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SHAFER v. SOUTH CAROLINA: ANOTHER MISSED OPPORTUNITY TO REMOVE JUROR IGNORANCE AS A FACTOR IN CAPITAL SENTENCING

Shafer v. South Carolina, 532 U.S. 36 (2001)

I. INTRODUCTION

In *Shafer v. South Carolina*,[1] the Supreme Court once again confronted South Carolina's practice of refusing to inform capital juries choosing between a sentence of life imprisonment or death that the defendant would be statutorily ineligible for parole if sentenced to a life term. Seven years earlier, in *Simmons v. South Carolina*,[2] the Court held that a capital defendant must be allowed to inform the jury of his prospective parole ineligibility, but only where: 1) the prosecutor had raised the issue of the defendant's future dangerousness, and 2) the only alternative to death is life imprisonment without the possibility of parole.[3] Subsequently, in response to the 1996 amendments to South Carolina's capital sentencing scheme, the South Carolina Supreme Court asserted that the rule in *Simmons* was no longer applicable in South Carolina.[4] However, in *Shafer* the United States Supreme Court rebuked this conclusion, holding that the "*Simmons* rule" did indeed still apply to the new South Carolina sentencing scheme.[5]

Unfortunately, in so doing the Court perpetuated the qualified rule of *Simmons*. The Constitution, and fundamental notions of justice, would have been better served had the Court taken this opportunity to affirm an unqualified right of capital defendants to inform juries that they would be ineligible for parole if sentenced to life

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[1] 532 U.S. 36 (2001).
[2] 512 U.S. 154 (1994).
[3] *Id.* at 178 (O'Connor, J., concurring).
[4] *Shafer*, 532 U.S. at 46–47.
[5] *Id.* at 51.

imprisonment. Extensive research, much of which was before the Court as it made its decision, has shown that capital jurors are in desperate need of being informed of the basic terms of their sentencing task. Where jurors are uninformed, imposition of the death sentence based in part on the arbitrary and capricious factor of juror ignorance seems inevitable. Furthermore, these problems are evident regardless of whether the prosecutor raises the issue of the defendant's future dangerousness, or whether the only alternative to death is life imprisonment without parole. An unqualified rule would also save time and effort at all levels in its application. These defects in the *Simmons* rule are amply illustrated by the facts surrounding the *Shafer* decision itself. Finally, an unqualified rule of disclosure would better comport with the Court's Eighth[6] and Fourteenth Amendment[7] jurisprudence concerning capital punishment. For all of these reasons, a capital defendant's prospective parole ineligibility under a life sentence should always be disclosed to the jury.

II. BACKGROUND

The United States Supreme Court inaugurated its modern death penalty jurisprudence in 1972, with the landmark case *Furman v. Georgia*.[8] In that decision, the Court struck down the capital sentencing schemes of Georgia and Texas, both of which granted unfettered discretion to sentencing juries, for violating the Eighth Amendment's proscription of cruel and unusual punishment.[9] While two justices argued that capital punishment should be declared unconstitutional *per se*,[10] the holding ultimately struck down the specific capital sentencing schemes at issue because under them the death penalty was "pregnant with discrimination,"[11] "wantonly . . . and freakishly imposed,"[12] and without a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it was not."[13] One of the primary rationales for the decision was the Court's recognition that the death penalty is unique in its moral significance and irrevocability, thus demanding a heightened degree of scrutiny

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[6] U.S. CONST. amend. VIII.

[7] U.S. CONST. amend. XIV, § 1.

[8] 408 U.S. 238 (1972).

[9] *Id.* at 239–40.

[10] *Id.* at 305 (Brennan, J., concurring); *Id.* at 371 (Marshall, J., concurring).

[11] *Id.* at 257 (Douglas, J., concurring).

[12] *Id.* at 310 (Stewart, J., concurring).

[13] *Id.* at 313 (White, J., concurring).

under the Eighth and Fourteenth Amendments.[14] The Court also recognized that the constitutional proscription of cruel and unusual punishment was a dynamic one, evolving along with our society's standards of decency.[15] From these first principles, the Court embarked on the project of delimiting the constitutional requirement that administration of the death penalty be based on a fully and fairly reasoned determination that death is indeed the appropriate punishment in a particular case.[16]

A. SUPREME COURT CASELAW BEFORE *SIMMONS*

Just four years after *Furman*, the Court passed down five decisions assessing the constitutionality of various states' capital sentencing schemes.[17] In *Gregg v. Georgia*,[18] the Court found Georgia's reformed capital sentencing scheme to be compatible with the Eighth Amendment,[19] explicitly declaring that capital punishment was not *per se* unconstitutional.[20] The Court first noted that, because the constitutional proscription of cruel and unusual punishment is intrinsically tied to the community's evolving standards of decency, the Court should show considerable deference to the state legislative process as the states attempted to construct constitutionally valid capital sentencing schemes.[21] But the Court reaffirmed the principle of *Furman* that, because of the death penalty's unique severity, "it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[22]

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[14] *See, e.g., id.* at 286–91 (Brennan, J., concurring) (discussing the magnitude of the moral difference between the death penalty and mere incarceration).

[15] *Id.* at 242 (Douglas, J., concurring).

[16] *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring).

[17] Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976). It should be noted that all of these cases were essentially decided by Justices Stewart, Powell, and Stevens. Justices Marshall and Brennan consistently voted to strike down the death penalty schemes at issue, and the remaining Justices (White, Burger, Rehnquist and Blackmun) voted to uphold the schemes at issue in each case.

[18] 428 U.S. 153 (1976). The holding and analysis in *Gregg* were mirrored in the companion case of Proffitt v. Florida, 428 U.S. 242 (1976).

[19] *Gregg*, 428 U.S. at 207.

[20] *Id.* at 186–87.

[21] *Id.* at 174–76.

[22] *Id.* at 188.

The Court then established some basic mechanisms by which a sentencing scheme could avoid such a result.[23] First, it noted that sentencing discretion should be "suitably directed and limited."[24] Second, the Court noted that the decision must be fully informed, including the consideration of evidence regarding the defendant's individual character and circumstances which might ordinarily be inadmissible.[25] To accomplish this, the Court strongly suggested the implementation of a bifurcated proceeding so that such evidence might be presented only after a determination of guilt has been made.[26] Since the new Georgia sentencing scheme did appropriately direct and limit sentencing decisions by directing the jurors to consider ten statutory aggravating circumstances, and employed a bifurcated proceeding in which the jury might fully consider any relevant mitigating evidence,[27] the Court held that it was constitutional.[28]

In the companion case of *Jurek v. Texas*,[29] the Court also upheld the reformed capital sentencing scheme of Texas.[30] Of particular concern for the Court was the fact that the new Texas scheme required jurors to consider whether the defendant was likely to pose a "continuing threat to society."[31] Although acknowledging that such considerations were inherently speculative, the Court did not find this fact alone to cause a constitutional infirmity.[32] Indeed, the Court noted that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."[33] The critical factor was whether the jury would be allowed to consider any relevant mitigating evidence the defendant might proffer that could affect that determination.[34] The Court noted that, "[it] is essential. . .that the jury

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[23] *Id.* at 189–91.

[24] *Id.* at 189.

[25] *Id.* at 189–90.

[26] *Id.* at 190–91.

[27] *Id.* at 163–67.

[28] *Id.* at 206–07.

[29] 428 U.S. 262 (1976).

[30] *Id.* at 276.

[31] *Id.* at 272.

[32] *Id.* at 274–75.

[33] *Id.* at 275.

[34] *Id.* at 271. The Court further emphasized that,

> [a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. . . . Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must al-

have before it all possible relevant information about the individual defendant whose fate it must determine."[35] Since the new Texas sentencing scheme did allow for the unfettered consideration of the defendant's mitigating evidence in a bifurcated proceeding, the Court found that it was consistent with the demands of the Eighth and Fourteenth Amendments.[36]

The Court further refined the principles established in *Furman* in the case of *Woodson v. North Carolina*.[37] The capital sentencing scheme at issue in that case made the death penalty mandatory for certain particular offenses.[38] The Court concluded that the scheme violated the Eighth and Fourteenth Amendments because it merely "papered over" the problems exposed in *Furman*.[39] Specifically, the Court recognized that under such mandatory schemes, jurors generally tailored their finding of guilt to the offense that carried the penalty they thought appropriate.[40] Particularly troubling for the Court was the fact that the sentencing scheme did not allow for an individualized assessment of the character and history of the defendant and the circumstances of his crime.[41] The Court concluded that such an assessment was necessary under the Eighth Amendment in capital cases, because the finality of the sentence demanded a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case."[42] Because North Carolina's sentencing scheme did not allow for such a fully informed and individualized assessment, it was struck down.[43]

The Court further developed the principles of its death penalty jurisprudence the following year in *Gardner v. Florida*.[44] That case concerned the imposition of the death penalty by a trial judge who relied in part on a presentence investigation report that was not fully

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low the sentencing authority to consider mitigating circumstances.

Id.

[35] *Id.* at 276.

[36] *Id.*

[37] 428 U.S. 280 (1976). The holding and analysis of *Woodson* were mirrored in the companion case of *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976).

[38] *Woodson*, 428 U.S. at 285–86.

[39] *Id.* at 302, 305.

[40] *Id.* at 302–03.

[41] *Id.* at 304–05.

[42] *Id.* at 305.

[43] *Id.*

[44] 430 U.S. 349 (1977).

disclosed to either the defense counsel or the prosecutor.[45] The Court once again cited to the moral severity and finality of capital punishment as considerations which demanded that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."[46] The Court also noted that its prior decisions had scrutinized not only specific sentencing results, but also the procedures which led to them.[47] Thus, the Court concluded that "petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."[48]

The Court next dealt with the requirements of the Eighth Amendment in the context of capital sentencing in *Lockett v. Ohio*.[49] In that case, the Court dealt with a sentencing scheme that limited the sentencer's consideration of evidence concerning the defendant's history and character and the circumstances of the offense.[50] The Court reaffirmed the Eighth Amendment principle that capital sentencing decisions must be based on an individualized assessment which fully takes into account, as mitigating factors, any evidence the defense proffers concerning the circumstances of the crime or of the defendant's character and background.[51] Once again, this principle was predicated on capital punishment's uniquely irrevocable character.[52] The Court concluded, "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not

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[45] *Id.* at 351.

[46] *Id.* at 357–58.

[47] *Id.* at 358.

[48] *Id.* at 362. Significantly, the decision in *Gardner* was predicated solely on the requirements of the Fourteenth Amendment's Due Process Clause, rather than on the Fourteenth Amendment's Clause in conjunction with the Eighth Amendment's proscription of cruel and unusual punishment.

[49] 438 U.S. 586 (1978).

[50] *Id.* at 589. Specifically, the Ohio statute limited the sentencer's consideration to three narrowly defined mitigating circumstances:

> (1) The victim of the offense induced or facilitated it. (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation. (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Id. at 607.

[51] *Id.* at 604.

[52] *Id.* at 605.

preclude consideration of relevant mitigating factors."[53]

In *Eddings v. Oklahoma*,[54] the Court considered a case in which a trial judge refused to consider evidence of the sixteen–year–old defendant's troubled background in his determination that death was the appropriate punishment.[55] Predictably, the Court held that the rule of *Lockett* had been violated, and that while the sentencer was free to decide what weight to assign mitigating evidence, it was not permitted to peremptorily exclude such evidence from its consideration.[56] The trial judge's decision was reversed and remanded for a determination of the appropriate sentence based on a full consideration of the mitigating evidence.[57] In a concurring opinion, Justice O'Connor succinctly expressed the fundamental principle of the Court's modern capital punishment jurisprudence to date. She wrote, "[b]ecause sentences of death are 'qualitatively different' from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." [58]

The Court seemed to rein in its rigid scrutiny of State sentencing schemes in *California v. Ramos*.[59] In that case, the Court considered California's "Briggs Instruction," which had been mandated in all capital cases by a voter referendum.[60] The instruction alerted sentencing juries that a sentence of life imprisonment without the possibility of parole may be commuted by the Governor to a sentence which did allow for the possibility of parole, but it did not inform those juries that a sentence of death might likewise be commuted.[61] The California Supreme Court found the instruction to be unconstitutional, but the United States Supreme Court reversed that decision.[62] The Court first re–iterated the principle, established in *Gregg*, that considerable deference should be shown to the state legislative proc-

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[53] *Id.* at 608.

[54] 455 U.S. 104 (1982).

[55] *Id.* at 109.

[56] *Id.* at 113–14.

[57] *Id.* at 117.

[58] *Id.* at 117–18 (citations omitted).

[59] 463 U.S. 992 (1983).

[60] *Id.* at 995 n.4.

[61] *Id.* at 995–96. As the Court acknowledged, an instruction that a death sentence may be commuted by the governor had previously been declared unconstitutional by the California Supreme Court. *Id.* at 1011–12.

[62] *Id.* at 996–97.

ess in determining what factors are relevant to juries in their capital sentencing determination.[63]

The Court then advanced three lines of argument in support of its ruling that the Briggs Instruction did not violate the Eighth Amendment. First, the Court rebuked the proposition that the instruction invited the jury to consider matters too speculative on which to form a properly reasoned sentencing decision, namely the possibility that a future governor would indeed commute the life sentence.[64] The Court reasoned that the true significance of the instruction was that it drew the attention of the jury to the possible future dangerousness of the defendant.[65] Since the Court had ruled in *Jurek* that future dangerousness was a proper subject for the jury to consider in its capital sentencing decision, the Briggs Instruction was likewise not too speculative.[66] Second, the Court dismissed the contention that the instruction drew the juror's attention to matters outside the proper scope of their consideration.[67] The Court reiterated its contention that the essential effect of the instruction was to bring to the jury's attention the issue of the defendant's future dangerousness.[68] Finally, the Court denied that the instruction skewed the jury's analysis by suggesting that a sentence of life imprisonment without the possibility of parole was uncertain, due to the possibility of commutation, but a sentence of death was not similarly uncertain.[69] The Court reasoned that even if a "balancing" instruction was provided, informing juries that a sentence of death carried with it a similar possibility of commutation, this would not impact the jury's desire to see the defendant off the streets permanently. Furthermore, the Court argued that such an instruction might actually prejudice the defendant by de-emphasizing the gravity of a sentence of death in the minds of the jurors.[70] Throughout the opinion, the Court emphasized that the Briggs

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[63] *Id.* at 1000.

[64] *Id.* at 1001–02.

[65] *Id.* at 1003.

[66] *Id.* As Justice Marshall pointed out, the Court nowhere addressed the actual probability that a capital defendant in California would have his sentence commuted, nor the ability of jurors to assess that probability. *Id.* at 1018–21.

[67] *Id.* at 1005–06.

[68] *Id.* at 1008.

[69] *Id.* at 1010–11. Under the California State Constitution, the governor was empowered to commute or pardon both life sentences and the death sentence. *Id.* at 1010 n.24.

[70] *Id.* at 1011–12. The Court cited to *People v. Morse*, 388 P.2d 33 (Cal. 1964), for the proposition that a balancing instruction might actually prejudice the defendant. In that case, the California State Supreme Court declared an instruction that the death sentence was sub-

instruction did convey a legally correct fact, and opined "[s]urely, the respondent cannot argue that the Constitution prohibits the State from accurately characterizing its sentencing choices."[71]

Finally, the Court again addressed capital sentencing scheme standards in *Skipper v. South Carolina*.[72] In that case, the South Carolina Supreme Court had determined that information concerning a defendant's conduct in jail awaiting trial was irrelevant for purposes of sentencing, and hence could not be considered as mitigating evidence showing his adaptability to life in prison.[73] The majority opinion, citing to *Lockett* and *Eddings*, found that the Eighth Amendment demanded the admission of all relevant mitigating evidence proffered by the defendant, and that evidence of good behavior in prison while awaiting trial qualified as such.[74] The concurring minority[75] argued that the decision should have been based on the narrower due process grounds, established in *Gardner*, that the defendant must be allowed to rebut evidence and arguments used against him.[76]

B. THE *SIMMONS* DECISION

In *Simmons v. South Carolina*,[77] the defendant was convicted of the capital murder of an elderly woman.[78] Because of his prior convictions for assault, he would have been parole ineligible under South Carolina's repeat violent offender provision.[79] However, the trial judge refused the defense counsel's request to inform the jury that the defendant would be statutorily ineligible for parole if sentenced to life imprisonment rather than death.[80] Subsequently, the jury returned from deliberations to explicitly inquire of the trial judge

ject to the governor's power of commutation unconstitutional because jurors would then presume that their sentence of death would not be final, but would rather be subject to further consideration by the governor.

[71] *Ramos*, 463 U.S. at 1005 n.19.

[72] 476 U.S. 1 (1986).

[73] *Id.* at 3.

[74] *Id.* at 4.

[75] The concurrence was by Justice Powell, with Chief Justice Burger and Justice Rehnquist joining. *Id.* at 9.

[76] *Id.* The prosecution had argued during closing arguments that Ronald Skipper would likely commit violent crimes in prison. *Id.*

[77] 512 U.S. 154 (1994).

[78] *Id.* at 156.

[79] S.C. CODE ANN. § 24-21-640 (Supp. 1993). This was not the same provision under which Wesley Shafer was rendered parole ineligible, but it is still in effect in South Carolina.

[80] *Simmons*, 512 U.S. at 158-60. During an in camera hearing on the subject, the defense counsel introduced testimony by a State pardon board attorney to confirm that Simmons would never be paroled. He also introduced statewide public opinion survey by the

from deliberations to explicitly inquire of the trial judge what the State's parole policy would be with regard to Simmons.[81] However, the trial judge refused to give the jury a straight answer, and the answer he did give strongly suggested that parole would indeed be a future possibility for Simmons.[82] The jury returned shortly thereafter with a sentence of death.[83]

The plurality opinion[84] found that, by refusing to inform the jury of Simmons's parole ineligibility, the State had deprived him of his due process rights under the Fourteenth Amendment.[85] The plurality relied primarily on the principle, established in *Gardner* and reiterated in *Skipper*, that a capital defendant must have a full opportunity to rebut the charges made against him.[86] In this case, the prosecution had clearly raised the issue of Simmons's future dangerousness to the community.[87] Since the fact that Simmons was statutorily parole ineligible directly militated against the charge that he would pose a future threat to society at large if sentenced to life imprisonment, the trial court could not properly withhold that information.[88] The plurality emphasized that the defense counsel was merely asking for a legally correct instruction.[89] Moreover, the plurality recognized that prospective jurors might be largely uninformed as to the recent trend of denying parole eligibility to violent offenders, leading them to presume that a capital defendant would be eligible for parole if sen-

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University of South Carolina (further discussed below) which showed that prospective jurors in South Carolina are likely to presume that a capital defendant sentenced to life imprisonment will be released on parole, and that this is likely to be a factor in their sentencing decision. *Id.* at 158.

[81] *Id.* at 160. The jury asked, "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.*

[82] *Id.* The trial judge instructed, "You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. This is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning." *Id.*

[83] *Id.*

[84] Justice Blackmun wrote for the plurality. He was joined by Justices Stevens, Souter, and Ginsburg. *Id.* at 156.

[85] *Id.* at 171.

[86] *Id.* at 161–62.

[87] *Id.* During its closing argument, the prosecution argued, "Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Id.* at 176.

[88] *Id.* at 163–64.

[89] *Id.* at 169.

tenced to life imprisonment.[90] They further recognized that "it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not."[91] Thus, the State had created a "false dilemma" for the jury, in that it was led to believe that the only way to prevent Simmons from posing a future threat to society would be to sentence him to death.[92] The plurality concluded that this situation was repugnant to the requirements of due process in the context of capital sentencing.[93]

Justice O'Connor wrote a concurring opinion in which Chief Justice Rhenquist and Justice Kennedy joined.[94] O'Connor agreed with the plurality's basic line of argument, that the right of rebuttal predicated on *Skipper* and *Gardner* required that a capital defendant be allowed to inform the jury of his parole ineligibility where the prosecution argued future dangerousness.[95] However, citing *Ramos*, O'Connor went on to stress that the Court had shown great deference to the States in deciding whether information regarding parole eligibility should be presented to the jury.[96] Hence, she emphasized that due process requires that the defendant be allowed to inform the jury of his parole ineligibility only as a form of rebuttal to the prosecution's argument of future dangerousness.[97] Ultimately, the narrow holding held out by O'Connor, and hence a majority of the Court, was: "Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without the possibility of parole, due process entitles the defendant to inform the capital sentencing jury — by either argument or instruction — that he is parole ineligible."[98]

Justice Souter, with whom Justice Stevens joined, concurred with the result but argued that a broader rule should be imple-

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[90] *Id.* at 169–70.

[91] *Id.* at 163.

[92] *Id.* at 161–62. Justice Blackmun wrote,

> In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing the petitioner to death and sentencing him to a limited period of incarceration.

Id. at 161.

[93] *Id.* at 162.

[94] *Id.* at 175.

[95] *Id.* at 175–76.

[96] *Id.* at 176–77.

[97] *Id.* at 178.

[98] *Id.*

mented.[99] Justice Souter argued that a defendant should be allowed to have the jury informed of his parole ineligibility regardless of whether the prosecution has raised the issue of future dangerousness.[100] He reasoned that such a rule was compelled by the Eighth Amendment principle that a defendant is entitled to a fully and fairly reasoned moral judgment that death is the appropriate judgment.[101] He further argued that here, the real issue was the proper definition of the basic terms of the jury's decision, the provision of which is "an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die."[102] Since it was clear that the jury might be misinformed as to the true meaning of "life imprisonment" due to the relatively recent development of repeat offender and truth–in–sentencing provisions, such as the one applicable to Simmons, the Eighth Amendment entitled the defendant to ensure that the jury was accurately informed as to the terms of its sentencing decision.[103] And in light of the fact that the jury explicitly inquired as to the parole policy applicable to Simmons, and the trial judge refused to give them a straight answer, the prospect that Simmons's death sentence was based at least in part on juror misperception seemed certain.[104] This result was clearly repugnant to the Eighth Amendment.[105]

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[99] *Id.* at 172. The *Simmons* decision also included a concurrence from Justice Ginsburg and a dissent from Justice Scalia, in which Justice Thomas joined. The main point argued by Justice Ginsburg was that it would be sufficient for defense counsel to inform the jury of the defendant's parole ineligibility. *Id.* at 174–75 (Ginsburg, J. concurring). Justice Scalia asserted that the decision was beyond the scope of the Court's constitutional authority with respect to the States, as established by the Due Process Clause, prior precedent, and the prevailing practice of the people. *Id.* at 178–79 (Scalia, J. concurring). He also reiterated that the States have been accorded a great degree of deference in determining if a jury is to be informed about the possibility of the defendant's parole. *Id.* at 183 (Scalia, J. concurring). Finally, he contended that refusal to admit information about Simmons's parole ineligibility did not rise to the level of "fundamental unfairness" which the Court had previously employed as a standard in assessing due process, and that the possibility that the jury's decision was predicated on this lack of information was "far fetched." *Id.* at 184 (Scalia, J. concurring).

[100] *Id.* at 172.

[101] *Id.*

[102] *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 190 (1976)).

[103] *Id.* at 173.

[104] *Id.* at 173–74.

[105] *Id.* at 174. Justice Souter also argued that in such circumstances the trial judge should be required to inform the jury that the defendant is statutorily parole ineligible. *Id.* at 173. He reasoned that the Court has long recognized that the instructions of the trial judge carry the greatest weight with the jury, and since the issue here was one of law, the trial judge ought to be required to establish it as such. *Id.* Ultimately, Justice Souter found that

C. POST-*SIMMONS* DEVELOPMENTS

A number of cases decided since *Simmons* have further delineated the ruling in that case. In *O'Dell v. Netherland*,[106] the Court determined that the holding in *Simmons* was a "new" rule within the meaning of *Teague v. Lane*.[107] Hence, the rule was inapplicable to defendants whose death sentence had been passed down before the decision in *Simmons*.[108] The Court denied certiorari in *Brown v. Texas*,[109] a case in which a capital defendant in Texas had been denied the opportunity to present evidence that if sentenced to life imprisonment he could not be paroled for at least thirty-five years. However, Justice Stevens[110] wrote to acknowledge the tension between the facts of that case and the holding in *Simmons*,[111] and to point out the disturbing practice in Texas of informing non-capital juries of all the parole ramifications of their sentencing decision while completely barring that information from capital juries.[112] He went on to emphasize that the denial of certiorari had no precedential value and did not endorse the practice.[113] In *Ramdass v. Angelone*,[114] the Court held that the *Simmons* rule did not apply to a defendant who, at the time of the sentencing proceeding, had not yet qualified as parole ineligible under Virginia's three-strikes law.[115] The defendant in that case had received a jury verdict of guilty on what would ostensibly be his third strike offense under the law, but judgment had not yet been entered by the trial court, and thus the three strikes law had not officially taken effect.[116] The Court held that such impending

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"[b]ecause . . . juries in general are likely to misunderstand the meaning of the term 'life imprisonment' in a given context . . . the judge must tell the jury what the term means, when the defendant so requests. . . . By effectively withholding from the jury the life-without-parole alternative, the trial court diminished the reliability of the jury's decision that death, rather than that alternative, was the appropriate penalty in this case." *Id.* at 173–74.

[106] 521 U.S. 151 (1997).

[107] 489 U.S. 288 (1989).

[108] *O'Dell*, 521 U.S. at 153.

[109] 118 S. Ct. 355 (1997).

[110] Stevens was joined by Justices Souter, Ginsburg and Breyer. *Id.* at 355.

[111] *Id.*

[112] *Id.* at 356.

[113] *Id.*

[114] 530 U.S. 156 (2000).

[115] One pertinent fact in the case was that the jury returned from its sentencing deliberations to specifically inquire of the trial judge what Ramdass's parole status would be under Virginia law. *Id.* at 162.

[116] *Id.* at 179–80 (O'Connor, J., concurring).

parole ineligibility was insufficient, and that *Simmons* only applies where the defendant is in fact statutorily ineligible for parole at the time of sentencing.[117]

D. THE SOUTH CAROLINA CAPITAL SENTENCING LAW

Under current South Carolina law, juries in capital cases take part in a bifurcated proceeding in which they first make a determination of guilt, and then make a sentencing determination in a separate proceeding.[118] During the sentencing phase, the defendant is given wide latitude in presenting mitigating evidence.[119] As the sentencing proceeding concludes, jurors are requested to make two distinct determinations. First, they are to determine if a statutory aggravating circumstance has been proven beyond a reasonable doubt.[120] If they fail to make such a finding, then their role in sentencing ends and they do not make a sentencing recommendation.[121] In that event, the trial judge will sentence the defendant to either life imprisonment or a thirty–year mandatory minimum term of years.[122] On the other hand, if the jury does find that a statutory aggravator has been proven beyond a reasonable doubt, they must choose between a sentence of life imprisonment or death.[123] Any person so sentenced to life imprisonment will be ineligible for parole or any other early release program.[124]

The South Carolina sentencing scheme had changed significantly since the trial of Jonathan Simmons.[125] Under the former system, if a statutory aggravator was not proven beyond a reasonable doubt, a sentence of life imprisonment with a mandatory minimum of twenty years was imposed.[126] If a statutory aggravator was found, then the sentencing alternatives would be death or life imprisonment with a mandatory minimum of thirty years.[127] What made Simmons parole ineligible was a distinct provision that applied to repeat violent of-

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[117] *Id.* at 165–66.
[118] S.C. CODE ANN. § 16–3–20 (A), (B) (Supp. 1998).
[119] *Id.* at § 16–3–20 (B).
[120] *Id.* at § 16–3–20 (C).
[121] *Id.*
[122] *Id.* at § 16–3–20 (B).
[123] *Id.* at § 16–3–20 (A), (B).
[124] *Id.* at § 16–3–20 (A).
[125] *See, e.g.*, Shafer v. South Carolina, 532 U.S. 36, 46 n.3 (2001).
[126] S.C. CODE ANN. § 16–3–20 (A) (Supp. 1993).
[127] *Id.*

fenders.[128] This repeat offender provision is still in effect, although it is now redundant in the context of capital sentencing.

III. FACTS AND PROCEDURAL HISTORY

A. FACTS OF THE CRIME

On the night of April 12, 1997, eighteen–year–old Wesley Aaron Shafer[129] and his friends Justin Porter and Adam Mullinax attempted to rob a convenience store.[130] The three arrived at the "Hot Spot" in Union County, South Carolina at 1:00 a.m.[131] As they cased the store, the few customers present departed because they suspected trouble.[132] That left store clerk Ray Broome alone behind the counter.[133] A few minutes passed, after which Broome momentarily left his post.[134] Porter then attempted to break into the cash register, but was unsuccessful.[135] As Broome returned, the three departed and proceeded to a nearby wooded area in order to discuss how to perpetrate the robbery.[136] At that point Shafer, according to a statement he later made to the police, "just snapped."[137] He reentered the Hot Spot, walked toward the counter where Broome was standing, and without warning shot him in the head from several feet away.[138] He then proceeded to another side of the counter, and after pausing momentarily, shot Broome once again in the head.[139] Shafer and Porter tried once again to force open the register, but failed.[140] As Shafer and Porter departed, they were seen by witnesses who soon discovered Broome lying behind the counter.[141] Shafer later confessed to the killing, and the whole incident was recorded on the store's secu-

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[128] § 24–21–640.
[129] *Shafer*, 532 U.S. at 40; State v. Shafer, 531 S.E.2d 524, 526 (S.C., 2000).
[130] *State v. Shafer*, 531 S.E.2d at 526.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* at 526–27.
[138] *Id.* at 526.
[139] *Id.*
[140] *Id.*
[141] *Id.*

rity camera.[142]

B. THE TRIAL

After a grand jury indicted Shafer on charges of murder, attempted armed robbery and conspiracy, the prosecutor informed Shafer that he would be seeking the death penalty and intended to present evidence of Shafer's "propensity for [future] violence and unlawful conduct."[143] Shafer was convicted on all counts, and the trial entered the penalty phase.[144] Prior to the closing arguments, there was an *in camera* hearing to determine the content of the jury instructions.[145] The defense counsel argued that under *Simmons* and the Due Process Clause of the Fourteenth Amendment, the instructions should explicitly inform the jury that Shafer would be statutorily ineligible for parole if sentenced to a life term.[146] The prosecutor objected, arguing that *Simmons* was inapplicable because he had not explicitly argued that Shafer posed a future danger to the community.[147] The defense counsel countered that the prosecutor had put on witnesses who directly attested to Shafer's potential for future dangerousness, and so could not now claim that the issue of future dangerousness had not been raised.[148] The trial judge decided that the prosecutor had not raised the issue of future dangerousness to the degree necessary to trigger the *Simmons* rule, and denied the defense counsel's request to inform the jury of Shafer's prospective parole ineligibility.[149] The defense counsel then made a motion to be allowed to read the statute directly to the jury during his closing arguments, and the prosecutor again objected.[150] The trial judge denied this motion as well.[151]

After the prosecutor's closing argument, the defense counsel renewed its plea to inform the jury of Shafer's prospective parole ineli-

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[142] *Id.* at 526 n.4.

[143] *Shafer*, 532 U.S. at 40.

[144] *State v. Shafer*, 531 S.E.2d at 526.

[145] *Shafer*, 532 U.S. at 41.

[146] *Id.*

[147] *Id.*.

[148] *Id.* Specifically, witnesses had testified to the effect that Shafer had committed a post arrest assault and other infractions while in jail awaiting trial. *Id.*

[149] *Id* at 41-42.

[150] *Id.* at 42.

[151] *Id.*

gibility.[152] The defense counsel argued that the prosecutor had just repeated the testimony of witnesses who had made direct statements as to Shafer's potential for future dangerousness.[153] While the trial judge expressed concern that the prosecutor had toed the line, he once again denied the defense counsel's plea.[154] In the end, the trial judge instructed the jury simply that "life imprisonment means until the death of the defendant."[155] Defense counsel once again objected, and was overruled by the trial judge.[156]

After about three and a half hours of deliberation, the jury returned with a questionnaire for the judge.[157] They asked two questions: "1) Is there any remote chance for someone convicted of murder to become elig[i]ble for parole? 2) Under what conditions would someone convicted of murder be elig[i]ble for parole?"[158] The defense counsel once again urged the judge to simply read the portions of the South Carolina capital murder statute pertaining to parole ineligibility to the jury.[159] The prosecution countered that under South Carolina law, the jury should not be allowed to consider state parole policy in its sentencing determination.[160] The trial judge once again sided with the prosecution.[161] He informed the jury only that, "life imprisonment means until the death of the offender . . . . Parole eligibility or ineligibility is not for your consideration."[162] Eighty minutes later the jury returned with a sentence of death.[163] Shafer appealed to the South Carolina Supreme Court.

C. THE DIRECT APPEAL

Among other reasons, not relevant here, Shafer appealed on the ground that the trial court erred in refusing to instruct the jury as to his statutory parole ineligibility if he were sentenced to a term of life

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[152] *Id.* at 43.

[153] *Id.* Specifically, the prosecutor had dramatically repeated the words of a terrified witness just after the crime: "they might come back, they might come back." *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 43-44.

[157] *Id.* at 44.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.* at 45.

[162] *Id.*

[163] *Id.*

imprisonment by the jury.[164] The South Carolina Supreme Court denied the appeal and affirmed the rulings of the trial judge.[165] The court's basic line of argument was that the *Simmons* decisions should be narrowly construed, and that a number of state and federal courts had already done so.[166] Hence, the *Simmons* holding should be strictly limited to its facts.[167] The court proceeded to distinguish the present case from *Simmons* on the basis of the sentencing schemes applicable in each case.[168]

In *Simmons*, the old South Carolina sentencing scheme operated such that when a capital jury found that a statutory aggravator had been proven, it then had to choose between a sentence of life imprisonment or death.[169] If no statutory aggravator were found, then the trial judge would impose a sentence of life imprisonment, but with a lesser minimum time served.[170] For Simmons, a life sentence would have been without the possibility of parole in either case due to the state's repeat violent offender provision.[171] The new sentencing scheme applicable in Shafer's trial worked essentially the same way, but if the jury did not find that a statutory aggravator had been proven, then the judge would have a choice between life imprisonment and a mandatory minimum thirty–year term of years.[172] Hence, there would be three legally possible outcomes: a mandatory minimum thirty–year term of years, a term of life imprisonment, and the death penalty.[173] According to the South Carolina Supreme Court, this was sufficient to distinguish the present case from *Simmons*, the holding of which the court construed as follows: due process requires that a defendant be allowed to inform the jury of his parole ineligibility only if the prosecution argues as to his future dangerousness, and only if life imprisonment without the possibility of parole and death are the only legally possible sentencing alternatives.[174]

The South Carolina Supreme Court went on to address another

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[164] State v. Shafer, 531 S.E.2d 524, 527 (S.C., 2000).
[165] *Id.*
[166] *Id.* at 528.
[167] *Id.*
[168] *Id.*
[169] Shafer v. South Carolina, 532 U.S. 36, 46 n.3 (2001).
[170] *Id.*
[171] *Id.*
[172] *Id.* at 41-41.
[173] *State v. Shafer*, 531 S.E.2d at 528.
[174] *Id.*

of Shafer's contentions: that the failure to inform the jury of Shafer's prospective parole ineligibility violated the Eighth Amendment of the United States Constitution.[175] The South Carolina Supreme Court conceded Shafer's argument that the Eighth Amendment prohibits the State from limiting the sentencing jury's consideration of any relevant mitigating evidence which the jury might weigh against imposition of the death penalty.[176] However, citing to *California v. Ramos*,[177] the court argued that the United States Supreme Court has generally left it to the states to decide what substantive factors are relevant in making a sentencing determination.[178] The court then cited to a line of United States and South Carolina Supreme Court precedent establishing that parole ineligibility has not been considered a "mitigating factor" within the meaning of the Eighth Amendment jurisprudence, and that declining to inform juries of a capital defendant's prospective parole ineligibility has not been held to violate the Eighth Amendment.[179] The court further concluded that because juries are charged only with the task of choosing a sentence, and not "legislat[ing] a plan of punishment," informing juries of a capital convict's prospective parole ineligibility will only lead to inaccuracy in the jury's sentencing determination.[180] In other words, because the South Carolina Supreme Court had previously determined that the issue of parole eligibility is irrelevant to a capital jury's sentencing decision, it reasoned that presenting the jury with such irrelevant information would only skew that decision, making it "less reliable."[181]

Shafer also argued that the trial court had erred in the supplemental instruction it gave in response to the jury questionnaire.[182] He contended that: 1) the trial judge should have informed the jury he would have been statutorily parole ineligible if sentenced to life, 2) the trial judge's actual response wrongly suggested that Shafer would be eligible for parole if sentenced to life, and 3) the trial judge erred in refusing to simply read the South Carolina statute governing parole

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[175] *Id.* at 529.

[176] *Id.* (citing Payne v. Tennessee, 501 U.S. 808, 822 (1991); Eddings v. Oklahoma, 455 U.S. 104, 114 (1982)).

[177] 463 U.S. 992, 1001 (1983).

[178] *State v. Shafer*, 531 S.E.2d at 529.

[179] *Id.* at 529–30.

[180] *Id.* at 530–31.

[181] *Id.* at 531.

[182] *Id.*

eligibility for a capital convict sentenced to life imprisonment.[183] The South Carolina Supreme Court summarily dismissed all three contentions.[184] First, it reiterated that under South Carolina precedent a capital defendant's parole eligibility is considered irrelevant with regard to the sentencing determination.[185] Second, the court concluded that because the supplemental jury instruction in this case appeared less suggestive than the similar instruction issued in *Simmons* (also in response to a jury questionnaire), it did not suggest that Shafer was parole eligible.[186] Third, the court held that the trial judge did not err in refusing to read the proffered portion of the relevant statute, because parole ineligibility was not a proper consideration for the jury under South Carolina precedent.[187] The court further criticized Shafer for proffering only the sections of the statute that would work in his favor.[188]

Chief Justice Finney wrote a dissenting opinion.[189] He first noted that under the new South Carolina sentencing scheme, Shafer would have been parole ineligible no matter what the sentence.[190] Even if the jury failed to find a statutory aggravator and the judge sentenced him to a mandatory minimum thirty–year term of years, Shafer would not be eligible for parole.[191] Thus, under the present South Carolina sentencing scheme, the jury's first question could have simply been answered "no."[192]

Chief Justice Finney then conceded that *Simmons* did not control the present case because future dangerousness had not been argued.[193] However, he contended that "the overriding principle to be drawn from that decision is that due process is violated when a jury's speculative misunderstanding about a capital defendant's parole eligibility is allowed to go uncorrected."[194] Since the trial judge's response to the jury questionnaire did suggest that parole was a possibility for

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[183] *Id.*
[184] *Id.* at 531–32.
[185] *Id.* at 531.
[186] *Id.*
[187] *Id.* at 532.
[188] *Id.*
[189] *Id.* at 534.
[190] *Id.* at 534 n.1.
[191] *Id.*
[192] *Id.*
[193] *Id.* at 534 n.2.
[194] *Id.* at 534.

Shafer, the requisite "speculative misunderstanding" was clearly implicated.[195] Hence, Chief Justice Finney would have reversed on those grounds.[196]

Chief Justice Finney went on to argue that as a policy matter, capital juries should always be informed that the defendant would be parole ineligible regardless of the sentence.[197] He queried, "[t]he specter of parole haunts every capital sentencing proceeding in this State, and I cannot understand why, given the simplicity of our new sentencing scheme in which no capital defendant is ever parole eligible, we would make a policy decision prohibiting the dissemination of the truth."[198]

Shafer petitioned for a writ of certiorari on the issue of whether the South Carolina Supreme Court had erred in its application of *Simmons*, and certiorari was granted by the United States Supreme Court.[199]

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

The United States Supreme Court reversed the decision of the South Carolina Supreme Court, and remanded for further consideration on the issue of whether future dangerousness was in fact argued by the prosecution.[200] The Court began by reaffirming the holding of *Simmons*, namely that "where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.'"[201] The Court found that the South Carolina Supreme Court had incorrectly limited *Simmons* in relation to South Carolina's new sentencing scheme.[202]

The Court noted that the South Carolina holding hinged on the

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[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at 535.
[199] Shafer v. South Carolina, 532 U.S. 36, 47 (2001).
[200] *Id.* at 55. The majority opinion was authored by Justice Ginsburg.
[201] *Id.* at 39 (quoting Ramdass v. Angelone, 530 U.S. 156, 165 (2000)).
[202] *Id. at* 39.

fact that, under the new sentencing scheme, there are three legally possible sentencing outcomes: death, life imprisonment, or a mandatory minimum thirty–year term.[203] Hence, according to the South Carolina Supreme Court, the present case was distinguishable from *Simmons*, where the only legally possible outcomes were life imprisonment or death.[204] The Court found that this reasoning might be persuasive had the jury's sentencing discretion actually encompassed all three choices.[205] However, a more accurate and functional analysis of the new South Carolina sentencing scheme revealed that this was not the case.[206]

Under the new scheme, the jury was first to make a finding of fact as to whether a statutory aggravating circumstance had been proven beyond a reasonable doubt.[207] It is only if such a statutory aggravator is found that a jury will even consider what sentence to pass down.[208] And at that point there are only two alternatives: life imprisonment without the possibility of parole or death.[209] If the jury does not find a statutory aggravator to have been proven, then the judge will determine the sentence, and it is only then that the third sentencing option becomes a possibility.[210] The Court further observed that the only reason that three sentencing outcomes are legally possible when the jury retires is that, under the new sentencing scheme, the jury is not required to reconvene in order to report its finding that a statutory aggravator has been proven beyond a reasonable doubt.[211] Rather, they move on directly to decide the sentence.[212] In fact, during oral argument the State acknowledged that, had the jury been required to report its finding on the statutory aggravator before moving on to decide the sentence, the case would be indistinguishable from the facts of *Simmons*, and an instruction as to Shafer's parole ineligibility would be required.[213]

The Court found this distinction to be entirely too vacuous to

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[203] *Id.* at 49.
[204] *Id.* at 50.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.* at 51 n.5.

properly distinguish *Simmons*.[214] To the extent that the jury would decide upon a sentence at all, after it had found a statutory aggravator, it would only have a choice between life imprisonment and death.[215] Hence, the Court concluded that the facts of the present case directly mapped on to the holding in *Simmons*.[216] "We therefore hold that whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that a life sentence carries no possibility of parole."[217]

The State of South Carolina proffered two alternative grounds on which to support the South Carolina Supreme Court's affirmation of Shafer's death sentence.[218] First, the State argued that the jury was effectively informed of Shafer's prospective parole ineligibility by the trial court's instructions to the jury and the defense counsel's closing argument.[219] Second, the State contended that no instruction was required under *Simmons* because the prosecution had not argued the issue of Shafer's future dangerousness.[220] The Court rejected the first argument, and remanded the case back to the South Carolina Supreme Court on the second.[221]

As for the State's argument that the jury had been effectively informed of Shafer's parole ineligibility, it pointed first to the defense counsel's closing argument, in which he implored the jury that if they spared Shafer's life he would die in prison.[222] In addition, the State noted that the trial judge had instructed the jury that "life imprisonment means until the death of the defendant."[223] In response, the Court first noted that displacement of the long–standing tradition of making parole available even to those sentenced to life imprisonment is a relatively recent phenomenon, and so it is reasonable to conclude that many prospective jurors are unaware of what precisely their state's parole policy is.[224] The Court went on to conclude that the

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[214] *Id.* at 52.
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.* at 54–55.
[221] *Id.* at 53.
[222] *Id.*
[223] *Id.*
[224] *Id.*

State's argument must fail completely in this case, in light of the fact that the jury actually sent the judge a questionnaire inquiring what the State's parole policy was concerning one convicted of capital murder.[225] Clearly, if the fact of Shafer's prospective parole ineligibility had been effectively communicated to the jury, they would have had no reason to ask the question in the first place.[226] In addition, the Court noted that the trial judge's evasive answer to the jury questionnaire did tend to suggest that parole was indeed a possibility for Shafer under South Carolina law.[227]

Finally, the State argued that, regardless of the other issues in the case, *Simmons* should not be held applicable because the prosecutor never made an argument as to Shafer's future dangerousness.[228] However, the Court noted that the South Carolina Supreme Court never squarely addressed this issue, but rather appeared to have assumed it *arguendo*.[229] Hence, the Court concluded that this issue was not ripe for resolution, and remanded the case back to the South Carolina Supreme Court for a determination on this issue.[230]

B. JUSTICE SCALIA'S DISSENT

The dissenting opinion of Justice Scalia was brief and general in principle.[231] He simply contended that the Due Process Clause of the Fourteenth Amendment was only intended to allow the Court to enforce then existing principles of the common law tradition.[232] It was not intended to give the Court the authority "to promulgate wise national rules of criminal procedure."[233] Hence, he took issue with the Court's expanding its "death is different" jurisprudence, of which this case he considered to be a part.[234] He further fretted that the next logical extension of the principle in *Simmons* would be to cases where the jury had not sent out a questionnaire directly inquiring as to the State's parole policy.[235]

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[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.* at 53–54.
[229] *Id.*
[230] *Id.* at 54.
[231] *Id.* at 54–55.
[232] *Id.* at 55.
[233] *Id.* at 55 (Scalia, J., dissenting).
[234] *Id.* at 56 (Scalia, J., dissenting).
[235] *Id.*

C. JUSTICE THOMAS'S DISSENT

The dissenting opinion of Justice Thomas supported the State's contention that the jury had been effectively informed as to Shafer's prospective parole ineligibility.[236] He argued that the statements made by the trial judge in his instructions, in combination with the defense counsel's closing argument, "left no room for speculation by the jury."[237] This was particularly true in contrast to the jury instructions in *Simmons*, where the trial judge informed the jury that "life imprisonment" was to be defined according to its "plain and ordinary meaning."[238] Here, by contrast, the trial judge instructed the jury that "life imprisonment means until the death of the defendant."[239]

Justice Thomas further attempted to explain away the jury questionnaire by inferring that it pertained only to Shafer's parole eligibility in the event that the jury did not return a sentencing recommendation at all.[240] After all, he noted, the question asked about the parole policy as applied to one convicted of murder generally, rather than the parole policy with regard to one convicted of capital murder and sentenced to life imprisonment by the jury.[241] He further noted that if the jury thought earlier release was a possibility in the event that they did not find a statutory aggravator and decide upon a sentence themselves, then they were right because in such an event a mandatory minimum thirty–year term of years would be a possible outcome.[242] He then concluded that the jury did not need to know what sentencing options were available to the trial court, and so the evasive maneuvers by the trial court in response to the questionnaire were justified.[243] Finally, he fretted that the role of the Court was not to micromanage jury sentencing proceedings, because the Constitution leaves that to the States.[244]

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[236] *Id.*

[237] *Id.* at 56–57. Specifically, the trial judge had defined "life imprisonment" as "until the death of the defendant" and "incarceration of the defendant until death." And the defense counsel implored that if Shafer was sentenced to life imprisonment, he would die in prison.

[238] *Id.* at 56.

[239] *Id.* at 56–57.

[240] *Id.* at 57.

[241] *Id.*

[242] *Id.*

[243] *Id.* at 57–58.

[244] *Id.* at 58.

V. ANALYSIS

In reversing the South Carolina Supreme Court's decision in *Shafer*, the United States Supreme Court correctly applied the *Simmons* rule to the new South Carolina capital sentencing scheme. The South Carolina decision represented little more than a legalistic ruse, and failed to properly distinguish *Simmons*. Unfortunately, the Court declined to seize this opportunity to replace the qualified rule of *Simmons* with an unqualified rule mandating the disclosure of a capital defendant's parole ineligibility under a life sentence in all cases where such an option is present. Both the facts of *Shafer* itself, and a growing body of academic research, demonstrate that capital juries have a dire and unqualified need for complete and accurate information as to the basic terms of their sentencing decision. This need is nowhere more acute than where a capital jury has the option of sentencing the defendant to life imprisonment without parole. Moreover, an unqualified rule would be simpler and more efficient to apply, thereby conserving valuable judicial resources. Finally, an unqualified rule would better comport to the basic principles of the Court's modern death penalty jurisprudence.

A. THE COURT'S MECHANICAL APPLICATION OF THE *SIMMONS* RULE WAS LOGICALLY SOUND

The majority opinion in *Shafer* cannot be faulted for the logic of its application of the rule in *Simmons* to the facts at hand. The South Carolina Supreme Court's attempt to distinguish the two cases via the mechanics of the state's new sentencing scheme was strained and obtuse. Moreover, the further rationale forwarded by the South Carolina Supreme Court in favor of withholding from the jury knowledge of a capital defendant's parole ineligibility does not stand up to critical analysis.

Clearly, the jury considers a sentencing recommendation under the new South Carolina sentencing scheme if, and only if, they have already found that a statutory aggravating circumstance has already been proven.[245] At that point, the jury has only two sentencing options: life imprisonment without the possibility of parole or death.[246] Hence, with regard to the sentencing alternatives available to Shafer's jury, this case squarely maps on to the facts of *Simmons*. The fact that there was technically a third possible outcome not even available

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[245] S.C. CODE ANN. § 16-3-20(C) (Supp. 2001).

[246] *Id.* at § 16-3-20 (A), (B).

to the jury is entirely too vacuous a distinction on which to properly distinguish the two cases. Clearly, the point in *Simmons* was that the jury must have only one sentencing alternative other than death—life imprisonment without the possibility of parole—at the time the sentencing determination is made.[247] That is where the constitutional infirmity of the "false dilemma" between death and a *de facto* term of years comes into play due to the jury's misperception of the defendant's parole eligibility.[248] And the State itself conceded in oral argument that, had the jury simply been required to report its finding of a statutory aggravator to the trial judge before moving on to the sentencing determination, the distinction between the two cases would have completely evaporated.[249] Therefore, the Court was completely justified in finding that the South Carolina Supreme Court had incorrectly limited the rule in *Simmons*.[250]

In support of its decision, the South Carolina Supreme Court also contended that informing jurors of a capital defendant's parole ineligibility would reduce accuracy in sentencing decisions, an assertion which seems completely untenable.[251] The fact that a capital defendant is parole ineligible is crucial in defining the basic terms of the jury's sentencing task. To refuse to give the jury adequate information to understand those basic terms can only inject caprice and arbitrariness into capital sentencing decisions, as jurors are forced to rely on their best guess as to what "life imprisonment" really means. And the South Carolina majority's contention appears even more inexplicable when one considers that the United States Supreme Court had previously acknowledged the prospect of a "false dilemma" in sentencing decisions by misinformed jurors in *Simmons*.[252] As Chief Justice Finney indicated in his dissent, there is simply no rational justification for prohibiting the dissemination of accurate sentencing information to the jury, particularly where the outcome of cases might be affected.[253]

What's more, the South Carolina majority went so far as to argue, "jurors perform their task completely when they decide the mat-

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[247] Shafer v. South Carolina, 532 U.S. 36, 51 (2001).

[248] Simons v. South Carolina, 512 U.S. 154, 161–62 (1994).

[249] *Shafer*, 532 U.S. at 51 n.5.

[250] *Id.* at 40. *See also* Penry v. Johnson, 532 U.S. 782, 804 (2001) (indicating that the South Carolina Supreme Court's holding was "objectively unreasonable").

[251] State v. Shafer, 531 S.E.2d 524, 530–31 (S.C., 2000).

[252] *Simmons*, 512 U.S. at 161–62.

[253] *State v. Shafer*, 531 S.E.2d at 534–35.

ter assigned to them upon the evidence before them. What happens thereafter is of no concern of theirs."[254] This statement is an obvious *non-sequitur*. A sentencing determination simply has no meaning other than as a determination of what is to happen to the defendant "thereafter." Hence, capital jurors need full and accurate information as to what "life imprisonment" means if they are to fulfill their appointed function with any degree of accuracy. And the South Carolina majority's contention that informing jurors as to a capital defendant's parole ineligibility will produce inaccurate sentencing results is patently absurd.

Finally, the Court rightly rebuked the contention of South Carolina[255] and Justice Thomas[256] that the jury was effectively informed of Shafer's parole ineligibility by the aggregate of the trial judge's instructions and the defense counsel's closing argument. As the majority opinion pointed out, this contention is simply untenable in light of the fact that the jury explicitly asked the trial judge what the state's parole policy was for defendants in Shafer's position.[257]

In addition, Justice Thomas's further arguments to the contrary simply do not hold any water. For one, he points out that the questions asked by the jury were general ones, and not directed specifically to their sentencing option of life imprisonment.[258] But clearly a high degree of legal exactitude in formulating questions cannot be expected of laypersons.[259] Furthermore, under the South Carolina sentencing scheme, the jury would not even consider sentencing unless they had found that a statutory aggravator existed beyond a reasonable doubt.[260] It is only then, while weighing the sentencing options of life imprisonment or death, that the issue of parole would occur to them. Hence, it seems highly probable that their question, although somewhat vague, was directed at Shafer's parole eligibility if he were sentenced to life imprisonment by them. On the other hand, if they were considering the prospective sentence before mak-

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[254] *Id.* at 531 (citing State v. Atkinson, 172 S.E.2d 111, 112 (S.C. 1970)).

[255] *Shafer*, 532 U.S. at 54.

[256] *Id.* at 57–58 (Thomas, J. dissenting). Justice Scalia's dissent will not be addressed here because the basis of his argument is not the merits of the case, but rather a very general argument as to the Court's constitutional authority. The validity or invalidity of Justice Scalia's brand of strict constructionism is obviously well beyond the scope of this paper.

[257] *Id.* at 53.

[258] *Id.* at 57 (Thomas, J. dissenting).

[259] Indeed, with all due respect to the service of the jurors, these particular laypersons did not even manage to spell "eligible" correctly. *Id.* at 44.

[260] S.C. Code Ann. § 16-3-20 (C) (Supp. 2001).

ing a factual determination as to whether the statutory aggravator had been proven, then they were clearly engaged in jury misconduct under South Carolina law by conditioning their finding of fact as to the statutory aggravator on Shafer's prospective punishment.[261] So either the jury was confused as to the basic meaning of the law they were asked to apply, or they were engaged in deliberate misconduct contrary to the trial judge's express instructions. However, considering the similar juror confusion and more precise juror question in *Simmons*, it appears the former was almost certainly the case.[262]

Justice Thomas's comparison of the jury instructions in *Simmons* and *Shafer* also falls flat.[263] The instruction in the *Simmons* trial was that the term "life imprisonment" was to be construed in its plain and ordinary meaning.[264] The instruction in Shafer's trial was that "life imprisonment" means "until the death of the defendant."[265] So in other words, the trial judge in *Shafer* spelled out the plain meaning that the trial judge in *Simmons* merely alluded to. That hardly seems like a substantive improvement. In both cases the trial judge completely failed to address the real issue of the jury's inquiry: the prospective parole eligibility of the defendant. Defining life imprisonment as ostensibly "until the death of the defendant" merely begs the question, "but is that with or without the possibility of parole?" And that is precisely the question that the juries in both cases asked.

B. THE COURT'S MISSED OPPORTUNITY TO IMPLEMENT AN UNQUALIFIED RULE OF DISCLOSURE WHICH WOULD BE MORE SOUND, JUST AND EFFICIENT

While the Court properly refuted the South Carolina Supreme Court's attempt to distinguish the facts in *Shafer* from those in *Simmons*, the Court nonetheless missed a crucial opportunity to broaden the *Simmons* rule to its proper scope. An extensive body of knowledge has been assembled which unequivocally establishes the dire need of capital juries to be fully informed as to the basic terms of their sentencing task.[266] Significant aspects of this research were be-

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[261] *See id.* (established aggravating circumstances do not include prospective sentence of the offender).

[262] Simmons v. South Carolina, 512 U.S. 154, 160 (1994).

[263] *Shafer*, 532 U.S. at 56–57 (Thomas, J. dissenting).

[264] *Id.* at 56 (Thomas, J. dissenting).

[265] *Id.* (Thomas, J. dissenting).

[266] *See, e.g.*, William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Sentencing Choices in Capital Sentencing*, 77 TEX. L.

fore the Court as it decided the outcome in *Shafer*.[267] Moreover, the facts in *Shafer* itself illuminate several reasons why an unqualified rule of disclosure should replace the *Simmons* rule.

For example, even if the Court were to insist on applying the conceptual framework of *Simmons*, there is a compelling case to be made that future dangerousness should be presumed to be placed "at issue" by the State in all capital trials. Capital defendants should have the right to answer this inevitable concern by informing juries that they would be ineligible for parole if sentenced to life imprisonment. On the other hand, even if the issue of future dangerousness were truly absent from the jury's deliberations, this would not remove the possibility of prejudicial error based on juror misperception of parole eligibility. The need for a jury instruction as to a capital defendant's parole ineligibility would remain, if only to allow capital juries to properly calibrate the degree of punishment which befits the crime. So in all cases, the significant possibility of juror error should be corrected as a matter of course by ensuring the jury is aware of the full meaning of their sentencing decision.

Another factor favoring an unqualified rule of disclosure is judicial economy. By implementing the convoluted restrictions of the *Simmons* rule, the Court has already wasted judicial resources at the highest level, as *Shafer* itself demonstrates. Finally, there is clearly a basis for such an unconditional rule of disclosure in the capital punishment jurisprudence of the Court. Indeed, such a rule would better comport with that jurisprudence then the *Simmons* rule, which is ultimately without rational support by either policy or precedent.

1. The Need to Inform Juries of a Capital Defendant's Parole Ineligibility

In considering Shafer's appeal, the Court had at least two documents before it that clearly illuminated the need for informing capital juries if the defendant was ineligible for parole. The first was the *Simmons* decision itself, in which the plurality opinion explicitly ac-

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REV. 605 (1999) (presenting statistical analysis and anecdotal evidence from a multi-state survey of hundreds of former capital jurors, as well as general background on other investigations and surveys).

[267] *See generally,* Brief for Amici Curae Cornell Death Penalty Project, Shafer v. South Carolina, 532 U.S. 36 (2001) (No. 00-5250) (presenting statistical analysis of in-depth interviews of former South Carolina jurors, as well as background on other investigations and surveys). *See also,* Simons v. South Carolina, 512 U.S. 154, 159 (1994) (acknowledging a statewide public opinion survey of prospective South Carolina jurors revealing a near-unanimous presumption that capital defendants sentenced to life imprisonment would be paroled).

knowledged a survey conducted by the University of South Carolina which examined the presuppositions of prospective South Carolina jurors with regard to the parole eligibility of capital defendants.[268] The second was an Amicus Brief submitted by the Cornell Death Penalty Project on behalf of Shafer.[269]

In *Simmons*, the plurality opinion explicitly acknowledged a statewide public opinion survey conducted by the University of South Carolina's Institute for Public Affairs.[270] According to the survey, only 7.1% of jury–eligible adults believed that a defendant sentenced to life imprisonment in South Carolina would actually serve his full term.[271] Almost half of the respondents presumed that a convicted murderer would serve less than twenty years in prison, and nearly three–quarters believed such a convict would be released within thirty years.[272] In addition, more that seventy–five percent felt that if they were called upon to serve as jurors in a capital case, the amount of time a convicted murderer would actually be required to serve would be "extremely important" or "very important" in their decision to recommend life imprisonment or death.[273] The obvious inference, acknowledged by the Court, is that South Carolina jurors might sentence a capital defendant to death simply because they presumed he would eventually be released under a life sentence.[274]

Further evidence of the impact on capital sentencing of juror misperceptions concerning parole eligibility was presented to the Court via an amicus brief by the Cornell Death Penalty Project.[275] That brief introduced a number of results from the research efforts of the Capital Jury Project ("CJP"), a National Science Foundation–funded multi–state investigation into the decision making process of capital jurors.[276] The CJP has interviewed 916 jurors from 257 separate capital trials in eleven different states.[277] Included in that total

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[268] Simmons v. South Carolina, 512 U.S. 154, 159 (1994).

[269] Amicus Brief, *Shafer*, (No. 00–5250).

[270] *Simmons*, 512 U.S. at 159. The survey had been offered into evidence by defense counsel during the sentencing phase of the trial. *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *Id.* at 161–62. *See also id.* at 177–78 (O'Connor, J.) (acknowledging that denial of parole to capital defendants is a recent practice, of which prospective jurors may generally be unaware).

[275] Amicus Brief, *Shafer*, 121 S. Ct. 1263 (2001) (No. 00–5250).

[276] *Id.* at 5 n.4.

[277] *Id.*

are 187 jurors from South Carolina, representing fifty–three capital cases which occurred between 1988 and 1997.[278] The interviews of South Carolina jurors showed that the median estimate of how long capital murderers sentenced to life imprisonment would actually serve was only seventeen years.[279] And less than one percent of South Carolina jurors believe that a capital murderer sentenced to life imprisonment would never be released on parole.[280] Thus, both Shafer and Simmons would appear to have been all but guaranteed a jury which misperceived the terms of a life sentence as applied to them.

It is true that these studies are susceptible to the criticism that they are dated. The new South Carolina sentencing scheme, which renders all capital murderers sentenced to life imprisonment ineligible for parole, was not in effect until 1996.[281] But looking beyond the data presented in the Amicus Brief, the CJP has also found ignorance of parole ineligibility to be pervasive in States where it was then the law.[282] For instance, the interviewees from Alabama, Missouri and Pennsylvania were near unanimous in their ignorance of the fact that the sentencing alternative to death for a capital defendant in their state was life without the possibility of parole.[283] Moreover, amongst the forty–nine Pennsylvania jurors, twelve years was their median estimate of when a capital defendant sentenced to life imprisonment would be released in that State, when in fact such a convict would be ineligible for parole altogether.[284] These results are particularly disturbing since all of the interviewees were former jurors in capital cases.[285]

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[278] *Id.* at 1.

[279] *Id.* at 5.

[280] *Id.*

[281] S.C. CODE ANN. § 16–3–20 (A) (Supp. 2001).

[282] Bowers & Steiner, *supra* note 266, at 670. Although this data was not presented in the Amicus Brief explicitly, the Bowers article was cited numerous times throughout the brief as a comprehensive source of information. The Bowers article contains comprehensive statistical analysis of the CJP interviews, as well as numerous juror descriptions of their actual decision–making process.

[283] *Id.* Only three out of the 164 jurors interviewed from these states got the answer right. Likewise, fewer than one–in–five jurors from California knew that life imprisonment would be without the possibility of parole for capital defendants in their state. *Id. See also, id.* at 647 tbl.1 (stating how many jurors were interviewed from each State).

[284] *Id.* at 670. Significantly, Pennsylvania is the only state other than South Carolina which presently refuses to inform capital jurors that life imprisonment would be without the possibility of parole. *See* Commonwealth v. Speight, 677 A.2d 317, 326 (Pa., 1996).

[285] Bowers & Steiner, *supra* note 266, at 670–71.

With regard to South Carolina jurors, a baseline presumption that capital murderers will be released on parole if sentenced to life imprisonment has been clearly established. And even though the sentencing scheme has been changed so as to deny parole to capital defendants generally, CJP research suggests that this information is not likely to be readily absorbed by prospective jurors (or even former jurors) without intervention by the trial court.[286] Indeed, the fact that the jury in *Shafer* inquired about the availability of parole in the first place confirms this inference.[287]

The Amicus Brief also reported that, while sixty–six percent of capital jurors who believed that a life sentence would result in less than twenty years of actual imprisonment voted for death, only forty–three percent of those who believed that the defendant would serve twenty years or more voted for the death penalty.[288] This obviously suggests a direct correlation between the degree of juror misperception about parole eligibility and the likelihood of the imposition of the death penalty. Personal interviews conducted by the CJP have further confirmed this inference, particularly where life imprisonment without the possibility of parole was a sentencing option.[289] For example, one South Carolina juror who had voted for death reported, "I made it known at that time that if this state had a life sentence law, I'd go along with it. Life means life. You stay there until you die . . . I wasn't interested in a man being executed. I was interested in him being off the street."[290] In another interview, a California juror who mistakenly believed that a capital defendant would be paroled in thirteen years, when in fact he would have been ineligible for parole, voted for death.[291] He reported:

> We were not in total agreement that he should have the death penalty but we were in total agreement that he should not be back in society . . . So we asked for the judge . . . to instruct us again on . . . whether this man, if we didn't give him the death penalty, [would] have a possibility of parole. And he, for some reason, could not . . . We did not want to give him life in prison because we thought perhaps he might be paroled.

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[286] *Id.* Indeed, the CJP researchers noted that mass media and political rhetoric has only exacerbated juror misperception of parole eligibility. *Id.* at 651.

[287] Shafer v. South Carolina, 532 U.S. 36, 44 (2001). *See also*, Commonwealth v. Clark, 710 A.2d 31, 35 (Pa. 1998) (demonstrating that jurors in Pennsylvania remain uninformed as to the true meaning of a life sentence to a capital murderer).

[288] Amicus Brief at 6 n.5, Shafer v. South Carolina, 532 U.S. 36, 44 (2001) (No. 00–5250).

[289] *See* Bowers & Steiner, *supra* note 266, at 674–700.

[290] *Id.* at 678.

[291] *Id.* at 697.

Given that option we had to give him the death penalty.[292]

These reports confirm that there are occasions where jurors will insist on life imprisonment without parole as the only appropriate alternative to death. And where they mistakenly believe that option is not available, they will vote for death on the basis of that misperception.

As a further indicator of the relevance of parole eligibility in the decision making process of capital jurors, the Amicus Brief also cited an independent study which indicated that jurors explicitly inquired about the possibility of parole or early release from a sentence of life imprisonment in twenty–five percent of the cases where the death sentence was returned.[293] That study examined the trial transcripts of the 280 such cases in Georgia from 1973 through 1990, and found seventy cases in which the jury so inquired.[294] However, the author acknowledged that because jurors are not necessarily aware of their right to ask such questions, this number most likely underrepresents the degree to which the issue of parole eligibility was a significant consideration for these juries.[295] The author also indicated that, where such information was present, the record usually indicated that only a short amount of time elapsed between the trial judge's invariably evasive answer and the return of the death sentence.[296] In fact, this pattern was evinced in the facts of both *Simmons*[297] and *Shafer*, as well.[298] Such a pattern strongly suggests that the issue of parole eligibility was one of the last and most decisive issues considered by both juries. Indeed, as the author of the study further pointed out, the United States Supreme Court has itself recognized the principle that a short time between a communication from the trial court and the response of the jury is indicative of the degree of prejudicial impact of that communication.[299]

Thus, by all accounts the availability of a life without parole sentencing alternative, and juror knowledge of that availability, is often

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[292] *Id.* at 697–98.

[293] Amicus Brief at 11, *Shafer*, (No. 00–5250).

[294] J. Mark Lane, *"Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L. REV. 327, 335–36 (1993).

[295] *Id.* at 336.

[296] *Id.* at 337 n.52.

[297] Simmons v. South Carolina, 512 U.S. 154, 160 (1994).

[298] Shafer v. South Carolina, 532 U.S. 36, 45 (2001).

[299] Lane, *supra* note 294, at 337 n.52 (*citing* Rogers v. United States, 422 U.S. 35, 40 (1975)); *see also* Yarborough v. Commonwealth, 519 S.E.2d 602, 615 (Va. 1999) (recognizing that jurors only inquire about parole when one or more of the members contemplates voting for a sentence less than the maximum, and the outcome hinges on parole eligibility).

critical to the fate of capital defendants. This unequivocally establishes the need for a procedural mechanism to make that information available to capital jurors, lest death sentences based on the arbitrary and capricious factor of juror ignorance be inevitable. The Supreme Court recognized this problem in *Simmons*, but refrained from providing the necessary remedy except in cases where future dangerousness was placed at issue by explicit arguments from the prosecutor.[300] However, as the Amicus Brief and the Court's own prior precedent makes clear, future dangerousness may reasonably be presumed to be "at issue" in all capital trials.

2. A Presumption That the Issue of Future Dangerousness Is Always Raised in Capital Trials

The *Simmons* rule only applies where "the State puts the defendant's future dangerousness in issue."[301] However, the case for a presumption that the issue of future dangerousness will always be put in issue in capital trials is both compelling and obvious. Capital crimes invariably involve violent acts of a particularly egregious nature, which in and of themselves raise the specter of future violence. Under South Carolina law, for example, only first degree murders committed under aggravating circumstances will even qualify for capital punishment.[302] Hence, the future dangerousness of the defendant will almost always be a prime consideration for capital jurors. There are a number of arguments that buttress this intuition.

For one, the research conducted by the CJP and presented in the Amicus Brief establishes that future dangerousness is on the minds of capital jurors even where the prosecutor fails to explicitly raise the issue.[303] The CJP study first identified South Carolina capital jurors who responded that the prosecutor's arguments and evidence had "not at all" raised the issue of the defendant's danger to the public if ever released.[304] In spite of the prosecutor's silence, fully two–thirds of these jurors reported having discussed the need to prevent the de-

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[300] *Simmons*, 512 U.S. at 161–62; *Id.* at 178.

[301] *Id.*

[302] *See* S.C. Stat. Ann. § 16–3–20 (2001) (last amended 1996). Likewise, in Pennsylvania, the only other State which refuses to instruct capital juries that defendants would be ineligible for parole under a life sentence, the death penalty is also applied to first degree murders committed under aggravating circumstances. *See* 42 Pa.C.S.A. § 9711 (1998).

[303] Amicus Brief at 7, Shafer v. South Carolina, 532 U.S. 36 (2001) (No. 00–5250).

[304] *Id.* at 9. Ultimately, fifty–three of the 187 South Carolina jurors responded that the prosecutor had not raised the issue "at all." *Id.* at app.A.

fendant from killing again either "a great deal" or "a fair amount" during deliberations.[305] Additionally, sixty–one percent reported discussing the issue of how likely the defendant was to be paroled either "a great deal" or "a fair amount."[306] Hence, a significant majority of South Carolina juries explicitly discussed issues regarding future dangerousness and parole eligibility even though the prosecutor did not explicitly raise the issue of future dangerousness.[307] Indeed, fifty–two percent of these jurors indicated that when considering which punishment to mete out, they were either "greatly concerned" or "somewhat concerned" that the defendant might return to society one day if not sentenced to death.[308] As further discussed below, these results should surprise no one. Capital crimes are generally gruesome and violent, and raise the specter of future dangerousness by their very nature.

A further legal argument supporting a presumption that future dangerousness is always at issue in capital trials was unwittingly supplied in the Petitioner's Brief in *Shafer*.[309] The brief argued that the issue of future dangerousness had indeed been raised at Shafer's trial,[310] and in so doing noted what evidence has been deemed to establish future dangerousness in prior cases.[311] For example, in *Ramos* the Court commented that the "jury's evaluation of the defendant's future dangerousness may rest on lay testimony about the defendant's character and background and the inferences to be drawn therefrom."[312] In States where future dangerousness is a formal statutory element in capital cases, the circumstances of the offense itself have been held sufficient to support a finding of future dangerousness beyond a reasonable doubt.[313] And in the same context, the United

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[305] *Id.* at 9 n.9.

[306] *Id.* at 9.

[307] The study also revealed that fifty–three percent of these jurors had explicitly discussed the threat posed by the defendant if he were ever to be placed back in society, either "a great deal" or "a fair amount." *Id.* at 9. And fifty–seven percent of the jurors reported discussing the amount of time they anticipated before the defendant would be released under a life sentence, either "a great deal" or "a fair amount." *Id.* at 9 n.9.

[308] *Id.* at 10. And when asked how important "keeping the defendant from ever killing again" was to their decision, forty–three percent responded that it was "very important" and twenty–six percent responded that it was "somewhat important." *Id.* at 10 n.10.

[309] Petitioner's Opening Brief at 25, Shafer v. South Carolina, 532 U.S. 36 (2001) (No. 00–5250).

[310] *Id.* at 25.

[311] *Id.* at 26–29.

[312] *Id.* at 26 (citing California v. Ramos, 463 U.S. 992, 1006 n.20 (1983)).

[313] *Id.* at 28–29 (citing Pope v. Commonwealth, 360 S.E.2d 352, 361 (Va. 1987); Bell v.

States Supreme Court has found future dangerousness to have been proven merely by the introduction of evidence concerning the defendant's prior criminal acts.[314] All of these holdings verify that the standard fare of capital murder trials intrinsically raise the issue of, and indeed conclusively prove, the future dangerousness of the defendant.

Finally, scrutiny of the Supreme Court's prior decisions reveals that it, too, has presumed that the issue of future dangerousness will be raised in capital trials. For instance, in *Jurek* the Court remarked that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."[315] In *Skipper* the Court reaffirmed that "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing."[316]

Moreover, the notion that future dangerousness will almost always be at issue in a capital trial is implied by the plurality's reasoning in *Simmons* itself. There, the Court first found that most jurors might very well presume that a capital defendant sentenced to life imprisonment would be eligible for parole.[317] However, the Court also found that a reasonable juror would find a capital defendant who is eligible for parole to be a prospective threat to society.[318] The syllogistic conclusion to be draw from these two findings is that future dangerousness will almost always be at issue in South Carolina capital trials for the very reason that jurors mistakenly presume that the defendant is eligible for parole. In fact, this inference has been confirmed by CJP research.[319] Analysis of the information provided by former capital jurors has revealed that the earlier a given juror anticipated the defendant would be released on parole, the more likely they were to believe that the evidence proved the defendant was dangerous, and the more likely they were to be "greatly concerned" about

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State, 938 S.W.2d 35, 42 (Tex. Crim. App. 1996)).

[314] *Id.* at 29 (citing Johnson v. Texas, 509 U.S. 350, 355 (1993)). Significantly, in the sentencing phase of the *Shafer* trial the prosecutor had presented evidence concerning Shafer's criminal record, past aggressive conduct, probation violations and misbehavior in prison. *See* Shafer v. South Carolina, 532 U.S. 36, 41 (2001).

[315] Jurek v. Texas, 428 U.S. 262, 275 (1976).

[316] Skipper v. South Carolina, 476 U.S. 1, 5 (1986).

[317] Simmons v. South Carolina, 512 U.S. 154, 169–70 (1994). *See also id.* at 177–78 (O'Connor, J., concurring).

[318] *Id.* at 163.

[319] Bowers & Steiner, *supra* note 266, at 667–70.

the defendant's possible return to society .[320] Likewise, in forming their sentencing decision, those jurors who anticipated an early release were more likely to regard keeping the defendant from killing again as "very important."[321] Indeed, this pattern held true regardless of whether the prosecution had made explicit arguments as to the defendant's future dangerousness.[322] As the CJP researchers reported, "[t]he clear implication is that jurors' release perceptions bear on their judgments of the defendant's dangerousness, and in turn, on their decision–making on punishment. Mistaken release estimates evidently promote the perception that the defendant will be dangerous in the future."[323] So while the Court's implied syllogism in *Simmons* may have been uninteded, in fact it was dead on.

All of these arguments support the intuition that future dangerousness will invariably be a significant factor in capital sentencing. Hence, even if the Court were to continue to apply the analytical framework developed in *Simmons*, the requirement of a particularized showing that future dangerousness was placed at issue by the porsecutor should be dropped. Statistical evidence and the Court's own precedent clearly supports a presumption that future dangerousness will be a crucial factor for a capital jury, even when the prosecutor declines to explicitly raise the issue. However, even if one were to assume away the issue of future dangerousness as a consideration in juror decision making, the case for abandoning the future dangerousness requirement would remain.

3. Beyond Future Dangerousness

The capital juries in *Simmons*,[324] *Ramdass*,[325] and *Shafer*,[326] all made inquiries as to whether the defendant would be eligible for parole. Indeed, as discussed above, researchers have found that as many as one quarter of capital juries that return the death sentence make inquiries concerning the possibility of parole.[327] However, what these cases do not tell us is why the jurors made these inquiries. One might presume that these inquiries were motivated by a desire to

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[320] *Id.* at 668–70.
[321] *Id.*
[322] *Id.* at 668.
[323] *Id.* at 670.
[324] Simmons v. South Carolina, 512 U.S. 154, 160 (1994).
[325] Ramdass v. Angelone, 530 U.S. 156, 162 (2000).
[326] Shafer v. South Carolina, 532 U.S. 36, 48 (2001).
[327] Lane, *supra* note 294, at 335–36.

be sure that the defendant would be permanently taken off the streets. Yet there is another possibility. The questions could have been motivated by a simple desire to see that the punishment fits the crime.[328]

The Supreme Court has recognized that "retribution clearly plays a more prominent role in capital cases."[329] Indeed, one Justice went so far as to contend that "in the context of capital felony cases . . . the question of whether the death sentence is an appropriate non–excessive response to the particular facts of the case will depend on the retribution justification."[330] In calibrating the proper degree of retribution, the Eighth Amendment demands an informed and reasoned moral response.[331] The jury must not only consider, but must be able to "give effect to a defendant's mitigating evidence in imposing sentence."[332] In practice, however, the jury must ultimately choose between two or more statutorily defined sentences. Hence, their ability to "give effect to" the defendant's mitigating evidence is contingent on their accurate understanding of what those alternatives really mean. Where a jury comes to the reasoned moral determination that the defendant truly deserves a life–long punishment short of death, the mistaken belief that a sentence of life imprisonment merely amounts to a term of years may very well compel them to accept death as the most appropriate sentence available. In such a case, the jury would lack "a vehicle for expressing its 'reasoned moral response,'"[333] due entirely to its easily correctable ignorance of the law. And mitigating evidence presented by the defendant would be prevented from having any practical impact on the sentencing decision. Indeed, the CJP analysis of capital jury decision–making revealed that the lower a juror's estimate of the time actually spent in prison

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[328] Other commentators have also expounded on the role of retribution in capital sentencing. *See* Bowers & Steiner, *supra* note 266, at 623–35.

[329] Spaziano v. Florida, 468 U.S. 447, 462 (1984). *See also* Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct.").

[330] *Id.* at 480 (Stevens, J., concurring in part, dissenting in part).

[331] Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

[332] *Id. See also* Boyde v. California, 494 U.S. 370, 377–78 (1990) ("The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner."); Crane v. Kentuky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)) ("the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'").

[333] *Penry*, 492 U.S. at 328. Some commentators have further argued that not only is it necessary that jurors know they have a choice of life imprisonment without the possibility of parole where such is the case, but that the Eighth Amendment demands that they have that alternative in the first place. *See generally,* Lane, *supra* note 297.

by those sentenced to life imprisonment, the higher the likelihood that the juror would vote for death.[334] Significantly, this pattern held even where jurors indicated that issues related to future dangerousness did not play a significant role in their deliberations.[335] Hence, CJP researchers concluded that juror misperception of the significance of "life imprisonment" had most likely skewed the process of calibrating the appropriate degree of retribution in favor of death.[336]

These facts show the fallacy of the Court's insistence on directing the inquiry toward the actions of the prosecutor in raising the issue of future dangerousness. The real problem is not prosecutorial hedging; the real problem is rampant jury ignorance as to the basic terms of their sentencing task. Perhaps the *Simmons* Court was motivated by a desire to identify the problem with something it could more readily get a handle on, something perceptible within the trial record. However, in reality the problem is pervasive and may quite readily defy outward perception unless the jury is specifically polled on the subject after the fact.[337] The appropriate solution is clear: fix the procedure itself by establishing an unqualified Eighth Amendment right to obtain an instruction that a capital defendant would be ineligible for parole if sentenced to life imprisonment. To do anything less would only ensure that there is at least some subset of capital defendants who will be sentenced to death on the arbitrary and capricious basis of juror ignorance.

Indeed, this argument is best illustrated by the facts in *Shafer* itself. According to the trial judge in that case, the prosecution had not effectively raised the issue of Shafer's future dangerousness.[338] Yet the jury's questionnaire demonstrates both that the issue of parole was a critical factor in its sentencing determination, and that the jury was ignorant of what the State's parole policy actually was.[339] Thus, whether concerned with future dangerousness or retribution, the jury

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[334] Bowers & Steiner, *supra* note 266, at 655 tbl.3 (noting that there is a twenty-five point difference in the percentage of jurors who estimated that the defendant would be out in zero to nine years and who voted for death (68.5%), and the percentage of jurors who estimated that the defendant would actually serve twenty or more years and who voted for death (43.1%)).

[335] *Id.* at 667.

[336] *Id.*

[337] In fact, this was attempted by Shafer's counsel, but was expressly denied. Shafer v. South Carolina, 532 U.S. 36, 45-46 (2001).

[338] *Id.* at 42. This point was also conceded by Chief Justice Finney in his dissent. State v. Shafer, 531 S.E.2d 524, 534 n.2 (S.C., 2000).

[339] *Shafer,* 532 U.S. at 44.

may very well have sentenced Shafer to death on the basis of its misperception of the law. *Shafer* itself demonstrates that the *Simmons* rule is insufficient to prevent the imposition of the death sentence on the basis of arbitrary and capricious grounds.

4. The Alternative Sentence Restriction Should Be Dropped

The rule ultimately adopted in *Simmons* is contingent not only on the prosecutor raising the issue of future dangerousness, but also on the fact that life imprisonment without the possibility of parole is the only sentencing alternative to death.[340] Unfortunately, the Court never tells us why this qualification is necessary, or even relevant. However, the South Carolina Supreme Court did venture an argument in a companion case to the *Shafer* decision, *State v. Starnes*.[341] There, the South Carolina Supreme Court argued that "the rationale for *Simmons* simply does not exist when there is a potential mandatory minimum thirty year sentence. Contrary to a sentence of life imprisonment without the possibility of parole, a mandatory minimum thirty year sentence does not rebut the argument regarding the defendant's threat to society."[342] However, this argument falls apart upon critical scrutiny. It is true that the option of a mandatory minimum thirty–year sentence does nothing to implicate the "false dilemma" identified in *Simmons*, nor does it rebut the prosecutor's implied argument of a future threat upon release. Yet the presence of this third sentencing option does absolutely nothing to dispel these problems either.

The false dilemma identified in *Simmons* occurs when the jury wrongly believes that it must choose between a sentence of death or a *de facto* term of years. Hence, the only way to keep the defendant permanently off the streets is through the sentence of death. This problem is exacerbated to the extent that the prosecutor raises the issue of future dangerousness, because the jury will become more motivated to keep the defendant off the streets permanently, one way or the other. On the other hand, the prosecutor's squeeze–play can be rebutted by properly informing the jury of the true meaning of a life term.

Injecting another sentencing option into the equation does not alter this dilemma. Jurors interested in keeping the defendant off the

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[340] Simmons v. South Carolina, 512 U.S. 154, 178 (1994).

[341] 531 S.E.2d 907 (S.C. 2000).

[342] *Id.* at 916.

street permanently will likely reject a term of years sentence out of hand. This still leaves the same possibility for error in sentencing as before: the jury may vote for death if they erroneously believe that the defendant would be eligible for parole if sentenced to life imprisonment. Nor is there a compelling argument to be made that the presence of a term of years as a sentencing option will imply to the jury that a life sentence is without the possibility of parole. As the Court noted in *Simmons*, jurors generally presume that a life sentence carries with it the possibility of parole,[343] and the presence of a lesser sentencing alternative is not likely to change this. In fact, the CJP found that one capital jury actually sentenced the defendant to a term of years rather than life imprisonment, precisely because they believed that the defendant would actually serve more time under the term of years.[344]

While the argument in favor of qualifying the *Simmons* rule according to the availability of a third alternative sentence is vacuous, the case for abandoning such a restriction is obvious. The alternative sentence qualification continues to permit jury misperception of the law to inject an element of arbitrariness and capriciousness into capital sentencing decisions for a subset of capital defendants. There is simply no rational justification for resolving the danger the Court clearly recognized in *Simmons* by half-measures.[345] A jury that would be inclined to impose the death penalty on the basis of the mistaken belief that a prospective life sentence entails the possibility of parole will not be deterred by the mere presence of an alternative lesser sentence. Yet this potential for fatal error could be effectively countered by simply giving a full and accurate jury instruction.

5. The Issue of Judicial Economy

Concerns for judicial economy clearly weigh in favor of a simpler unqualified rule of disclosure.[346] This is best illustrated by the facts of *Shafer* itself. Had the Court originally adopted a rule unfettered by qualifications, they never would have had to deal with this

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[343] *Simmons*, 512 U.S. at 169–70.

[344] Bowers & Steiner, *supra* note 266, at 695.

[345] *Simmons*, 512 U.S. at 161–62.

[346] As the Seventh Circuit has recognized in another context, "[c]oncerns of judicial economy often enter the analysis of whether to adopt or maintain a given rule or test." Erickson v. Trinity Theatre, 13 F.3d 1061, 1069 n.6 (7th Cir. 1994) (citing Ankenbrandt v. Richards, 504 U.S. 689 (1992); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991)).

case in the first place. As the Court itself recognized, *Shafer* is nothing if not a redux of *Simmons*.[347] It was a complete waste of the Court's valuable time. During the 2000 term, there were 7,852 cases filed with the Supreme Court, but only eighty–six of those cases were argued before the Court and only seventy–seven signed opinions were produced.[348] Hence, the obtuse qualifications of the *Simmons* rule have already wasted judicial resources at the highest level. And the case is not over yet. *Shafer* was remanded for a determination on the issue of future dangerousness, and may yet reappear before the Court.[349]

An unqualified rule would save judicial resources at all levels. The trial court in *Shafer* would have had no need to wrestle with the issue of whether the prosecutor had "crossed the line" in alluding to Shafer's future dangerousness.[350] Moreover, by allowing the State to deny jurors information they need to make an accurate sentencing determination, their task can only be prolonged and made more arduous than it already is. Commentators have identified numerous instances in which juror frustration has made itself known.[351] This purposeless anxiety is made even more egregious because it is founded on ignorance of a simple legal fact, easily correctable by a full and accurate jury instruction. An unqualified rule would alleviate this difficulty, making the trial and deliberation process more efficient in all cases where life imprisonment without parole is a sentencing alternative. By declining to implement an unqualified rule of disclosure in

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[347] *Shafer*, 532 U.S. at 474–48.

[348] Supreme Court of the United States, 2001 Year–End Report on the Federal Judiciary, *available at* http://www.supremecourtus.gov/publicinfo/year–end/2001year–endreport.html.

[349] *Shafer*, 532 U.S. at 53. Indeed, since *Shafer* was decided the Court has already wasted another valuable space on its docket. In *Kelly v. South Carolina*, the Court reaffirmed its holding in *Shafer*, and reversed the death sentence because the prosecutor in that case had raised the issue of future dangerousness. 122 S.Ct. 726, 728–29 (2002). While that opinion added little in the way of rationale for the *Simmons* rule, it did contain some interesting developments. Justice O'Connor joined the *Simmons* plurality in finding that the prosecutor's statements had raised the issue of future dangerousness. *Id.* Chief Justice Rehnquist and Justice Kennedy dissented, arguing for a strict interpretation of the future dangerousness qualification in the *Simmons* rule. *Id.* at 734–36. Most significantly, the Court is now bickering over an obtuse distinction that never should have been drawn in the first place.

[350] *Shafer*, 532 U.S. at 43.

[351] *See generally* Bowers & Steiner, *supra* note 266 (citing numerous trial records and juror interviews evincing juror disgust at not being informed of the basic terms of their sentencing decision). *See also* Lane, *supra* note 294, at 241–43 (reporting that one jury actually crafted its own sentencing alternative in the face of judicial silence about the meaning of life imprisonment).

Shafer, the Court merely created more valueless work for itself, for trial courts, and for jurors in the future, and perpetuated the potential for the arbitrary and capricious imposition of the death penalty.

In sum, there appears to be no rational basis for restricting the *Simmons* rule to those cases where the prosecutor explicitly argues the issue of future dangerousness. The issue of future dangerousness is most often raised in the minds of jurors by the facts of the capital crime itself, and even where it is not jurors still need complete and accurate information as to the basic terms of their sentencing decision in order to determine the appropriate degree of punishment. Likewise, there appears to be no rational basis for restricting the *Simmons* rule to those cases where there is no alternative to death other than life imprisonment without the possibility of parole. The presence of a third sentencing alternative does nothing to dispel the false dilemma created by juror ignorance of the basic terms of their sentencing task. Finally, the qualified rule in *Simmons* cannot help but waste judicial resources and has already done so, as demonstrated by *Shafer* itself. This leads one to question whether the obtuse rule laid out in *Simmons* was somehow mandated by the mechanics and inertia of prior precedent. Upon close scrutiny, it is clear that this is not the case.

6. The Constitutional Grounds for an Unqualified Rule of Disclosure

The most appropriate legal basis for an unqualified rule of disclosure of a capital defendant's parole ineligibility would be that proposed by Justice Souter in his concurrence in *Simmons*.[352] Justice Souter contended that the decision should have been grounded on the Eighth Amendment principle that, because of its unique severity and finality, the death penalty may only be imposed on the basis of a fully informed and reasoned moral response.[353] This is the principle that was first established in *Furman*, and further developed in *Gregg*.[354] Indeed, in *Gregg* the Court explicitly recognized that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision."[355] As

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[352] Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring). Other commentators have also advocated adopting Justice Souter's approach. *See, e.g.*, Janice Clark, Note, *Putting an End to the Imposition of Death by Misperception and Misunderstanding: Simmons v. South Carolina*, 43 U. KAN. L. REV. 1147, 1164 (1995).

[353] *Simmons*, 512 U.S. at 172 (Souter, J., concurring).

[354] *Id.* at 172–73.

[355] Gregg v. Georgia, 428 U.S. 153, 190 (1976). *See also* Walton v. Arizona, 497 U.S.

Justice Souter noted, this Eighth Amendment mandate has consistently been held to invalidate procedural rules that tend to interfere with the formation of an accurate sentencing determination.[356] Thus, under these basic principles of the Court's death penalty jurisprudence, the appropriate rule would surely be one of unqualified disclosure of a capital defendant's statutory parole ineligibility under a life sentence.[357]

In addition, the Court has also recognized that the Eighth Amendment proscription of cruel and unusual punishment is a dynamic principle, evolving with public standards of decency.[358] An unqualified rule of disclosure appears to be warranted on this basis as well. As the Petitioner's Brief in *Shafer* documents, of the thirty States which both employ juries in capital sentencing and provide life imprisonment without parole as an alternative to death, twenty–seven of those States disclose to the jury that the defendant would be parole ineligible.[359] One State has not addressed the issue.[360] And only two States now engage in the practice of refusing to inform the jury of the defendant's parole ineligibitility, where possible under *Simmons*: South Carolina and Pennsylvania.[361] Significantly, at the time *Simmons* was decided the Commonwealth of Virginia also engaged in this practice.[362] However, in *Yarborough v. Commonwealth* the Virginia Supreme Court overturned the prior rule and instituted an unconditional rule of disclosure of a capital defendant's parole ineligibility.[363] Recognizing the restricted nature of the Court's holding in *Simmons*, the Virginia Supreme Court declined to base its decision on the Eighth or Fourteenth Amendment.[364] Rather, the Virginia Supreme Court based its decision on the Commonwealth's constitu-

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639, 653 (1990) ("When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process.")

[356] *Id.*

[357] *Simmons*, 512 U.S. at 172 (Souter, J., concurring).

[358] *Gregg*, 428 U.S. at 172–73.

[359] Appellant's Brief at 1aa app.B, *Shafer* (No. 00–5250). Some States explicitly instruct the jury that the defendant would be ineligible for parole, and others simply describe the alternative as "life imprisonment without the possibility of parole," while still others allow the jury to choose if the defendant will be eligible for parole or not. *Id.* at 1aa–2aa.

[360] *Id.* at 3aa.

[361] *Id. See also*, State v. Shafer, 531 S.E.2d 524 (S.C., 2000); Commonwealth v. Speight, 677 A.2d 317, 326 (Pa. 1996).

[362] *See Simmons*, 512 U.S. at 168 n.8.

[363] Yarbrough v. Commonwealth, 519 S.E.2d 602, 615 (Va. 1999).

[364] *Id.* at 612.

tional right to a trial by an informed jury.[365] Ironically, this is precisely the principle that the U.S. Supreme Court has recognized to be mandated by the Eighth Amendment in the context of capital punishment.[366] This holding further illuminates the unwarranted nature of the qualified rule in *Simmons*.

7. The Absence of a Constitutional Justification for the Qualified Rule of Simmons

While an unqualified rule of disclosure would clearly be in accord with the basic principles of the Supreme Court's modern death penalty jurisprudence, the same cannot be said for the qualified rule established in *Simmons*. As discussed above, the *Simmons* rule was predicated on Justice O'Connor's concurring opinion in that case.[367] However, that concurrence provides little in the way of rational justification for requiring disclosure only "[w]here 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."[368] Rather, the adoption of a qualified rule appears to rest on two legalistic maneuvers. First, Justice O'Connor cites to *Skipper v. South Carolina* and *Gardner v. Florida* for the proposition that the Due Process Clause of the Fourteenth Amendment guarantees a capital defendant's right to rebut arguments made against him by the prosecutor.[369] By basing her decision on the due process right of rebuttal, rather than the broader Eight Amendment mandate that capital juries make fully informed decisions, Justice O'Connor laid the groundwork for a rule which is triggered only by the action of the prosecutor. Second, Justice O'Connor cites to *California v. Ramos* for the proposition that the Court should defer to the States on the issue of whether to inform juries of a capital defendant's prospective early release.[370] However, all of these cases were either misrepresented or can be amply distinguished from the facts presented in both *Simmons* and *Shafer*.

First, *Skipper*[371] was decided on the basis of the Eighth Amend-

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[365] *Id.* at 613.

[366] Gregg v. Georgia, 428 U.S. 153, 189–90 (1976).

[367] Unfortunately, the opinion in *Shafer* does little more than repeat the basic reasoning in *Simmons*. *See* Shafer v. South Carolina, 532 U.S. 36, 49 (2001).

[368] Simmons v. South Carolina, 512 U.S. 154, 178 (1994).

[369] *Id.* at 175–76.

[370] *Id.* at 176.

[371] Skipper v. South Carolina, 476 U.S. 1 (1986).

ment right to present all mitigating evidence necessary to allow the jury to make a fully informed decision, not the due process right of rebuttal. This fact was made crystal clear by Justice Powell's concurrence in that case.[372] It was only the concurring minority that argued for a narrower holding based on the due process right of rebuttal.[373] Although the majority acknowledged that such grounds were a valid basis for decision,[374] it ultimately decided the case on the basis of the Eighth Amendment jurisprudence established in *Locket v. Ohio* and *Eddings v. Oklahoma*.[375] Specifically, the majority found that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration."[376] Hence, in reality *Skipper* lends more credence to an unqualified rule of disclosure based on the Eight Amendment, as advocated by Justice Souter in *Simmons*,[377] rather than the qualified rule laid down by Justice O'Connor.

Second, the Court in *Simmons* understated the degree to which the facts of that case, and of *Shafer*, map on to the holding in *Gardner*. Both the plurality opinion and the concurrence by Justice O'Connor assert that the principle holding in *Gardner* is that due process does not allow a defendant to be sentenced to death "on the basis of information he had no opportunity to deny or explain."[378] However, the "information" at issue in *Gardner* was not evidence submitted by the prosecutor.[379] Rather, it was a pre-sentence report ordered by the trial judge, to which neither the defense nor the prosecutor had complete access.[380] Hence, the information at issue was information autonomously attained by the sentencing authority.

Likewise, the real threat of arbitrary prejudice posed to Jonathan Simmons and Wesley Shafer was not the arguments made by their prosecutors. The real threat was posed by the misinformation likely to have been autonomously attained by the jurors themselves prior to

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

[373] *Id.* (Powell, J., concurring).

[374] *Id.* at 5 n.1.

[375] *Id.* at 4–5.

[376] *Id.* at 5.

[377] Simmons v. South Carolina, 512 U.S. 154, 172-74 (1994) (Souter, J., concurring).

[378] *Id.* at 175 (O'Connor, J., concurring) (quoting Gardner, 430 U.S. at 362); *see also id.* at 164 (plurality opinion).

[379] Gardner v. Florida, 430 U.S. 349, 353–54 (1977).

[380] *Id.*

trial. As discussed above, the Court in *Simmons* acknowledged that where South Carolina jurors are forced to guess as to a capital defendant's parole eligibility, they would most likely guess that he was parole eligible. This misperception, attained due to the long–standing practice of granting such parole and exacerbated by sensationalism in the mass media and political rhetoric, may prove crucial to the fate of a capital defendant; no less so than the information contained in Gardner's pre-sentence report. And for all the Court knew, the information in the *Gardner* report may have been factually correct. The problem was that the defendant was denied an opportunity to ensure that was the case. By contrast, the State of South Carolina would deny capital defendants the opportunity to ensure that jurors accurately perceived the nature of a life sentence, even though there is ample evidence that they are likely to guess wrongly on that point if, as the State insists, they are required to guess.

Ultimately, *Gardner* stands for the proposition that a capital defendant has a constitutional right to deny or explain potentially prejudicial information autonomously obtained by his sentencer. In *Simmons,* the Court recognized that South Carolina jurors are likely to have autonomously obtained a faulty conception of what a sentence of life imprisonment means for a capital convict. Hence, in reality *Gardner*, like *Skipper*, supports an unqualified rule of disclosure and illustrates that the real problem is the ignorance of jurors, not the arguments of prosecutors.

Finally, *Ramos*[381] was a poorly reasoned decision that can be distinguished on its most pertinent facts. In *Ramos*, the Court reversed a decision by the California Supreme Court by upholding the constitutionality of the Briggs Initiative.[382] This California law required State court judges to instruct capital juries that the Governor had the power to commute a sentence of life imprisonment without the possibility of parole.[383] However, these courts were not permitted to mention that the Governor may likewise commute a death sentence.[384] Two principle arguments were raised against the Briggs Instruction. First, the defendant argued that the prospect of a life sentence being commuted by the Governor was far too speculative to be properly considered by a jury, and could only increase the chance that a

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[381] California v. Ramos, 463 U.S. 992 (1983).

[382] *Id.* at 1013–14.

[383] *Id.* at 995.

[384] *Id.* at 1012.

sentence of death would be predicated on arbitrary and capricious grounds, thereby violating the Eighth Amendment.[385] Such an ephemeral possibility could easily be blown out of proportion by a jury of laypersons invited to speculate about the legal and political mechanics of the commutation process. Second, the defendant argued that the Briggs Instruction improperly skewed the jury's perception of the law, leading them to believe that commutation was possible for those sentenced to life but not for those sentenced to death.[386] As a result, jurors were left with the impression that the only way to be sure that the defendant would permanently be kept off the streets would be to sentence him to death.

The Court first responded by asserting that the true function of the Briggs Instruction was to invite the jury to consider the defendant's future dangerousness, a consideration that had been expressly authorized in *Jurek v. Texas*.[387] The Court found that "[t]he instruction invites the jury to predict not so much what some future Governor might do, but more what the defendant himself might do if released into society."[388] It further contended that the instruction was but one of many factors to be considered by a jury, and would not necessarily be a dispositive factor in a capital jury's decision–making process.[389] As to the second issue, the Court merely denied that a balancing instruction informing juries that the Governor could also commute a death sentence would be effective.[390] The Court theorized that such a balancing instruction would actually prejudice the defendant because it would lead the jury to believe that a sentence of death would not be final, but would rather be subject to review by the Governor.[391]

However, these arguments are manifestly inadequate. First, the Briggs Instruction invites the jury to speculate on the defendant's future dangerousness only in relation to the possibility that the defendant's sentence would be commuted by a future Governor. Hence, misguided juror speculation on the prospect of commutation seems unescapable. Secondly, the Briggs Instruction clearly operates as a rhetorical ploy. By instructing the jury about the Governor's commu-

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[385] *Id.* at 998.
[386] *Id.* at 1010.
[387] *Id.* at 1003.
[388] *Id.* at 1005.
[389] *Id.* at 1008–09.
[390] *Id.* at 1011.
[391] *Id.*

tation power with regard to one sentencing alternative, but remaining silent as to the other, the clear implication is that only the one alternative may be commuted. This effect is well recognized by the maxim, *expressio unius est exclusio alterius*.[392] By accurately informing the jury as to the full extent of the law, this effect is defeated. Moreover, as Justice Marshall pointed out in his vehement dissent, even if the Court were right about the prejudicial effect of a prospective balancing instruction, the obvious solution would be to simply ban the Briggs Instruction outright.[393] That would have been the most effective alternative.

In the final analysis, the Court never even directly engages the arguments made against the constitutionality of the Briggs Instruction. After picking apart the majority's faulty reasoning, Justice Marshall lamented that:

> I had thought it was common ground that the capital sentencing process must be reliable, as rational, and as free of mistakes as is humanly possible. Yet the Court upholds the Briggs Instruction without ever disputing its substantial potential to mislead. The Court thus authorizes the State to "cross the line of neutrality" and encourage death sentences by deceiving the jury.[394]

In fact, the reasoning in *Ramos* was so unpersuasive that upon remand the California Supreme Court promptly struck down the Briggs Instruction once again, this time on the basis of the California State Constitution.[395]

However, there is one basic principle of the Court's death penalty jurisprudence that lends credence to the outcome in *Ramos*, and this principle no doubt drove that decision. Importantly, this principle is fundamentally inapplicable to the facts in *Simmons* and *Shafer*. From the beginning of its modern scrutiny of capital punishment procedures, the Court has recognized that the Eighth Amendment's proscription of cruel and unusual punishment is a dynamic principle, changing to reflect our evolving community values.[396] This recognition in turn implies that the Court should give state legislators wide latitude in deciding the terms on which capital punishment may be imposed, because state legislators are in a better position to assess the

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[392] "Expressing only one of two related ideas implies the exclusion of the other."

[393] *Ramos*, 463 U.S. at 1017–18 (Marshall, J. dissenting).

[394] *Id.* at 1018 (Marshall, J. dissenting) (quoting Witherspoon v. Illinois, 391 U.S. 510, 523 (1968)).

[395] *See generally*, California v. Ramos, 689 P.2d 430 (Cal. 1984).

[396] *See* Furman v. Georgia, 408 U.S. 239, 242 (1972) (Douglas, J., concurring).

contemporary values of the community.[397] In this regard, the case for upholding the Briggs Instruction was especially strong because that instruction was mandated by a voter initiative.[398] If state legislators are in a better position to assess the values of the community than judges, then a popular vote would seem the best gauge of all. Accordingly, the holding in *Ramos* is characterized as one of deference to the state legislative process.[399] The Court wrote, "We sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the states."[400]

However, this principle of deference to the legislative process is clearly inapplicable to the facts of *Simmons* and *Shafer*. The South Carolina rule prohibiting juries from being informed as to the parole ineligibility of capital defendants was not the product of a voter initiative or legislative process.[401] It was judicially mandated by the South Carolina Supreme Court.[402] In *Ramos*, the United States Supreme Court showed no deference to the California Supreme Court in overturning its decision as to the constitutionality of the Briggs Instruction. Likewise, the Court owes no deference to the decisions of the South Carolina Supreme Court, particularly where the Eighth and Fourteenth Amendments of the United States Constitution are implicated. Moreover, it seems self-evident that fully informing jurors as to the basic terms of their sentencing decision better comports with our contemporary community values. As discussed above, the CJP has extensively documented the frustration and outrage of former capital jurors at not being fully informed of their sentencing decision.[403] Moreover, the jurors in *Simmons* and *Shafer* seemed to have concurred in this sentiment, as their questionnaires to the trial judge demonstrate.[404]

In the end, whether one relies on the Eighth Amendment jurisprudence arising out of *Furman* and *Gregg*, or the Fourteenth Amendment principles established in *Gardner*, the case for a blanket

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

[398] *Ramos*, 463 U.S. at 995 n.4.

[399] *Id.* at 1013–14.

[400] *Id.* at 1014.

[401] *See generally*, S.C. STAT. ANN. § 16–3–20 (2001) (no statutory rule against disclosure of a capital defendant's parole ineligibility).

[402] *See* State v. Shafer, 531 S.E.2d 524, 529 (S.C., 2000).

[403] See Bowers & Steiner, *supra* note 266 and accompanying text.

[404] Simmons v. South Carolina, 512 U.S. 154, 160 (1994); Shafer v. South Carolina, 532 U.S. 36, 48-9 (2001).

rule allowing all capital defendants to inform the jury of their parole ineligibility under a life sentence is manifest. Ample evidence demonstrates that jurors are likely to misperceive a capital defendant's parole eligibility, as well as the amount of time that will pass before his release. In that this misperception exacerbates the issue of future dangerousness, along with the facts of the capital crime itself, that issue may be presumed to be raised in a capital trial regardless of what the prosecutor argues. What's more, even where future dangerousness is not considered a significant issue at all, the prejudicial effect of juror misperception concerning parole may still be manifest in determining which punishment best fits the crime. Finally, by formulating a rule with awkward and unwarranted exceptions, the Court has already wasted judicial resources at all levels. For all these reasons, an unconditional rule of disclosure ought to be promulgated.

VII. CONCLUSION

Ultimately the argument for an unconditional Eighth and Fourteenth Amendment mandate that capital juries be informed of a defendant's parole ineligibility falls back on simple common sense. If due process is to mean anything in the context of capital sentencing, it should mean that jurors are adequately informed as to the legal framework upon which they must make their decision as to life or death. There is simply no justification for a system that insists on jeopardizing the lives of defendants based not on a reasoned moral judgment, but on common juror misunderstandings of which all are aware. Likewise, there is no justification for increasing the anxiety of jurors charged with this weighty task by insisting that they fumble about in the dark when it would be effortless to illuminate the true consequences of their decision. There is simply no valid reason for the Court to qualify the protection of the *Simmons* rule, thereby leaving the door open for the near certain likelihood that some future executions will be predicated on the arbitrary and capricious basis of easily foreseeable and correctable juror ignorance. In the end, the missed opportunity in *Shafer* seems another tragic instance of the blind leading the blind.

William Baarsma