THE PROBLEM WITH RAMDASS

Justice Stevens correctly concluded that the outcome of *Ramdass* was constitutionally invalid,[285] but failed to identify the specific flaw in the decision. He began by trying to analogize *Ramdass* and *Simmons*, but did not succeed.[286] The argument that Simmons was parole eligible because the state parole board had not yet declared him ineligible is incorrect.[287] Simmons was ineligible for parole as a matter of state law, even absent a formal declaration by the parole board, because the relevant South Carolina statute cited by Justice Stevens forbade the board from

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[279] *See* Michael G. Turner, et. al., *"Three Strikes And You're Out" Legislation: A National Assessment*, FED. PROBATION, Sep 1995, at 16.

[280] *Simmons*, 512 U.S. at 165, (plurality opinion).

[281] *Id.*; *see also supra* notes 27-51 and accompanying text.

[282] *Simmons*, 512 U.S. at 165, n. 5 (plurality opinion).

[283] *Id.*

[284] *See supra* notes 275-83 and accompanying text.

[285] Ramdass v. Angelone, 120 S. Ct. 2113, 2128-43 (2000) (Stevens, J., dissenting).

[286] *Id.* at 2130-32.

[287] *See* S.C. CODE ANN. § 24-21-640 (Supp. 1993).

granting parole to "any prisoner serving a sentence for a second or subsequent conviction . . . ."[288] Once Simmons had received his second conviction, the parole board was statutorily prohibited from granting him parole.[289] At the very best, declaration of Simmons' ineligibility was a purely ministerial act in that it was "foreseeable, imminent and inexorable."[290] Contrary to Stevens' assertion, nothing in either *Simmons* or *Ramdass* suggested that either decision was based on a future inevitability.[291] At the moment of sentencing, Simmons was technically ineligible for parole, even without a declaration from the parole board.[292]

The inverse of that argument, that Ramdass was parole ineligible as a matter of state law, is also incorrect.[293] According to Virginia law, a defendant was parole eligible until he had three predicate convictions, where conviction required entry of judgment.[294] At the time the jury was considering his sentence, Ramdass had a single predicate conviction which had been reduced to judgment.[295] Since it was not uncommon for verdicts in Virginia courts to be set aside before they are reduced to judgment,[296] entry of judgment did not qualify as a "purely ministerial act."[297]

Justice Stevens' citation of *Rollins v. Brazile*[298] to support the contention that entry of judgment is ministerial is puzzling. The language he quoted differentiates rendition of judgment by the trial judge, which it specifies is a judicial act, from entry of judgment by the clerk, a ministerial act.[299] It is inconceivable that the plurality and the Virginia Supreme Court used the "entry of judgment" language in reference to the clerk's act of re-

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[288] *Id.*

[289] *Id.*

[290] *Ramdass*, 120 S. Ct. at 2124 (plurality opinion) (*citing* Brief for Petitioner at 21, 36).

[291] *See Id.*; Simmons v. South Carolina, 512 U.S. 154, 161-74 (1994) (plurality opinion).

[292] *See* Ramdass v. Angelone, 120 S. Ct. 2113, 2120 (2000) (plurality opinion); *Simmons*, 512 U.S. at 166-70; S.C. CODE ANN. § 24-21-640 (Supp. 1993).

[293] *See* VA. CODE ANN. § 53.1-151(B1) (1993).

[294] *See, generally*, Smith v. Commonwealth, 113 S.E. 707 (Va. 1922).

[295] *See Ramdass*, 120 S. Ct. at 2117 (plurality opinion).

[296] *See Id.* at 2124.

[297] *Id.* at 2127 (O'Connor, J., concurring).

[298] *Id.* at 2133 (Stevens, J., dissenting) (*citing* Rollins v. Brazile, 139 S.E.2d 114, 117 (Va. 1964).

[299] *Id.* (citing *Rollins*, 139 S.E.2d at 214).

cording the judgment, rather than the judge's act of rendering it.[300] Even if they did, the judicial act of rendering judgment was also lacking in the Domino's verdict, [301] undermining Justice Stevens' argument.

D. THE RELATIVE CERTAINTY STANDARD IS NOT THE KEY FLAW IN THE VIRGINIA REGIME

The plurality committed a strategic mistake when it adopted the relative certainty standard, suggesting that "the possibility of post–verdict relief renders a jury verdict uncertain and unreliable until judgment is entered."[302] None of the caselaw the plurality cites supports this statement.[303] Additionally, as Justice Stevens correctly pointed out, the statutory standard for setting aside a jury verdict was identical to the standard for setting aside an entered judgment.[304] However, the entire debate about relative certainty was not relevant to the issue at hand, because the constitutional problem with the Virginia law is not only unrelated to the difference in certainty between a verdict and a judgment, but unrelated to *Simmons* altogether. [305]

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[300] Ramdass v. Commonwealth, 450 S.E.2d 360, 361 (Va. 1994).

[301] *See* Ramdass v. Angelone, 120 S. Ct. 2113, 2117 (2000) (plurality opinion).

[302] *Id.* at 2124.

[303] *Id.* at 2133 (Stevens, J., dissenting). Justice Stevens notes that the plurality cites eleven cases in support of this proposition. In fact, it cites only four, none of which suggest that an entered judgment is more certain than a verdict. The remaining seven cases are cited merely to demonstrate that Virginia courts routinely consider and grant pre-judgment motions to set aside verdicts. These cases are relevant only to the question of whether entry of judgment is a ministerial task. Dowell v. Commonwealth, 408 S.E.2d 263 (Va. App. 1991) and Smith v. Commonwealth, 113 S.E. 707 (Va. 1922), both state that a verdict is not legally a conviction under Virginia law until judgment has been entered. Blair v. Commonwealth, 66 Va. 850 (1874) held that the governor may pardon a person who has been convicted of a crime before the sentence has been imposed. It was already established that the governor could pardon the person *after* sentence had been imposed, so this decision simply established that an entry of judgment is no *less certain* than a naked verdict. Davis v. Commonwealth, 2000 WL 135148 (Va. App. 2000), merely held that because of the possibility of post-verdict motions, events subsequent to the jury's recommendation of sentence were not properly characterized as "none of the court's concern." *Id.* at 4, n.1. The opinion does not even address the issue of post-judgment motions, let alone find any disparity in certainty.

[304] *Id.* at 2132 (Stevens, J., dissenting).

[305] *See infra* notes 306-19 and accompanying text.

E. THE VIRGINIA LAW VIOLATES DUE PROCESS INDEPENDENT OF SIMMONS

Perhaps because he was so focused on the *Simmons* context of the case, Justice Stevens failed to realize that the Due Process flaw with the Virginia regime is not that it is inconsistent with *Simmons*, but that it is inconsistent with *Gardner v. Florida*.[306] The *Gardner* right of rebuttal exists independent of *Simmons*, and requires that a defendant not be sentenced to death "on the basis of information he had no opportunity to deny or explain."[307] Virginia law allowed the prosecutor in *Ramdass* to argue that the defendant posed a future danger, relying in part on the Domino's verdict.[308] Further, it allowed the prosecutor to inform the jurors that a jury had convicted Ramdass of the prior robbery.[309] Since the jury was not aware that Virginia does not consider a jury verdict to be a conviction until judgment has been entered, the Domino's conviction was a *fait accompli* from the jury's perspective when they were considering the sentence.[310] Were the conviction truly a *fait accompli*, however, the Kayani conviction would have rendered Ramdass parole ineligible, and consequently eligible for *Simmons* protection.[311] The Supreme Court's previous capital punishment decisions strongly suggest a guiding principle that a jury may not sentence a defendant to death on the basis of incomplete or inaccurate information.[312] That the bulk of such analysis has focused not on the "right to rebut" guarantee, but rather on the "mitigating evidence" guarantee, does not change the underlying principle.[313] To the extent that Virginia law allows a jury to sentence a defendant to death in part because it believes that a particular conviction is established, but does not allow the defendant to address the jury as if

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[306] 430 U.S. 349 (1977); *See infra* notes 307-19 and accompanying text.

[307] *Gardner*, 430 U.S. at 362.

[308] Ramdass v. Angelone, 120 S. Ct. 2113, 2118 (2000) (plurality opinion).

[309] *Id.*

[310] *Id.* at 2117-18.

[311] *See* Simmons v. South Carolina, 512 U.S. 154, 161-74 (1994) (plurality opinion). The Court seems to take for granted the contention that had the Domino's conviction been reduced to judgment, the Kayani verdict would have been Ramdass' third predicate strike, rendering him parole ineligible. Technically, this is not true, since the Kayani verdict would not become a predicate strike until the court entered judgment, long after the jury had finished deliberating.

[312] *See supra* notes 13-53 and accompanying text.

[313] *See supra* notes 13-53 and accompanying text.

that conviction were established, Virginia allows the defendant to be put to death without being allowed to meet the prosecution's case.[314] As Justice Stevens pointed out at the beginning of his dissent,

> [t]here is an acute unfairness in permitting a State to rely on a recent conviction to establish a defendant's future dangerousness while simultaneously permitting the State to deny that there was such a conviction when the defendant attempts to argue that he is parole ineligible and therefore not a future danger.[315]

This constitutional flaw is unrelated to *Simmons* because it could be remedied without affecting Ramdass' exclusion from *Simmons* protection.[316] Virginia could fix the problem if it prohibited the prosecutor from arguing future dangerousness based on "unadjudicated prior bad acts"[317] which, once adjudicated, would render the defendant parole ineligible. Alternately, Virginia could disallow use of such acts in future dangerousness arguments altogether. Under such a rule, neither the defendant nor the prosecutor would be allowed to discuss any conviction which had not been reduced to judgment, with the result that evidence of a prior bad act would become available to both parties at the moment judgment was entered, giving them equal access to the conviction and its parole–eligibility implications.[318] In either case, Virginia would have fixed the constitutional flaw in its capital punishment regime without changing the plurality's interpretation of *Simmons*.[319]

VI. CONCLUSION

Ramdass v. Angelone[320] involved two different constitutional questions: whether the defendant's right to present evidence of parole ineligibility in a capital case, established in *Simmons v. South Carolina*,[321] turns entirely on whether the defendant is ineligible for parole as a matter of state law; and whether the Vir-

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[314] Ramdass v. Angelone, 120 S. Ct. 2113, 2117-18 (2000) (plurality opinion); 2128-30 (Stevens, J., dissenting).

[315] *Id.* at 2128.

[316] *See infra* notes 317-19 and accompanying text.

[317] *Ramdass*, 120 S. Ct. at 2122 (plurality opinion).

[318] *Id.*

[319] *See supra* notes 306-18 and accompanying text.

[320] 120 S. Ct. 2113 (2000).

[321] 512 U.S. 154 (1994).

ginia capital sentencing regime, which allows the prosecutor to use unadjudicated prior bad acts to argue future dangerousness, complies with Due Process. None of the Justices separated the two questions, with the result that both the plurality and the dissent answered one question correctly. The plurality correctly concluded that the *Simmons* right properly turns on the defendant's parole–eligibility status as determined by state law. The dissent recognized that the Virginia regime violates the Due Process requirement that a defendant not be sentenced to death based on evidence which he "had no opportunity to deny or explain."[322]

On its face, this decision seems to increase the deference which federal courts owe to state supreme court determinations of a defendant's eligibility for *Simmons* protection. Nonetheless, the emphasis which the *Ramdass* plurality placed on state discretion is unlikely to have a significant impact on the Court's capital punishment jurisprudence because the Court has rarely allowed precedent which favors state discretion to stand in the way of a new Due Process restriction on that discretion. Ironically, since the Court essentially validated the flawed Virginia law, this decision will probably make it far more difficult for a defendant to challenge the unconstitutional aspect of the Virginia capital sentencing regime.

Christopher Varas

[322] Gardner v. Florida, 430 U.S. 349, 362 (1977).