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O'Dell v. Netherland: A Bedrock Principal of Fundamental Fairness?

I. INTRODUCTION

*Some of the jurors were wanting to know would he get out in like seven years on good behavior If we were gonna put him in prison, we wanted to make sure he would stay there. But . . . we didn't really feel like he would We really felt like we didn't have any alternative.*¹

The preceding quote made by a juror in an interview following a death verdict imposed on a defendant² illustrates jurors' frustration with the lack of alternatives to capital punishment. Several states began providing a life-without-parole alternative to the death penalty.³ Despite providing this alternative, some of these states failed to inform juries of this life-without-parole option.⁴ Regardless of this alternative, some prosecutors still argued that a defendant should receive a death sentence because, in the absence of such a sentence, he or she would pose a future danger to society.⁵ In some of these cases, the defendant was prohibited from rebutting that concern by offering evidence to show his or her parole ineligibility.⁶

In 1994, the Supreme Court held in *Simmons v. South Carolina*⁷ that where the prosecution promotes a death sentence by arguing that the defendant presents a future danger to society, the defendant may rebut this assertion by offering evidence that he or she is parole ineligible.⁸ The *Simmons* decision came down as Joseph O'Dell sat

1. See Richard C. Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty* (last modified Mar. 1, 1998) <<http://www.essential.org/dpic/dpic.r07.html>>.

2. See *id.*

3. See *Simmons v. South Carolina*, 512 U.S. 154, 167 n.7 (1994) (stating that "there are 26 States that both employ juries . . . and provide for life imprisonment without parole as an alternative to capital punishment").

4. See *id.* at 168 n.8. Those states were Pennsylvania, South Carolina, and Virginia. See *id.*

5. See, e.g., *id.* at 157-58; *O'Dell v. Netherland*, 117 S. Ct. 1969, 1972 (1997).

6. See, e.g., *Simmons*, 512 U.S. at 157-58; *O'Dell*, 117 S. Ct. at 1972.

7. 512 U.S. 154 (1994).

8. See *id.* at 178.

on death row.⁹ In *O'Dell v. Netherland*,¹⁰ the prosecution made that same argument as a means of ensuring that O'Dell receive a death sentence, as opposed to a life-in-prison term.¹¹ Like the defendant in *Simmons*, at the time of his sentencing hearing, O'Dell was not permitted to offer evidence of his parole ineligibility to rebut the prosecution's argument.¹² Upon learning of the *Simmons* decision, Joseph O'Dell sought to apply the rule retroactively in an effort to upset his death sentence.¹³ Taking his plea all the way to the Supreme Court, O'Dell walked away a loser.¹⁴ In *O'Dell*,¹⁵ the Supreme Court concluded that, as per the *Teague* doctrine,¹⁶ the *Simmons* rule could not be applied retroactively to overturn O'Dell's death sentence.¹⁷

This Note analyzes the Supreme Court's decision in *O'Dell* and addresses the impact that the decision will have on future habeas corpus petitioners. First, this Note summarizes the history and development of capital sentencing procedures¹⁸ and the establishment of rules regarding the introduction of evidence in sentencing and post-sentencing capital punishment cases.¹⁹ Further, this Note reviews the retroactive application of rules to habeas petitions, both before and after *Teague v. Lane*.²⁰ This Note then discusses the facts of *O'Dell*,²¹ along with the majority²² and dissenting opinions.²³ Although this Note applauds the majority for treating *Simmons* as a "new" rule under the *Teague* doctrine,²⁴ it criticizes the majority for failing to apply the rule retroactively to O'Dell as a "bedrock procedural element"²⁵ under

9. See *O'Dell*, 117 S. Ct. at 1971-72.

10. 117 S. Ct. 1969 (1997).

11. See *id.* at 1972.

12. See *id.*

13. See *id.*

14. See *id.* at 1979. The Supreme Court affirmed the judgment of the United States Court of Appeals for the Fourth Circuit that the new *Simmons* rule could not be retroactively apply to O'Dell. *Id.*

15. 117 S. Ct. 1969 (1997).

16. See *Teague v. Lane*, 489 U.S. 288 (1989); see also *infra* Part II.C (discussing whether new rules of criminal procedure should be applied retroactively).

17. *O'Dell*, 117 S. Ct. at 1978 (stating that the *Simmons* rule is new and that O'Dell may not invoke it unless it falls within one of the *Teague* doctrine exceptions).

18. See *infra* Part II.A.

19. See *infra* Part II.B.

20. See *infra* Part II.C.

21. See *infra* Part III.A.

22. See *infra* Part III.B.

23. See *infra* Part III.C.

24. See *infra* Part IV.A.

25. *Teague*, 489 U.S. at 315.

Teague's second exception.²⁶ Finally this Note advocates that, because applying *Teague's* second exception narrowly to death penalty petitioners violates the criminal system's fundamental principles of justice, the Supreme Court should adopt a broader approach for death penalty cases.²⁷

II. BACKGROUND

Given the severity of capital punishment, courts and legislatures have established extensive procedural safeguards and a lengthy appeals route for defendants sentenced to death.²⁸ Further, complex evidentiary rules govern both sentencing and post-sentencing death penalty cases.²⁹ Due to the length of time that a defendant sits on death row, it is likely that a procedural rule will come down that could assist his or her case.³⁰ Thus, the defendant will seek to retroactively apply the new rule through application of the *Teague* doctrine—a doctrine that governs the retroactive application of new rules.³¹

A. Death Penalty Sentences

As of February, 1997, 3,365 people were residents of "death row"³² in the United States.³³ Because no penalty for wrongdoing is as severe and permanent as the death penalty,³⁴ the controversy over

26. See *infra* Part IV.B.

27. See *infra* Part V.

28. See *infra* Part II.A.

29. See *infra* Part II.B.

30. See *infra* Part II.C.

31. See *infra* Part II.C.

32. "Death row" is a separate area in prisons for those who have been sentenced to death. See Amnesty International, Proposal for a Presidential Commission on the Death Penalty in the United States of America, reprinted in HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 375, 379 (3d ed. 1982) (stating "[p]risoners under sentence of death wait there, often in isolation and under special deprivations and restraints, until the hour of their execution").

33. See Death Penalty Information Center, (last modified Mar. 1, 1998) <<http://www.essential.org/dpic/dpic5.html>>; see also David I. Bruck, Decisions of Death, NEW REPUBLIC, Dec. 12, 1983 (rev. 1995), reprinted in RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 55 (1994) (noting that "[i]f death row were really a row [in 1995], it would [have] stretch[ed] for more than [three] miles, cell after six-foot-wide cell").

34. See Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1662 (1986). Van den Haag stated: "The death penalty is our harshest punishment. It is irrevocable: it ends the existence of those punished . . . [and] is the only corporal punishment still applied to adults." *Id.*

Hanging, firing squad, electric chair, gas chamber, and lethal injection constitute the five available methods of capital punishment in the United States. See Jacob Weisberg, *This Is Your Death*, THE NEW REPUBLIC, July 1, 1991, at 23.

capital punishment continues to rage.³⁵ Given the high stakes involved in sentencing a human being to death and the serious consequences caused by any error in death sentencing, in 1968, the Supreme Court began to take an active role in assuring that death sentencing procedures meet Constitutional requirements.³⁶

1. Procedural Safeguards in Death Sentencing

Before 1968, the Supreme Court did not grant certiorari to any case concerning the constitutionality of a defendant's death sentence.³⁷ However, the landmark case of *Furman v. Georgia*³⁸ introduced the Supreme Court's commitment, in the early 1970s, to creating additional procedural safeguards in death sentencing cases.³⁹ In *Furman*, the Supreme Court overturned every state's death penalty law, releasing every prisoner on death row⁴⁰ on the basis that jury-discretionary selection of criminals sentenced to death was random and arbitrary.⁴¹ Although the *Furman* Court did not decide the issue of whether any capital sentencing statute could meet constitutional

35. See, e.g., Betsy Hart, *Conversion No Cause to Spare Murderers' Lives*, MILWAUKEE J. SENTINEL, Feb. 9, 1998, at 10 (rejecting the argument that conversion is cause to overturn a death sentence); Deborah Mathis, *Death Penalty Halts Steps Toward Enlightenment*, IDAHO STATESMAN, Feb. 9, 1998, at 7a (analyzing the conflict surrounding capital punishment); Jonathan Roos, *House GOP Leaders Shelve Death-Penalty Efforts for '98*, DES MOINES REG., Feb. 13, 1998, at 3A (reporting the controversy in Iowa regarding the failed attempt to restore the state's death penalty law repealed thirty-three years ago); Mike Ward, *Officials Stand Up for Death Penalty*, AUSTIN AM.-STATESMAN, Feb. 5, 1998, at A1 (examining Texas officials' continued support for the death penalty after Karla Faye Tucker's execution); Tony Wharton, *With Plea to Spare Woman, Robertson Breaks a Pattern; Some Pleased, Others Enraged that He Says this Killer Should Live*, VIRGINIAN PILOT & LEDGER-STAR, Jan. 11, 1998, at A1 (discussing the Karla Faye Tucker controversy).

36. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In *Witherspoon*, the Court refused to uphold a death sentence imposed by a jury, which at the time of its selection, excluded all jurors who voiced general objections to capital punishment or expressed conscientious or religious problems with capital punishment. See *id.* at 521-22; see also WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 4 (1991) (discussing the change in the Court's mindset regarding the constitutionality of the death penalty and the culmination of that change in *Furman v. Georgia*, 408 U.S. 238 (1972)).

Death penalty sentences are often challenged by either the Eighth Amendment's prohibition of cruel and unusual punishment, or the Fourteenth Amendment's due process requirement. See RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 91 (1994).

37. See WHITE, *supra* note 36, at 4.

38. 408 U.S. 238 (1972). *Furman* was a five-to-four decision, with all nine Justices writing separate opinions. See *id.* at 240.

39. See WHITE, *supra* note 36, at 4.

40. See Bruck, *supra* note 33, at 57.

41. See *id.*; WHITE, *supra* note 36, at 4.

muster,⁴² in the years following *Furman*, the Court held that, although capital punishment was not per se unconstitutional, states were required to ensure fairness and consistency in their death penalty systems.⁴³

Thus, the Court steadily mandated additional substantive and procedural safeguards before subjecting a defendant to capital punishment.⁴⁴ The Court has struck down mandatory death sentences, encouraging individualized sentencing.⁴⁵ In contrast, it has upheld both death penalty laws that incorporate sentencing guidelines and jury consideration of the specific crime and the defendant's character.⁴⁶ In the late 1970s and early 1980s, the Court began to require that the jury consider any mitigating evidence, such as a defendant's character and record, and the circumstances surrounding the defendant's crime.⁴⁷ The Court also encouraged a limitation on the use of aggravating

42. See *Furman*, 408 U.S. at 310 (Stewart, J., concurring); see also WHITE, *supra* note 36, at 4 (discussing that each of the nine Justices wrote separate opinions in *Furman*). Five Justices concurred on the "core basis . . . that the death penalty had been applied so capriciously as to violate the Eighth Amendment." WHITE, *supra* note 36, at 4.

43. See *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia's death penalty statute that narrowed the class of defendants subject to the death penalty, permitted jury consideration of aggravating and mitigating circumstances, and provided for automatic appeal); *Proffitt v. Florida*, 428 U.S. 242 (1976) (holding that Florida's revised death penalty statute satisfied the *Furman* test against arbitrary and capricious imposition of the death penalty); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas' post-*Furman* death penalty statute). But see *Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding North Carolina's revised death penalty statute unconstitutional); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (invalidating Louisiana's post-*Furman* death penalty statute).

Within four years after the Court's decision in *Furman*, 35 states enacted revised death penalty statutes. See *Gregg*, 428 U.S. at 155. The following states currently have death penalty statutes: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See Death Penalty Information Center, *supra* note 33, at <<http://www.essential.org/dipc/dpic1.html>>.

44. See generally WHITE, *supra* note 36, at 4-25 (discussing the Court's role in creating more stringent procedural safeguards, and suggesting a quicker appeals process, disallowing the arbitrary imposition of death sentences).

45. See *Woodson*, 428 U.S. at 303-04.

46. See *Gregg*, 428 U.S. at 193 n.44; see also WHITE, *supra* note 36, at 5-6 (explaining that the *Gregg* and *Woodson* decisions constitute a tension between a desire for the even-handed application of the death penalty and a desire for individualized sentencing in capital cases).

47. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In *Lockett*, the Court held that a defendant must be permitted to introduce mitigating factors during the sentencing phase of his or her trial. See *id.*

factors permissible during a defendant's sentencing phase.⁴⁸

2. The Extensive and Drawn Out Appeal Route for a Defendant Sentenced to Death

In 1983, the Court changed its focus from requiring procedural safeguards in death penalty cases to speeding up the often lengthy appeals process for death penalty cases.⁴⁹ Ultimately, in the last fourteen years, the Court has dismissed all principal challenges to the capital punishment system.⁵⁰ Particularly in habeas death-penalty cases, the Court appears troubled by drawn-out litigation, because in most federal habeas cases, the defendant faces a very prolonged and extensive appeals process.⁵¹

Although each state's capital punishment statute differs, some common trends exist.⁵² Usually, death penalty sentencing involves two separate trials.⁵³ The first trial requires a jury to determine if the

48. See *Godfrey v. Georgia*, 446 U.S. 420, 432-33 (1980). In 1980, the Court limited the use of broadly defined aggravating circumstances in the sentencing phase of a defendant's trial and held that an aggravating circumstance cannot be defined so broadly that it provides no direction to the jury. See *id.* But see *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (finding a capital punishment statute that limited the jury's ability to impose a lesser offense on the defendant unconstitutional). See generally WHITE, *supra* note 36, at 8 (discussing *Lockett*, *Godfrey*, and *Beck*).

49. See WHITE, *supra* note 36, at 9-10 (citing *Barefoot v. Estelle*, 463 U.S. 880 (1983)). White notes that *Barefoot* best illustrates the Court's new commitment to speedier death penalty appeals. See *id.* at 10. In *Barefoot*, the prisoner sought a stay of execution, appealing to the Fifth Circuit on January 14, 1983. See *Barefoot*, 463 U.S. at 886. Only five days later, his petition was argued, even though none of the circuit judges had seen the petitioner's trial transcript, or the transcript of his federal habeas hearing. See *id.* Despite the fact that United States Courts of Appeals generally do not hand an opinion down for some time after oral arguments, the Fifth Circuit rendered an opinion the following day, denying the defendant's claims. See *id.* The Supreme Court upheld the Fifth Circuit's action, thereby encouraging speedy appeal processes for capital defendants. See *id.* at 906.

50. See WHITE, *supra* note 36, at 11; see e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting defendant's argument that Georgia's death penalty statute is racially biased). The Court seems to be particularly troubled in habeas cases by drawn out litigation. See WHITE, *supra* note 36, at 14. In most federal habeas cases, the defendant faces a very prolonged and extensive appeals process. See *id.*

51. See WHITE, *supra* note 36, at 14. "[T]he Court was particularly concerned with expediting consideration of death penalty cases in the federal courts. This concern undoubtedly stemmed from its realization that death penalty litigation in the federal courts is often protracted, sometimes stretching out for several years and involving multiple habeas corpus petitions." *Id.*

52. See RONALD L. CARLSON, CRIMINAL JUSTICE PROCEDURE 214 (5th ed. 1995); see also *supra* note 43 (listing states having death penalty statutes).

53. See WHITE, *supra* note 36; see, e.g., ARK. CODE ANN. § 16-97-101 (Michie Supp. 1997). The statute states:

The following procedure shall govern jury trials which include any felony

defendant is guilty of a capital crime.⁵⁴ If the jury finds guilt, it then determines the defendant's sentence based on a presentation of aggravating and mitigating evidence in the second trial.⁵⁵ If a defendant receives the death sentence and seeks appellate review, he or she first must exhaust all state appellate relief.⁵⁶ Most state statutes provide for automatic appeal in which the state appellate court

charges: (1) The jury shall first hear all evidence relevant to every charge on which a defendant is being tried and shall retire to reach a verdict on each charge.

(2) If the defendant is found guilty of one (1) or more charges, the jury shall then hear additional evidence relevant to sentencing on those charges. Evidence introduced in the guilt phase may be considered, but need not be reintroduced at the sentencing phase.

(3) Following the introduction of additional evidence relevant to sentencing, if any, instruction on the law, and argument, the jury shall again retire and determine a sentence within the statutory range.

(4) The court, in its discretion, may also instruct the jury that counsel may argue as to alternative sentences for which the defendant may qualify. The jury, in its discretion, may make a recommendation as to an alternative sentence. However, this recommendation shall not be binding on the court.

(5) After a jury finds guilt, the defendant, with the agreement of the prosecution and the consent of the court, may waive jury sentencing, in which case the court shall impose sentence.

(6) After a plea of guilty, the defendant, with the agreement of the prosecution and the consent of the court, may be sentenced by a jury impaneled for purposes of sentencing only.

Id.

54. See CARLSON, *supra* note 52, at 214-16. The Supreme Court has offered guidance as to what crimes may and may not result in capital punishment. See *id.* (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding unconstitutional a death sentence of a 15-year-old or younger defendant found guilty of murder)); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that imposition of the death penalty on mentally retarded adults is not per se unconstitutional); *Cabana v. Bullock*, 474 U.S. 376 (1986) (holding a requirement that a capital defendant be found to have killed, attempted to kill, or intended to kill in order to receive a death sentence) (other citations omitted).

55. See CARLSON, *supra* note 52, at 214-16; see also URSULA BENTELE, CAPITAL CASE SENTENCING: HOW TO PROTECT YOUR CLIENT 12 (1988) (noting that "during the penalty phase . . . [t]here are several distinct types of statutory burdens The most common type of statute requires the prosecution to prove at least one aggravating circumstance, and that circumstance must outweigh the mitigating factors presented by the defense.").

Although a jury can determine that a defendant should receive a life sentence, rather than a death sentence in capital cases, only a limited number of states allow juries to determine the length and types of sentences for defendants in non-capital cases. See CARLSON, *supra* note 52, at 218. Allowing juries to determine the length and type of sentences in non-capital cases is generally condemned. See *id.* at 217-18. Critics recognize a need for experts to determine sentences in non-capital cases in order to prevent arbitrary and non-uniform sentences. See *id.*

56. See IRA P. ROBBINS, ABA TASK FORCE ON DEATH PENALTY HABEAS CORPUS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 43 (1990).

generally reviews both the conviction and the sentence.⁵⁷ When review is exhausted at the state level, a defendant typically files a writ of certiorari to the United States Supreme Court.⁵⁸ If the writ of certiorari is denied, the defendant then enters a second phase of state post-conviction petitions.⁵⁹ In this second phase of state appeals, the defendant brings forth constitutional claims.⁶⁰

After exhausting state relief, the defendant may then turn to federal habeas remedies⁶¹ if the defendant claims denial of constitutional rights.⁶² First, the defendant files a writ of habeas corpus in federal district court.⁶³ Next, the federal district court will hold a full hearing.⁶⁴ Appeals, including a petition for writ of certiorari, generally

57. See Barry Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 68 (1978), reprinted in HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 241-46 (3rd. ed. 1982). "If the judgment is death, the case will be appealed; indeed, most statutes provide for automatic appeal of death sentences." *Id.* at 243 (citing FLA. STAT. ANN. § 921.141(4) (Supp. 1976-1977); GA. CODE ANN. §27-2537(a) (Supp. 1976); N.C. GEN. STATE. § 15-2000(d)(1) (Supp. 1977)). In fact, of the 37 states with death penalty statutes, only one state, Arkansas, does not require a mandatory appeal. See Richard C. Dieter, *Ethical Choices For Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 810 n.81 (1990).

58. See Nakell, *supra* note 57, at 245. The Supreme Court denies most writs of certiorari, due to their overwhelming volume. See CARLSON, *supra* note 52, at 234 (commenting that the Supreme Court grants certiorari in only about five to six percent of cases). However, despite the limited grants of certiorari, the Court decides a significant number of death penalty cases each term. See David O. Stewart & Scott Nelson, *Hip Deep in the Death Penalty*, 74 A.B.A. J. 40, 40 (1988) (stating that in 1987 the Supreme Court decided 10 death penalty cases).

59. See Nakell, *supra* note 57, at 245 (noting "prisoners sentenced to death exhaust every imaginable avenue for relief").

60. See CARLSON, *supra* note 52, at 247.

61. See Nakell, *supra* note 57, at 245. Nakell notes that if federal habeas relief is unsuccessful, defendants often seek governor commutation, as well as additional state and federal review. See *id.* Commutation, clemency, or pardon "is an official act by an executive that removes all or some of the actual or possible punitive consequences of a criminal conviction." KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 4 (1989).

62. See CARLSON, *supra* note 52, at 246 (noting that "federal habeas corpus courts sit to ensure that individuals are not imprisoned in violation of the U.S. Constitution"); see also 28 U.S.C. § 2241 (1994) (providing requirements for application for writ of habeas corpus).

63. Habeas corpus is a prisoner's right to challenge his or her incarceration in federal court. See U.S. CONST. Art I, §9, cl. 2 which provides: "The Privilege of Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it." See David P. Saybolt, et al., *Habeas Relief for State Prisoners*, 85 GEO. L.J. 1507, 1507 n. 2706 (1997).

64. See ROBBINS, *supra* note 56, at 43 n.115; see also 28 U.S.C. § 2243 (1994) (stating that "[t]he person to whom the writ or order is directed shall make a return certifying the true cause of the detention" and that "[w]hen the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause . . .").

follow.⁶⁵ This long and specialized process of appeals usually results in delaying a defendant's execution for several years.⁶⁶

*B. Establishment of Rules of Criminal Procedure Regarding
Introduction of Evidence in Sentencing and Post-Sentencing Death
Penalty Cases*

In appealing a sentence or conviction, it is not uncommon for a defendant to contest the lower court's procedures during his sentencing phase.⁶⁷ Although the Supreme Court generally refuses to entertain challenges to the capital sentencing system as a whole, it continues to examine the constitutionality of specific state sentencing procedures, many of which involve evidentiary questions.⁶⁸ The Court is often divided on the constitutionality of different states' sentencing procedures.⁶⁹ Additionally, even if the Court finds that

65. See ROBBINS, *supra* note 56, at 43. Robbins states:

Following Supreme Court Review, if any, the case will become the subject of state executive-branch clemency proceedings. If clemency is denied, emergency post-conviction proceedings will be filed in both state and federal trial courts, with expedited appeals to the state and federal intermediate and ultimate appellate courts.

Id.

66. See *id.* at 43 (noting that "it is rare for a death sentence to be carried out within five or six years of its imposition"). "[O]n average, it took six years and eight months in 1988, and seven years and two months in 1986 and 1987, for death-sentence inmates to be executed from time of sentencing to execution." See *id.* at 43 n.116.

67. See *id.* at 158-59. In fact, as per the advice of their attorney, defendants will contest procedures for the main purpose of causing delay; delay is a strategic tactic often used by defense attorneys. See *id.* at 159. Multiple factors result in the delay of capital proceedings, including:

delays in appointing counsel; delays from less than adequate competence of counsel; delays in processing state transcripts and records; delays from reviewing records that are ordinarily longer than in non-capital cases; delays from state policies and procedures; delays from uncertainty concerning the substantive criminal law and Eighth amendment law; delays from the application of, and uncertainty about the interpretation of, threshold inquiries for federal habeas corpus review; delays from discovery of new facts; delays from developments in the law; and delays from the understandable inclination of both litigants and their attorneys to postpone the ultimate sanction.

Id.

68. See *infra* notes 71-105 and accompanying text (discussing specific cases in which the Court has examined and ruled on the constitutionality of different states' sentencing procedures).

69. See, e.g., *Skipper v. South Carolina*, 476 U.S. 1 (1986) (finding that refusal to allow jury consideration of potentially mitigating evidence violates the Eighth Amendment); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (finding it unconstitutional for a prosecutor to inform a sentencing jury that its decision would be reviewed); *California v. Ramos*, 463 U.S. 992 (1983) (upholding a state procedure that informs a sentencing jury of the governor's ability to pardon a defendant's death sentence);

states' procedures are unconstitutional, it is often at odds as to what part of the Constitution prohibits those particular procedures.⁷⁰

1. Deciding a Death Sentence on Evidence Unavailable to the Defendant

State procedures that allow a death sentence to be decided in part on the basis of a pre-sentence investigation report, not fully disclosed to the defendant, violates the Eighth Amendment of the Constitution.⁷¹ In *Gardner v. Florida*, although the jury advised that the defendant be sentenced to life imprisonment rather than death,⁷² the judge requested a pre-sentence investigation report and subsequently sentenced the defendant to death.⁷³ Although the Court found the procedure followed by the judge to be unconstitutional, it differed as whether the Eighth⁷⁴ or the Fourteenth⁷⁵ Amendment prohibited the procedure.⁷⁶

Gardner v. Florida, 430 U.S. 349 (1977) (vacating, under the Eighth Amendment, a death sentence partially decided on a presentence investigation report to which the defendant did not have full access).

70. See *infra* notes 71-105 (discussing four Supreme Court opinions in which the justices disagreed as to what constitutional provisions govern different state sentencing procedures); see also *supra* note 36 (discussing constitutional provisions under which death penalty statutes are generally challenged).

71. See *Gardner*, 430 U.S. at 362.

72. See *id.* at 352-53. In *Gardner*, the defendant was convicted of first degree murder. The jury "expressly found that the mitigating circumstances outweighed the aggravating circumstances and advised the court to impose a life sentence [on the defendant]." *Id.* at 352-53.

73. See *id.* The judge based his decision on evidence presented at both the guilt and sentencing phases of the trial, as well as his review of the pre-sentence investigation report, a portion of which was undisclosed. See *id.* at 353.

74. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

75. U.S. CONST. amend. XIV, § 1. The amendment states:

No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

76. *Gardner* produced seven separate decisions. Justices Stevens, Stewart and Powell represented a three-member plurality that based its holding on the Due Process Clause. See *Gardner*, 430 U.S. at 351-62. Specifically, the plurality found that it is impermissible to withhold from the defendant part of a pre-sentence investigation report. See *id.* at 360-61. Further, even if it were allowable, the full report would have to be part of the appeal record because, "[w]ithout full disclosure of the basis for the death sentence the . . . capital sentencing procedure would be subject to the defects [that] resulted in the holding of unconstitutionality in *Furman v. Georgia*." *Id.* at 361. Then Chief Justice Burger concurred in the judgment with no opinion. See *id.* at 362 (Burger, J., concurring). Additionally, Justice White concurred on the basis that the Eighth Amendment's ban on cruel and unusual punishment prohibits a state from imposing the

However, the controlling concurrence⁷⁷ reasoned that the procedure for imposing the death sentence on the defendant violated the Eighth Amendment rather than the Due Process Clause.⁷⁸

2. Introduction of Evidence Regarding Offender's Character

A state's refusal to admit evidence of a defendant's good behavior in prison also violates the Eighth Amendment's⁷⁹ prohibition on the exclusion of relevant mitigating evidence.⁸⁰ In *Skipper v. South Carolina*,⁸¹ the prosecution argued, during the defendant's penalty phase, that if not sentenced to death, the defendant would likely rape prisoners and cause disciplinary problems in jail.⁸² The Supreme Court remanded the case because the defendant was precluded from introducing mitigating evidence that he had previously behaved well in prison.⁸³ Once again, however, the Supreme Court disagreed as to what constitutional principle the trial court violated.⁸⁴

death sentence on the basis of information in a pre-sentence report, part of which was not given to the defendant. *See id.* at 364 (White, J., concurring). Justice Blackmun also concurred based on precedent and the opinions of Justices Brennan and Marshall. *See id.* (Blackmun, J., concurring). In a separate opinion, Justice Brennan agreed with the plurality's due process holding, but reiterated his belief that the death penalty is prohibited in all cases under the Eighth and Fourteenth Amendments. *See id.* at 364-65 (Brennan, J., concurring). Further, Justice Marshall dissented, both because of his belief that the death penalty is always unconstitutional, and because Florida failed to follow required capital sentencing procedures. *See id.* at 365 (Marshall, J., dissenting). Finally, Justice Rehnquist also dissented. *See id.* at 371 (Rehnquist, J., dissenting).

77. When a case produces no majority opinion, the concurrence providing the necessary fifth vote and written on the narrowest grounds constitutes the controlling opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Of the Justices whose votes were necessary to render the judgment, Justice White's concurrence, which relied on the Eighth Amendment, was based on the narrowest grounds. Thus, his concurrence constitutes the controlling rule in *Gardner*. *See Gardner*, 430 U.S. at 363-65 (White, J., concurring).

78. *See Gardner*, 430 U.S. at 365 (White, J., concurring).

79. *See Skipper v. South Carolina*, 476 U.S. 1, 8 (1986). In a footnote, the Court also noted the Fourteenth Amendment's "due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *Id.* at 5 n.1.

80. *See id.* at 8. In *Skipper*, the defendant received the death penalty after a jury found him guilty of murder and rape. *See id.* at 2. In seeking the death penalty, the prosecution argued that, if sentenced to a prison term, the defendant would likely commit criminal acts while in prison. *See id.* at 3. The defendant attempted to offer mitigating evidence in the form of testimony regarding his prior good behavior in prison. *See id.*

81. 476 U.S. 1 (1986).

82. *See id.* at 3.

83. *See id.* at 8-9.

84. *See id.* at 9-15. The plurality found that the procedure violated the Eighth Amendment. However, a three-member concurrence in *Skipper* disagreed as to whether the state's conduct violated the Eighth Amendment and concluded, on narrower grounds,

3. Introduction of Evidence of Post-Sentencing Laws

In addition to determining what evidence may be introduced regarding a defendant's character at the sentencing phase of his or her trial, the Supreme Court has also decided whether informing juries of state post-sentencing laws is constitutional.⁸⁵ The Supreme Court gives deference to state choice in determining what information a jury should consider in the death penalty sentencing phase of a defendant's trial.⁸⁶ For example, in *California v. Ramos*,⁸⁷ the Supreme Court held that the Eighth and Fourteenth Amendments do not prohibit the Briggs instruction, which informs juries in a sentencing procedure that the Governor has the power to pardon or modify a defendant's sentence.⁸⁸

In contrast, though the Court will generally defer to the states' choices, it will not allow states to provide the jury with inaccurate or misleading information during sentencing hearings.⁸⁹ For example, in

that the conduct was only in violation of the rule previously handed down in *Gardner*. See *id.* at 9; see also *supra* notes 71-78 (discussing *Gardner*).

85. An example of a state's post sentencing law is where a state requires that a death sentence receive automatic appeal to the state supreme court. See *supra* note 57 (stating that of the 37 states with death penalty statutes, only one does not require a mandatory appeal); see also *infra* notes 87-95 and accompanying text (discussing *California v. Ramos*, 463 U.S. 992 (1983) and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), two cases concerning the introduction of state post-sentencing law).

86. See, e.g., *Ramos*, 463 U.S. at 1004.

87. 463 U.S. 992.

88. See *id.* at 1014. The Briggs Instruction was a result of California voter initiative and mandated that the judge inform the jury that if it decided upon a verdict of life imprisonment without parole, the Governor could commute it to provide for the possibility of parole. See *id.* at 995, 995 n.4.

In *Ramos*, the defendant was sentenced to death following a conviction for robbery, attempted murder, and first degree murder. See *id.* at 995. Pursuant to California law, which requires the Briggs instruction, the trial judge informed the jury that a sentence of life imprisonment without parole could be pardoned or modified to imprisonment with the possibility of parole. See *id.* In deciding the constitutionality of the Briggs instruction, the Court noted that "[i]t is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires. 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." *Id.* at 1013-14. State courts have not always heeded Supreme Court warnings to leave certain decisions up to the state legislatures. See *id.* at 1013. For example, New York Governor George Pataki criticized the New York Court of Appeals, New York's highest court, in going "too far in protecting the rights of criminal defendants." *The Governor's Attack on the Judges*, N.Y. TIMES, Feb. 3, 1996, at C1. In 1996 Governor Pataki introduced legislation that would mandate the appellate court's deference to United States Supreme Court's rules. See *id.*

89. See *Caldwell v. Mississippi*, 472 U.S. 320, 342 (1985); see also *infra* notes 90-95 (discussing *Caldwell*).

Caldwell v. Mississippi,⁹⁰ the Court found it unconstitutional⁹¹ for a prosecutor to attempt to minimize the significance of the jury's decision by arguing that its decision for or against the death penalty would be automatically reviewed on appeal.⁹² Although the Court agreed that the prosecutor's argument was both inaccurate and misleading, it differed as to whether the information was relevant.⁹³ However, the controlling opinion⁹⁴ on this point found that as long as the information was accurate and not misleading, a state could choose whether or not to instruct its sentencing juries as to post-sentencing procedures.⁹⁵

4. Introduction of Evidence by Defendant Regarding His Parole Ineligible Status to Rebut Prosecution's Argument that Defendant Poses a Future Danger to Society

Until 1994, states were left with the decision whether to inform a sentencing jury on a capital defendant's possibility of parole.⁹⁶ However, in 1994, the Supreme Court, in *Simmons v. South*

90. 472 U.S. 320 (1985).

91. In *Caldwell*, a jury convicted the defendant of murdering a grocery store owner during a robbery. *See id.* at 324. During his sentencing hearing, the defendant's lawyers emphasized to the jury the seriousness and responsibility of imposing the death penalty. *See id.* To rebut this argument, the prosecution explained to the jury that its decision would be automatically reviewed on appeal. *See id.* at 325-26.

92. *See id.* The prosecutor stated, "Now, [the defense] would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it They know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court." *See id.* at 325-26.

93. The plurality, written by Justice Marshall, and joined by Justices Brennan, Blackmun, and Stevens, determined that the defendant's death sentence should be overruled because of the impropriety of the prosecutor's statements. The Court distinguished *Ramos* by pointing out that *Ramos* did not hold that States may decide to educate juries on any information regarding post-sentencing procedures. *See id.* at 335-37. Specifically, the Court stated that the prosecutor's statements to the jury in *Ramos* were both "accurate and relevant to a legitimate state penological interest." *Id.* at 355. In contrast, the Court found the argument presented to the *Caldwell* jury to be neither accurate nor relevant. *See id.* at 336.

94. Justice O'Connor's concurrence controlled this point. *See supra* note 77.

95. *See Caldwell*, 472 U.S. at 342. In her concurrence, Justice O'Connor agreed that no "valid state penological interest" condoned giving the jury inaccurate and misleading information. *Id.* (O'Connor, J., concurring). Nonetheless, Justice O'Connor disagreed that appellate review information is irrelevant to a jury's determination of a defendant's sentence. *See id.* at 342-43 (O'Connor, J., concurring). Justice O'Connor stated, "Should a State conclude that the reliability of its sentencing procedure is enhanced by accurately instructing the jurors on the sentencing procedure, including the existence and limited nature of appellate review, I see nothing in *Ramos* to foreclose a policy choice in favor of jury education." *Id.* (O'Connor, J., concurring)

96. *See Simmons v. South Carolina*, 512 U.S. 154 (1994).

Carolina, held that where a defendant is ineligible for parole and the prosecution, in seeking the death penalty, argues that the defendant presents a future danger to society, the defendant must be allowed to inform the jury that he is parole ineligible if sentenced to life imprisonment.⁹⁷ *Simmons* produced no majority opinion for the Court.⁹⁸

The Plurality in *Simmons*, relying on both *Gardner v. Florida*⁹⁹ and *Skipper v. South Carolina*,¹⁰⁰ held that the Due Process Clause of the Fourteenth Amendment prohibited a defendant from being sentenced to death on the basis of information that the defendant was not permitted to deny or explain.¹⁰¹ Nonetheless, Justice O'Connor's concurrence, joined by Chief Justice Rehnquist and Justice Kennedy, provided the controlling opinion in *Simmons*.¹⁰² Justice O'Connor reaffirmed the Court's "general deference to state decisions regarding what the jury should be told about sentencing."¹⁰³ Justice O'Connor then

97. See *id.* at 178. During deliberations after the sentencing phase of *Simmons*' trial, the jury asked the judge: "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.* at 160. The judge responded that *Simmons*' parole eligibility "is not a proper issue for your consideration." *Id.*

98. See *id.* at 154-78. Justices Blackmun, Stevens, Souter, and Ginsburg represented the plurality and based their opinion on the Due Process Clause of the Fourteenth Amendment. See *id.* at 162. Justices Souter and Stevens also wrote a concurrence, reasoning that the Eighth Amendment required the *Simmons* rule. See *id.* at 172-74 (Souter & Stevens, JJ., concurring). Justice Ginsburg filed a separate concurrence, explaining that the decision was narrow, and expressing concern with the plurality's broad language. See *id.* at 174-75 (Ginsburg, J., concurring). Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy only concurred in the judgment, emphasizing the narrowness of the decision. See *id.* at 175-78 (Rehnquist, O'Connor, & Kennedy, JJ., concurring). Justices Scalia and Thomas dissented on factual grounds, stating that the *Simmons* rule should be applied only if the prosecutor argues about parole. See *id.* at 178-85 (Scalia & Thomas, JJ., dissenting); see also Benjamin P. Cooper, Comment, *Truth in Sentencing: The Prospective and Retroactive Application of Simmons v. South Carolina*, 63 U. CHI. L. REV. 1573, 1579-81 (1996) (providing a brief description of the plurality opinion, concurring opinions, and the dissenting opinion in *Simmons*).

99. See *supra* notes 71-78.

100. See *supra* notes 79-84.

101. See *Simmons*, 512 U.S. at 164-65 (stating that "[t]he principle announced in *Gardner* was reaffirmed in *Skipper*, and it compels our decision today").

102. See *id.* at 175-78; see also *supra* note 72.

103. See *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring). Justice O'Connor stated:

We have previously noted with approval . . . that '[many state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon, or parole' The decision whether or not to inform the jury of the possibility of early release is generally left to the States . . . the Constitution does not require (or preclude) jury consideration of that fact.

Id. at 176 (O'Connor, J., concurring) (citing *California v. Ramos*, 463 U.S. 992, 1013

distinguished *Skipper* on the basis that the defendant in *Skipper* requested the introduction of factual evidence, rather than evidence of the State's sentencing law, in order to rebut the prosecutor's future dangerousness argument.¹⁰⁴ Thus, Justice O'Connor concurred with the judgment on the narrow grounds that, when a prosecutor argues future threat of danger, and the defendant's only available alternative to the death penalty is life imprisonment without parole, due process mandates that the defendant be allowed to introduce evidence of his parole ineligibility.¹⁰⁵

C. Assessing Whether Rules of Criminal Procedure Should Be Applied Retroactively

Given the length of the appeals process, it is likely that, while a defendant is on death row, a new rule of criminal procedure will come down that could assist in the appeal of his or her sentence.¹⁰⁶ Therefore, a defendant will most likely seek to retroactively apply this new rule to his case in an attempt to upset his death sentence.¹⁰⁷ In 1989, the Supreme Court, in the controversial case of *Teague v. Lane*,¹⁰⁸ radically changed the habeas regime¹⁰⁹ and eliminated the

n.30, 1014 (1983)).

104. See *id.* at 176. The Court stated, "Unlike in *Skipper*, where the defendant sought to introduce factual evidence tending to disprove the State's showing of future dangerousness . . . petitioner sought to rely on the operation of South Carolina's sentencing law in arguing that he would not pose a threat to the community if he were sentenced to life imprisonment." *Id.*

105. See *id.* at 178.

106. See generally WHITE, *supra* note 36, at 19-21 (stating that retroactive decisions have enormous significance for death row inmates seeking relief); see also *supra* note 56 (examining the frequency of Supreme Court review of capital sentencing cases).

107. See WHITE, *supra* note 36, at 178.

108. 489 U.S. 288 (1989). The *Teague* Court reached this decision *sua sponte*, and thus, without briefing or oral argument. See Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160, 164 (1991). In *Teague*, an all-white jury convicted an African-American of attempted murder, armed robbery, and aggravated battery. See *Teague*, 498 U.S. at 292-93. The prosecutor used all of his preemptory challenges to exclude African-Americans from the jury. See *id.* at 293. The trial judge denied defendant's motions for a mistrial. See *id.* After defendant's attempts on direct appeal were unsuccessful, defendant filed a habeas petition arguing, *inter alia*, that he was entitled to relief under the Sixth Amendment's fair cross section requirement. See *id.* Although neither party raised the issue, the Court decided to address retroactivity *sua sponte* and held that the rule petitioner sought, that the Sixth Amendment's fair cross section requirement should extend to the petit jury, should not be applied retroactively. See *id.* at 316.

109. See Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two)*, 30 U. RICH. L. REV. 303, 322 (1996); see also John Blume & William Pratt, *The Changing Face of Retroactivity*, 58 U. MO. KANSAS CITY L. REV. 581, 581 (1990) (noting that "*Teague v. Lane* marked, in the eyes

preexisting procedure for treatment of new rules of criminal procedure.¹¹⁰ In *Teague*, the Supreme Court held that a "new rule"¹¹¹ in a criminal proceeding would not be applied retroactively on collateral review.¹¹² Thus, under *Teague*, a habeas corpus petitioner cannot apply a new rule retroactively to his claim unless it falls under one of two narrow exceptions.¹¹³ Although *Teague* did not specify whether the rule would be applied to death sentence petitioners, the Supreme Court, in *Penry v. Lynaugh*,¹¹⁴ extended *Teague's* retroactivity rule to capital cases.¹¹⁵ Under *Teague*, retroactivity is decided as a "threshold" matter, and only then will the Court examine

of many, an attempt by the United States Supreme Court to judicially limit the scope of federal habeas corpus review") (citations omitted).

110. See Cooper, *supra* note 98, at 1576. Congress recently amended 28 U.S.C. § 2254(d), seeming to codify the Supreme Court's holding in *Teague* as applied to the retroactivity standard in federal habeas petitions. See *id.* Cooper states "[a]lthough Congress did not explicitly say so, the new statute appears to codify the Supreme Court's controversial decision in *Teague v. Lane*." *Id.* at 1576 (citing 28 U.S.C. § 2254(d) (1996) (amended 1996)). 28 U.S.C. § 2254(d) states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.S. § 2254(d) (Law Co-op. 1992 & Supp. 1997), amended by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214.

111. See *infra* Part II.C.2.

112. Thus, *Teague's* retroactivity bar does not apply to cases on direct review, rather, only to habeas corpus petitions. See Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 347 (1997) (stating that, on direct review, all Supreme Court decisions are applied retroactively).

113. See *infra* Part II.C.2.b and accompanying text (discussing *Teague's* two exceptions).

114. 492 U.S. 302 (1989).

115. See Clarke, *supra* note 109, at 322. *Penry* also extended *Teague's* two exceptions to capital cases. See *Penry*, 492 U.S. at 330. *Penry's* extension of *Teague* was also mandated "without the benefit of briefing or oral argument." *Id.* at 342 (Brennan, J., dissenting in part). In *Penry*, the defendant, who was mentally retarded, was found guilty of capital murder and sentenced to death, despite his insanity defense. See *id.* at 307-11. The defendant argued, inter alia, that his death sentence violated the Eighth Amendment because the jury was not instructed that it could consider mitigating evidence of the defendant's mental retardation. See *id.* at 311. The Court applied *Teague* and found that the rule the defendant sought to apply was not new. See *id.* at 318-19; see also *infra* Part II.C.2 (discussing what constitutes a new rule under *Teague*). Further, the Court found that, even if it were new, it fell under *Teague's* first exception. See *Penry*, 492 U.S. at 330; see also *infra* Part II.C.2.b (discussing *Teague's* first exception).

the merits of the petitioners' arguments.¹¹⁶

1. Pre-*Teague*: Case by Case Approach

Before *Teague*, the Court performed a case-by-case analysis to determine whether new criminal procedure rules should be applied retroactively.¹¹⁷ Specifically, the Court would announce a new rule in one case, and then decide, either in that case or a later case, whether to apply that rule retroactively.¹¹⁸ The Court looked to the prior history of the rule and instructed courts to weigh the pros and cons of retroactive application in each case.¹¹⁹ The Court later specified this case-by-case approach in *Stovall v. Denno*,¹²⁰ by creating a three-prong balancing test that looked to "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."¹²¹ Fifteen years after *Stovall*, the Supreme Court modified the balancing test and held that a rule must meet certain requirements before it can be analyzed under *Stovall*.¹²²

116. See Blume & Pratt, *supra* note 109, at 581 (stating "[u]nder this approach, a court would first decide whether the rule required to grant a petitioner relief applied retroactively. Only after a court decided that such a rule would apply retroactively would it determine whether the Constitution required such a rule.").

117. See Stephen P. Garvey, *Politicizing Who Dies*, 101 YALE L.J. 187, 192 (1991); see, e.g., *Yates v. Aiken*, 484 U.S. 211 (1988) (determining retroactivity of *Francis v. Franklin*, 471 U.S. 307 (1985)); *Brown v. Louisiana*, 447 U.S. 323 (1980) (deciding whether the rule in *Burch v. Louisiana*, 441 U.S. 130 (1979) could be retroactively applied).

118. See Garvey, *supra* note 117, at 192.

119. See Blume & Pratt, *supra* note 109, at 585 (citing *Linkletter v. Walker*, 381 U.S. 618 (1965)). In *Linkletter*, the Court stated that in determining retroactivity, courts should look to the rule's "purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter*, 381 U.S. at 629.

120. 388 U.S. 293 (1967). In *Stovall*, a state prisoner sought to retroactively apply rules prohibiting identification evidence where, in the absence of counsel, the defendant was shown to identifying witnesses before trial. See *id.* at 295. In deciding whether the rule should be applied retroactively, the Court looked to the rule's purpose, the law enforcement authorities' reliance on the old rule, and the effect of retroactive application of the new rule. See *id.* at 297. The Court found that "retroactive application [of the rules petitioner sought to apply] 'would seriously disrupt the administration of our criminal laws.'" *Id.* at 300 (quoting *Johnson v. New Jersey*, 384 U.S. 719, 731 (1966)). Thus, the Court denied the prisoner's request to apply the rules retroactively. See *id.*

121. Blume & Pratt, *supra* note 109, at 585-86 (quoting *Stovall v. Denno*, 388 U.S. 293 (1967)). The Court laid out the *Stovall* test, finding no justification for the establishment of a bright line rule. See *id.* at 586.

122. See *id.* at 586 (citing *United States v. Johnson*, 457 U.S. 537 (1982)). Blume and Pratt argue that the *Johnson* Court defined a "spectrum," in which the *Stovall* balancing test fell in the middle. See *id.* at 587. On one end of the spectrum were decisions that would always be applied retroactively because they were either dictated by

2. *Teague v. Lane*: Uniform Approach to Retroactive Application of New Rules of Criminal Procedure

In *Teague*, the Court overruled the *Stovall* balancing test in habeas corpus proceedings.¹²³ The *Teague* Court announced a sweeping mandate that new rules of criminal procedure would not be applied retroactively unless they fell under one of two narrow exceptions.¹²⁴

a. "New Rule" Under *Teague v. Lane*

As defined in *Teague*, a case introduces a new rule if "it breaks new ground or imposes a new obligation on the States or the Federal government," or if "the result was not *dictated* by precedent existing at the time the defendant's conviction became final."¹²⁵ Since *Teague*, the Court has offered additional guidance on what constitutes a new rule.¹²⁶ For example, the Court has stated that a rule is new if it is subject to debate among either reasonable minds¹²⁷ or reasonable jurists,¹²⁸ or if existing precedent would have compelled a state court to conclude that the Constitution required the rule in question.¹²⁹ Finally, the Court has emphasized that the purpose behind *Teague* is to "validate[s] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."¹³⁰

prior precedent or "a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place," or a new rule that "overcome[s] an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Id.* at 587 (citing *Johnson*, 457 U.S. at 550, 544). On the other end of the spectrum were rules that broke from precedent and would not be applied retroactively. *See id.* This language sounds similar to the *Teague* doctrine because the *Teague* Court relied on *Johnson* to create the *Teague* doctrine. *See Teague v. Lane*, 489 U.S. 288 (1989).

123. *See* Blume & Pratt, *supra* note 109, at 587 (stating that "[*Teague*] overruled the *Stovall* balancing test insofar as it applied to collateral proceedings").

124. *See Teague*, 489 U.S. at 310; *see also* Garvey, *supra* note 117, at 192 (stating, "In *Teague v. Lane*, . . . the Supreme Court dramatically altered the existing habeas regime . . . [and] categorically held, with two narrow exceptions, that new rules of criminal procedure would not be applied retroactively on collateral appeal to any defendant whose conviction had become final before the new rule was announced").

125. *Teague*, 489 U.S. at 301.

126. *See infra* notes 127-130 and accompanying text.

127. *See* *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

128. *See* *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). A jurist is "[o]ne who is versed or skilled in law; . . . [a] judge; a legal scholar." BLACK'S LAW DICTIONARY 855 (6th ed. 1990).

129. *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *see also Teague*, 489 U.S. at 306 (stating that the state court need only apply the constitutional standards that prevailed at the time the original proceedings took place).

130. *Saffle*, 494 U.S. at 488 (quoting *Butler*, 494 U.S. at 414).

b. Application of the Two Exceptions Under *Teague*

Although *Teague* generally prohibits retroactive application of new rules, two exceptions to the *Teague* doctrine exist. Therefore, if a defendant seeks to apply a new rule, he or she can nonetheless apply it retroactively if it qualifies under one of these two exceptions.¹³¹

The first exception to *Teague* provides that a new rule can be applied retroactively if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"¹³² This exception arises in two instances: (1) where the rule that the defendant seeks to apply retroactively finds that the defendant's conduct was, in fact, not criminal; and (2) where the rule prohibits a particular punishment on a certain class of defendants.¹³³ This exception, in essence, stands for the proposition that, if a new rule holds that an activity is legal, rather than illegal, the Court will apply it retroactively, even if the rule is deemed new.¹³⁴ In the capital punishment context, this exception will also encompass categories of people or types of crimes that have been found to be beyond the scope of the death penalty.¹³⁵ Critics note, however, that this first exception will not be frequently met.¹³⁶

131. See *infra* notes 126-39 and accompanying text.

132. *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part)); *Clarke, supra* note 109, at 304-05; see also *infra* notes 132-36 and accompanying text (discussing the first exception to the *Teague* doctrine).

133. See *Sawyer*, 497 U.S. at 241-42 (stating that "[t]he first [exception] applies to new rules that place an entire category of primary conduct beyond the reach of the criminal law . . . or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense") (citations omitted). *Id.* at 241.

134. See *Metzner, supra* note 108, at 167. An example of conduct once illegal, that is later made legal, is the manufacture, sale, and transportation of alcohol. See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

135. See *Blume & Pratt, supra* note 109, at 597 n.130. Blume & Pratt provide examples of these types of rules:

Ford v. Wainwright, 477 U.S. 399 (1986) (prohibiting the execution of a person that is currently insane) . . . *Coker v. Georgia*, 433 U.S. 584 (1977) (precluding the death penalty as a possible punishment of the crime of rape of an adult woman) . . . *Enmund v. Florida*, 458 U.S. 782 (1982), and modified in *Tison v. Arizona*, 481 U.S. 137 (1987) (prohibiting persons who do not have the requisite moral culpability to warrant the imposition of capital punishment, while possibly being legally guilty of murder under state law, from being sentenced to death).

Id. See generally *WHITE, supra* note 36, at 20 (discussing retroactivity decisions of the Supreme Court).

136. See *Metzner, supra* note 108, at 179 (stating "[t]he opportunities for application of this exception will be few and far between"). But see *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). In *Penry*, the Court, in a unanimous section of the opinion,

The second exception relates to “‘watershed rules of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.”¹³⁷ This exception requires two things: (1) that the rule be a “watershed rule of criminal procedure[;]” and (2) that the rule be “central to an accurate determination of innocence or guilt[.]”¹³⁸ This second exception extends to rules governing capital sentencing procedures.¹³⁹ However, since *Teague*, no Supreme Court case, either capital sentencing or otherwise, has ever found that a rule qualifies under this second exception.¹⁴⁰

Although no rule has qualified under *Teague*’s second exception, the Court has provided an example as to the type of rule that the exception was intended to reach.¹⁴¹ The Court used the rule announced in *Gideon v. Wainwright*,¹⁴² holding that defendants in all felony criminal prosecutions have the right to counsel, as an example of the type of rule covered by *Teague*’s second exception.¹⁴³ In *Teague*, however, the Court specifically noted that a rule encompassing the basic components of due process, such as the

stated:

[I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review.

Id.

137. *Graham v. Collins*, 506 U.S. 461, 478 (1993) (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)). This exception was originally announced in *Teague*. See *Teague*, 489 U.S. at 311; see also *infra* notes 137-44 and accompanying text (discussing the second exception to the *Teague* doctrine).

138. See *Teague*, 489 U.S. at 311-13; see also *Clarke*, *supra* note 109, at 305 (noting that Justice O’Connor’s plurality opinion borrowed the skeleton of this formula from Justice Harlan’s dissent in *Desist v. United States*, 394 U.S. 244 (1969), but added the accuracy requirement in the second prong of the rule).

139. See *Cooper*, *supra* note 98, at 1596-97 (citing *Graham v. Collins*, 506 U.S. 461, 478 (1993)). Thus, because the jury has already decided the defendant’s guilt or innocence by the sentencing phase, it appears that the second prong of *Teague*’s second exception test would apply to an accurate determination of the defendant’s sentence. See *Hopkinson v. Shillinger*, 888 F.2d 1286, 1291 (10th Cir. 1989) (en banc).

140. See *Clarke*, *supra* note 109, at 308.

141. See *Saffle*, 494 U.S. at 495.

142. 372 U.S. 335, 348 (1963) (holding that defendants in all criminal prosecutions have the right to counsel in felony cases and indigent defendants have the right to have counsel appointed in felony criminal prosecutions).

143. See *Saffle*, 494 U.S. at 495. In *Saffle*, the Court stated that “[a]lthough the precise contours of [the second exception to *Teague*] may be difficult to discern, we have usually cited *Gideon v. Wainwright*, holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception.” *Id.* (citations omitted).

Gideon rule, would be unlikely to emerge.¹⁴⁴ Of the several lower court cases that have applied *Teague's* second exception, only a few have ever found a rule to satisfy the exception.¹⁴⁵

III. DISCUSSION

A. The Facts and the Lower Courts' Opinions

On February 5, 1985, Joseph O'Dell brutally raped, sodomized, and murdered Helen Schartner.¹⁴⁶ A jury found O'Dell guilty of all three of these crimes.¹⁴⁷ In the sentencing phase of O'Dell's trial, the prosecution argued that O'Dell should receive the death sentence because he presented a future danger to society.¹⁴⁸ To rebut the

144. See *Teague v. Lane*, 489 U.S. 288, 313 (1989).

145. See *Clarke*, *supra* note 109, at 310-11; *Garvey*, *supra* note 117, at 194. The only cases that have found a rule to qualify under *Teague's* second exception are: *Humphrey v. Cain*, 120 F.3d 526, 529 (5th Cir.) (recognizing that the *Cage* rule satisfies the second exception to *Teague*, yet holding that prior Fifth Circuit precedent prevents a satisfaction of *Teague's* second exception in habeas cases and requesting en banc consideration), *reh'g granted*, No. 95-31101, 1997 U.S. App. LEXIS 24818 (5th Cir.) (en banc); *Adams v. Aiken*, 41 F.3d 175, 178-79 (4th Cir. 1994) (finding the *Cage* rule to satisfy *Teague's* second exception); *Nutter v. White*, 39 F.3d 1154, 1157 (11th Cir. 1994) (holding that the rule in *Cage v. Louisiana*, 498 U.S. 39 (1990) satisfied *Teague's* second exception; the *Cage* case involved a jury instruction that defined reasonable doubt as "substantial doubt" and "grave uncertainty," and therefore violated due process); *Williams v. Dixon*, 961 F.2d 448, 456 (4th Cir. 1992) (holding that a jury instruction requiring the jury to unanimously find mitigating evidence constituted a new rule of criminal procedure that qualified under *Teague's* second exception); *Graham v. Hoke*, 946 F.2d 982, 993 (2d Cir. 1991) (holding that the rule in *Cruz v. New York*, 481 U.S. 186 (1987), which prevents an "admission of a nontestifying codefendant's confession even if that confession interlocks with that of the defendant" falls under the second exception to *Teague*); *Ostrosky v. Alaska*, 913 F.2d 590, 594 (9th Cir. 1990) (holding that a defendant's right to rely on a lower court's finding of a statute's unconstitutionality in that defendant's case constitutes a new rule that qualifies under *Teague's* second exception); *Hall v. Kelso*, 892 F.2d 1541, 1543 n.1 (11th Cir. 1990) (stating that "a burden-shifting error would be subject to retroactive correction on habeas review because, not only is it a 'bedrock, "axiomatic and elementary" [constitutional] principal,' but it is also an error that diminishes the 'likelihood of an accurate conviction'" (citations omitted); *Safian v. Scully*, No. 90 Civ. 7489, 1991 WL 143403 (S.D.N.Y. 1991) (holding that the *Cruz* rule satisfies *Teague's* second exception), *aff'd*, 962 F.2d 4 (2d Cir. 1992); see also *Hopkinson v. Shillinger*, 888 F.2d 1286, 1292 (10th Cir. 1989) (en banc) (holding that the rule in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), satisfies the second *Teague* exception). Note that the Supreme Court later effectively overruled *Hopkinson* in *Sawyer v. Smith*, 497 U.S. 227, 234 (1990), see also *supra* notes 90-95 for a discussion of *Caldwell*.

146 See *O'Dell v. Netherland*, 117 S. Ct. 1969, 1972 (1997). O'Dell beat the victim on the head with a gun barrel and strangled her with such force that he broke her neck bones and left finger imprints on her neck. See *id.* at 1971.

147 See *id.* at 1972.

148 See *id.* The prosecution argued two aggravating circumstances: (1) that O'Dell

prosecution's argument that O'Dell posed a future danger to society, O'Dell requested a jury instruction providing that if he were sentenced to life imprisonment he would be ineligible for parole.¹⁴⁹ The trial judge denied O'Dell's request.¹⁵⁰ After deliberating for only seventy-two minutes,¹⁵¹ the jury recommended that O'Dell be sentenced to death because O'Dell would present a continuing threat to society.¹⁵²

O'Dell exercised his automatic right of appeal to the Supreme Court of Virginia which unanimously affirmed the trial court's conviction and sentence.¹⁵³ Next, O'Dell petitioned for writ of certiorari, arguing that the Eighth and Fourteenth Amendments required that he be permitted to inform the jury that he was parole ineligible.¹⁵⁴ The Supreme Court denied that petition.¹⁵⁵ After exhausting the possibility

presented a future danger to society; and (2) that Shartner's murder was "wanton, vile or inhuman." *Id.*

In his closing argument, the prosecutor remarked:

Isn't it interesting that he is only able to be *outside of the prison system* for a matter of months to a year and a half before something has happened again? [Y]ou may still sentence him to life in prison, but I ask you ladies and gentleman[,] in a system, in a society that believes in its criminal justice system and its government, *what does this mean?* . . . I put it to you ladies and gentlemen. What is right in this case is that this man has forfeited his right to live among us because all the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. *Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose.*

Brief for Petitioner at *2-3, *O'Dell v. Netherland*, 1997 WL 43522 (No. 96-6867) [hereinafter *Petitioner's Brief*].

149. See *O'Dell*, 117 S. Ct. at 1972. O'Dell represented himself at trial. See *Petitioner's Brief*, *supra* note 148, at *3.

150. See *O'Dell*, 117 S. Ct. at 1972.

151. See *Brief for Respondent* at *3, *O'Dell v. Netherland*, 1997 WL 80525 (No. 96-6867) [hereinafter *Respondent's Brief*].

152. See *O'Dell*, 117 S. Ct. at 1972. Although the record stated that the jury found O'Dell guilty on both aggravating factors, the Virginia Supreme Court concluded that the jury's recommendation for the death penalty was based only on the fact that O'Dell presented a future danger to society, rather than on the fact that the victim's murder was egregious. See *id.* at 1972 n.1.

153. See *O'Dell v. Commonwealth*, 364 S.E.2d 491, 510 (Va. 1988), *cert. granted in part sub nom.* *O'Dell v. Netherland*, 117 S. Ct. 631 (1996), *aff'd*, 117 S. Ct. 1969 (1997). O'Dell also appealed his conviction on a claim of innocence. See *O'Dell*, 117 S. Ct. at 1972. However, every court agreed that such claim was "not even colorable." *Id.*

154. See *Respondent's Brief*, *supra* note 151, at 4 (citing *Pet. for Cert.* No. 88-5007, at 21-24). O'Dell argued that the Supreme Court had not yet ruled on the issue and that the Court should now "recognize the relevance of parole ineligibility and require its admission." *Id.*

155. See *O'Dell v. Virginia*, 488 U.S. 871 (1988) (denying petition for certiorari and petition for rehearing on the jury instruction issue).

for state habeas relief,¹⁵⁶ O'Dell filed for federal habeas relief, alleging that he was entitled to re-sentencing based on the Supreme Court's decision in *Simmons v. South Carolina*, which permitted a defendant to inform the jury of his parole ineligibility if the prosecution argued his future dangerousness to society.¹⁵⁷ The District Court of the Eastern District of Virginia granted that request.¹⁵⁸ However, on appeal, a divided *en banc* Court of Appeals for the Fourth Circuit¹⁵⁹ reversed the district court's decision, holding that the decision in *Simmons* was a "new rule" under the *Teague* doctrine that could not be applied retroactively to O'Dell's claim.¹⁶⁰ The Supreme Court granted certiorari to decide whether the decision in *Simmons* constituted a new rule under the *Teague* doctrine.¹⁶¹

B. The Majority Opinion of the United States Supreme Court

In a five-to-four decision,¹⁶² the Supreme Court upheld the Fourth Circuit's ruling.¹⁶³ The Court first concluded that the *Simmons* rule, which permits a defendant to introduce evidence of his parole ineligibility when the prosecution argues his future dangerousness to society, was new under *Teague* and therefore could not be applied retroactively.¹⁶⁴ In addition, the Court concluded that the *Simmons*

156. See *O'Dell*, 117 S. Ct. at 1792. The Supreme Court also denied O'Dell's subsequent petition for writ of certiorari. See *O'Dell v. Thompson*, 502 U.S. 995 (1991).

157. See *O'Dell*, 117 S. Ct. at 1792. The Supreme Court decided *Simmons* approximately two months prior to the district court's consideration of O'Dell's federal habeas claim. See *id.* (citing *O'Dell v. Thompson*, Civ. Action No. 3:92CV480 (E.D.Va., Sept. 6, 1994), app. 171-172). In *Simmons*, the Supreme Court held that the Due Process Clause requires permitting a defendant to inform the jury of his parole ineligibility if the prosecution argues his future dangerousness to society. See *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994); see also *supra* notes 96-105 and accompanying text (discussing *Simmons*).

158. See *O'Dell*, 117 S. Ct. at 1792.

159. See *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996) (*en banc*), *cert. granted in part*, 117 S. Ct. 631 (1996), *aff'd*, 117 S. Ct. 1969 (1997). Of the 13 judges sitting *en banc* for the Fourth Circuit, seven agreed that the rule in *Simmons* was new and did not fall under an exception to the *Teague* doctrine, while six dissenting judges determined that the rule was not new under *Teague*. See *id.* at 1218.

160. See *id.*

161. See *O'Dell*, 117 S. Ct. 1969.

162. Justice Thomas wrote the majority opinion for the Court, in which Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia joined. Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined. See *id.* at 1971.

163. See *id.*

164. See *id.* at 1978; see also *infra* notes 175-93 and accompanying text (discussing the Court's holding that *Simmons* is a new rule).

rule did not fall under either exception to the *Teague* doctrine, thus barring its retroactive application.¹⁶⁵

1. *Simmons* Is a New Rule Under *Teague*

Writing for the Court, Justice Thomas first noted that a state prisoner may not disturb his sentence unless he can show that the rule he seeks to apply retroactively is not new.¹⁶⁶ The Court noted that a new rule generally "break[s] new ground," imposes a new obligation on the state or federal government, or is not dictated by existing precedent when the defendant's conviction becomes final.¹⁶⁷ Accordingly, Justice Thomas explained that the Court will upset a defendant's sentence only if the state would have acted objectively unreasonably by not granting the defendant the remedy he later pursued in federal court.¹⁶⁸

The Court then discussed the necessary steps in determining a rule's status under *Teague*.¹⁶⁹ The Court applied the *Teague* doctrine to

165. See *O'Dell*, 117 S. Ct. at 1978. The Court stated, "*Simmons* possesses little of the 'watershed' character envisioned by *Teague*'s second exception." *Id.*; see also *infra* notes 190-94 and accompanying text (discussing the Court's finding that *Simmons* does not fall under the second exception to *Teague*). Note that *O'Dell* did not raise the issue of whether his conviction fell within the first exception to the *Teague* doctrine. See *O'Dell*, 117 S. Ct. at 1978.

166. See *id.* at 1978. Justice Thomas stated that "[b]efore a state prisoner may upset his state conviction or sentence on federal collateral review, he must demonstrate as a threshold matter that the court-made rule of which he seeks the benefit of is not 'new.'" *Id.* at 1973.

167. See *id.* at 1973 (citing *Teague v. Lane*, 489 U.S. 288, 301 (1989)). The Court further noted that "the *Teague* doctrine 'validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'" *Id.* (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)). The Court proceeded to state that "reasonable" is an objective standard. See *id.* (quoting *Stringer v. Black*, 503 U.S. 222, 237 (1992)).

168. See *id.* (stating that "we will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court").

169. See *id.* When applying *Teague*, the habeas Court first ascertains the date on which the defendant's sentence was finalized. See *id.* Next, the Court decides whether existing precedent on that date would have obligated a state court to determine that the Constitution requires the rule the defendant now seeks to apply. See *id.* If the Court decides that a state court would not have so determined, then the rule is new and cannot be applied retroactively unless it falls within one of two narrow exceptions. See *id.* Thus, the Court must examine the rule under *Teague*'s two exceptions. See *id.* If the rule falls under one of two exceptions to the *Teague* doctrine, a court may apply it retroactively, despite its new rule status. See *id.* The first exception permits retroactive application for new rules that forbid "criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 306 (1989)).

determine whether O'Dell could utilize the *Simmons* rule to rebut the prosecution's argument that O'Dell posed a future danger to society.¹⁷⁰ The Court first noted that O'Dell's conviction became final on October 3, 1988,¹⁷¹ and the *Simmons* decision came down roughly six years later in 1994.¹⁷² After discussing the facts and differing opinions in *Simmons*,¹⁷³ the Court turned to the issue of whether the *Simmons* rule was new under *Teague* so as to prohibit retroactive application of the *Simmons* rule in reviewing the constitutionality of O'Dell's sentencing.¹⁷⁴

In deciding whether the *Simmons* rule was new, the Court first noted that *Simmons* failed to produce a majority opinion for the Court.¹⁷⁵ In light of the "array of views" expressed in *Simmons*, the Court found that the *Simmons* rule was "susceptible to debate among reasonable minds."¹⁷⁶ Next, the Court looked to the decisions that

The second exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* (quoting *Graham v. Collins*, 506 U.S. 461, 478 (1993)); see also *supra* Part II.C.2.b (discussing *Teague*'s second exception to the rule prohibiting retroactive application of new rules). The Court went on to note that "[w]hatever the precise scope of this [second] exception, it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *O'Dell*, 117 S. Ct. at 1973 (quoting *Graham v. Collins*, 506, 478 (1993)).

170. See *O'Dell*, 117 S. Ct. at 1973-79.

171. See *id.* at 1973. The Court determined that October 3, 1988 was the date on which the Court denied O'Dell's petition for writ of certiorari to review the Virginia Supreme Court's affirmation of O'Dell's sentence. See *id.*

172. See *id.* The Supreme Court decided *Simmons* on June 17, 1994. See *Simmons v. South Carolina*, 512 U.S. 154, 154 (1994).

173. The Court discussed the reasoning of both the plurality and concurring opinions in *Simmons*. See *O'Dell*, 117 S. Ct. at 1974-78. The *Simmons* plurality opinion relied on *Gardner v. Florida*, 430 U.S. 349 (1977), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), and decided that "[b]ecause truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention[.]" *Id.* (quoting *Simmons*, 512 U.S. at 169). The concurrence, on the other hand, noted that the Court had previously held it proper for state courts to preclude the jury from receiving information about the possibility of "commutation, pardon, or parole." See *id.* Further, the concurrence distinguished *Skipper* because it found that *Skipper* involved introduction of factual evidence, whereas *Simmons* involved introduction of evidence regarding laws of the state. See *id.* (quoting *Simmons*, 512 U.S. at 176-77); see also *supra* notes 71-84 and accompanying text (discussing the *Gardner* and *Skipper* opinions).

174. See *O'Dell*, 117 S. Ct. at 1974.

175. See *id.* In *Simmons*, there was a three-member plurality, two concurring opinions and a dissenting opinion. See *supra* note 98 (discussing the varying opinions in *Simmons*).

176. *Id.* at 1975 (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990)). Justice Thomas stated, "The array of views expressed in *Simmons* itself suggests that the rule announced there was, in light of this Court's precedent, 'susceptible to debate among

Simmons relied upon in order to determine whether the rule was new or should have been considered as part of existing precedent at the time *O'Dell* was sentenced.¹⁷⁷ The Court first looked to *Gardner v. Florida*,¹⁷⁸ which held that, in determining a defendant's sentence, a judge's consideration of a pre-sentence report that the defendant had no opportunity to rebut violated the Constitution.¹⁷⁹ The Court then examined *Skipper v. South Carolina*,¹⁸⁰ which held that, where a prosecutor, in arguing the death sentence, states that a defendant would present disciplinary problems in prison, the defendant must be able to rebut that argument by introducing evidence of his previous good behavior in prison.¹⁸¹ The Court noted that *Gardner* itself produced seven opinions with no majority opinion of the Court.¹⁸² Additionally, the Court reasoned that Justice White's concurrence, which provided the rule in *Gardner*,¹⁸³ was a narrow one, based solely on the Eighth Amendment and not the Due Process Clause.¹⁸⁴ Further, the Court noted that the *Gardner* holding should be read very narrowly and utilized only when considering the issue of whether a defendant should be allowed to admit evidence of past behavior.¹⁸⁵

The Court then examined the complexity of the capital punishment legal landscape in 1988.¹⁸⁶ In doing so, the Court looked to two

reasonable minds." *Id.*

177. *See id.* at 1975. *Simmons* relied primarily on *Gardner*, 430 U.S. at 349 and *Skipper*, 476 U.S. at 1. *See O'Dell*, 117 U.S. at 1975; *see also supra* notes 66-79 for a discussion of *Gardner* and *Skipper*.

178. 430 U.S. 349 (1977).

179. *See O'Dell*, 117 S. Ct. at 1975; *see also supra* notes 71-78 and accompanying text for a detailed explanation of *Gardner*.

180. 476 U.S. 1 (1986).

181. *See O'Dell*, 117 S. Ct. at 1975; *see also supra* notes 79-84 and accompanying text (discussing the Court's opinion in *Skipper*).

182. *See O'Dell*, 117 S. Ct. at 1975. In *Gardner*, Justice Stevens, joined by Justices Stewart and Powell wrote the opinion and Chief Justice Burger concurred in the judgment. Justices White and Blackmun wrote separate concurring opinions, Justice Brennan filed a separate opinion, and Justices Marshall and Rehnquist dissented. *See Gardner*, 430 U.S. at 351-65.

183. *See O'Dell*, 117 S. Ct. at 1976 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977); *see also supra* note 77 (providing the rule of *Marks*)).

184. *See O'Dell*, 117 S. Ct. at 1976. Justice White held that "[a] procedure for selecting people for the death penalty which permits consideration of . . . secret information relevant to the character and record of the individual offender' violates the Eighth Amendment's requirement of 'reliability in the determination that death is the appropriate punishment.'" *Id.* (italics omitted) (quoting *Gardner*, 430 U.S. at 364).

185. *See id.* (stating that "the [*Gardner*] holding is a narrow one Petitioner points to no secret evidence given to the sentencer but not to him. And, the evidence he sought to present to the jury was not historical evidence about his 'character and record,' but evidence concerning the operation of the extant legal regime").

186. *See id.* at 1976. Justice Thomas noted that "[w]hatever support *Gardner* and

decisions preceding *Simmons* which dealt with the introduction of post-sentencing evidence: *California v. Ramos*¹⁸⁷ and *Caldwell v. Mississippi*.¹⁸⁸ *Ramos* held that a jury instruction stating that a defendant sentenced to life imprisonment without the possibility of parole could nevertheless receive parole at the Governor's discretion, was constitutional.¹⁸⁹ Similarly, in *Caldwell*, Justice O'Connor's concurrence¹⁹⁰ found that the decision on whether to instruct juries on post-sentencing proceedings should be left to the states.¹⁹¹ Thus, in light of *Ramos* and *Caldwell*, the Court held that "a reasonable jurist in 1988 would not have felt compelled to adopt the rule later set out in *Simmons*."¹⁹² Accordingly, the Court held that, under *Teague*, the rule in *Simmons* was new.¹⁹³

Skipper[,] standing alone, might lend to petitioner's claim that *Simmons* was a foregone conclusion, the legal landscape in 1988 was far more complex." *Id.*

187. 463 U.S. 992 (1983).

188. 472 U.S. 320 (1985). The Fourth Circuit relied on both *Ramos* and *Caldwell* in affirming O'Dell's sentence. *See O'Dell*, 117 S. Ct. at 1976.

189. *See O'Dell*, 117 S. Ct. at 1976 (citing *Ramos*, 463 U.S. at 1001-1004); *see also supra* notes 87-88 and accompanying text (providing a discussion of *Ramos*). The *Ramos* Court decided that it would defer to the states' judgment in deciding whether such information should or should not be given to the jury. *See O'Dell*, 117 S. Ct. at 1976. The Court found that *Simmons*, in effect, carved out an exception to the *Ramos* rule that requiring that a defendant be permitted to educate his sentencing jury on post-sentencing possibilities. *See id.* at 1976-78.

190. Justice O'Connor's concurrence was the controlling decision in *Caldwell* on the issue of whether juries could receive instruction on post-sentencing proceedings. *See O'Dell*, 117 S. Ct. at 1977; *see also supra* note 87-88 (discussing *Ramos*).

191. *See O'Dell*, 117 S. Ct. at 1977-78. Justice Thomas explained that in *Caldwell*, "Justice O'Connor . . . stat[ed] that, under *Ramos*, a State could choose whether or not to 'instruct[t] [sic] the jurors on the sentencing procedure, including the existence and limited nature of appellate review,' so long as any information it chose to provide was accurate." *Id.* at 1977 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 342 (1985)) (O'Connor, J., concurring in part and concurring in judgment).

192. *Id.* at 1977. The Court further noted that, although *Simmons* relied on *Gardner* and *Skipper*, both *Gardner* and *Skipper* involved information regarding the defendant's character and record. *See id.* Neither case involved the issue of information regarding post-sentencing procedures under state law, which arose in both *Ramos* and *Caldwell*. *See id.* In light of the differences in issues, the Court found that a reasonable jurist could have distinguished between "information about a defendant and information concerning the extant legal regime." *Id.* The Court further determined that "[i]t would hardly have been unreasonable . . . for the jurist to conclude that his State had acted constitutionally by choosing not to advise its jurors as to events that would (or would not) follow their recommendation of a death sentence . . . [and may have even] concluded that the most surely constitutional course . . . was silence." *Id.* at 1977-78.

193. *See id.* at 1978.

2. *Simmon's* Rule Does Not Qualify Under *Teague's* Second Exception

The Court concluded its analysis by determining whether the *Simmons* rule, although new, fell within the second exception¹⁹⁴ to *Teague*.¹⁹⁵ As discussed above, the second exception allows retroactive application of a new rule if it constitutes a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."¹⁹⁶ The Court rejected O'Dell's argument that the *Simmons* rule was "on par" with the procedural protections afforded in *Gideon*.¹⁹⁷ Rather, the Court found that, unlike the "sweeping" rule in *Gideon* that sets forth the affirmative right to counsel in felony cases, the *Simmons* rule only grants defendants a narrow right to rebut evidence.¹⁹⁸ The Court stated that this narrow right did not alter the Court's understanding of the "bedrock procedural elements" necessary to the fairness of a proceeding.¹⁹⁹ Therefore, the Court held that the *Simmons* rule did not fall under *Teague's* second exception and thus, could not be applied retroactively to upset O'Dell's 1988 sentence.²⁰⁰

C. *The Dissenting Opinion*

Justice Stevens' dissent, in which Justices Souter, Ginsburg and Breyer joined, began its analysis by stating that, as per the Court's decision in *Simmons*, O'Dell's sentencing hearing violated the Due Process Clause of the Fourteenth Amendment.²⁰¹ Thus, the dissent

194. See *id.*; see also *supra* Part II.C.2.b (explaining the parameters of *Teague's* second exception).

195. See *O'Dell*, 117 S. Ct. at 1978.

196. *Id.* (quoting *Graham v. Collins*, 506 U.S. 461, 478 (1993)).

197. See *id.* at 1978 (citing Petitioner's Brief, *supra* note 158, at *35). The Petitioner's Brief states that "both [*Simmons* and *Gideon*] rest upon this Court's belief that certain procedural protections are essential to prevent a miscarriage of justice[.]" Petitioner's Brief, *supra* note 158, at *35.

198. See *O'Dell*, 117 S. Ct. at 1978.

199. *Id.* (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)). Justice Thomas stated: "*Simmons* possesses little of the 'watershed' character envisioned by *Teague's* second exception." *Id.* "[T]he narrow right of rebuttal that *Simmons* affords to defendants in a limited class of capital cases has hardly alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.*

200. See *id.* at 1979 (affirming the Fourth Circuit Court of Appeals' decision).

201. See *O'Dell*, 117 S. Ct. at 1979 (Stevens, J., dissenting) (stating that "it is undisputed that the conduct of the sentencing hearing that lead to the imposition of [O'Dell's] death penalty violated the Due Process Clause of the Fourteenth Amendment"). Specifically, the dissent noted that "[O'Dell] was denied the opportunity to make a fair response to the prosecutor's misleading argument about the future danger that he allegedly posed to the community." *Id.* (Stevens, J., dissenting).

found the issue in the present case to be whether O'Dell's death sentence, which was in violation of the Due Process Clause, should be upheld merely because O'Dell was sentenced before *Simmons*.²⁰² The dissent first emphasized that the *Simmons* rule applied a fundamental principal of fairness and accuracy in criminal proceedings, and, as such, fell under the second exception to *Teague*.²⁰³ Next the dissent found that, even if *Simmons* did not fall under *Teague's* second exception, the rule in *Simmons* was not new.²⁰⁴

1. Dissent Finds Satisfaction of *Teague's* Second Exception

The dissent began its analysis by first discussing the general scope of *Teague's* second exception.²⁰⁵ Specifically, the dissent noted that the second exception allows the retroactive application of new rules that encompass "'bedrock procedural elements . . . essential to the substance of a full hearing,'" but limited to those procedures necessary to provide an accurate determination of a defendant's guilt or innocence.²⁰⁶ Despite the fact that the Supreme Court has never found a rule to be within *Teague's* second exception, the dissent maintained that the *Simmons* rule so qualified.²⁰⁷ In response to the majority's argument regarding the narrowness of the *Simmons* rule, the dissent reasoned that *Simmons* was narrow only because a limited number of

202. *See id.* (Stevens, J., dissenting). Justice Stevens noted that "this case is not about whether O'Dell was given a fair sentencing hearing; instead, the question presented is whether, despite the admittedly unfair hearing, he should be put to death because his trial was conducted before *Simmons* was decided." *Id.* at 1980 (Stevens, J., dissenting).

203. *See id.* (Stevens, J., dissenting). The dissent stated that their "decision in *Simmons* applied a fundamental principal that is as old as the adversary system itself, and that had been quite clearly articulated by [the Supreme Court] in two earlier opinions." *Id.* (Stevens, J., dissenting).

204. The dissent essentially applied a backwards analysis of *Teague*, focusing first on its belief that the *Simmons* rule fell under *Teague's* second exception, and then discussing the fact that *Simmons*, in the dissent's view, was not even a new rule. *See id.* at 1980-84 (Stevens, J., dissenting); *see also infra* notes 239-48 and accompanying text (examining the dissent's application of the *Teague* doctrine to the rule in *Simmons*).

205. *See O'Dell*, 117 S. Ct. at 1980 (Stevens, J., dissenting); *see also supra* Part II.C.2.b (explaining the second exception to *Teague*).

206. *O'Dell*, 117 S. Ct. at 1980 (Stevens, J., dissenting) (quoting *Mackey v. United States*, 401 U.S. 667, 693-94 (1971)). The dissent stated that the exception is "limited to those 'procedures without which the likelihood of an accurate [determination of guilt or innocence] is seriously diminished.'" *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 313 (1989)). The dissent further noted that sentencing procedures are bound by due process and "the unique character of the death penalty mandates special scrutiny of [that] procedure in capital cases," and thus falls under this limitation. *Id.* at 1980 n.3 (Stevens, J., dissenting).

207. *See id.* at 1980 (Stevens, J., dissenting) (stating that the *Simmons* rule "is surely a bedrock procedural element of a full and fair hearing").

states allowed the practice that *Simmons* prohibited.²⁰⁸ In fact, according to the dissent, the prevailing view requires that defendants be permitted to instruct the jury on their life-without-parole sentencing alternative.²⁰⁹

The dissent proceeded to highlight the overall significance of the *Simmons* rule.²¹⁰ First, the dissent noted that since *Simmons*, Virginia's requirement that the jury be informed of the defendant's parole ineligible status has resulted in a seventy-five percent decline in the number of death sentences in Virginia.²¹¹ Moreover, the dissent noted that the Supreme Court itself realized that a jury would more often recommend the death sentence if no alternative sentence was available.²¹² Thus, the dissent concluded that the *Simmons* rule was a "bedrock procedural element" that qualified under the second exception to *Teague*.²¹³

208. *See id.* at 1981 (Stevens, J., dissenting) (noting that "only a very few states had in place procedures that allowed the prosecutor to argue future dangerousness while at the same time prohibiting defendants from using 'the only way that [they] can successfully rebut the State's case'" (quoting *Simmons v. South Carolina*, 512 U.S. 154, 177 (1994))).

209. *See id.* (Stevens, J., dissenting) (citing *Simmons*, 512 U.S. at 167 n.7). In 1994, 26 states provided the jury with an alternative of life imprisonment without parole for juries deciding for or against a death penalty sentence. *See Simmons*, 512 U.S. at 167 n.7. Seventeen of those states required the *Simmons* rule—that the jury be informed of a defendant's parole-ineligibility. *See id.* The other nine provide the jury with two alternatives: life without parole or death. *See id.*

210. *See O'Dell*, 117 S. Ct. at 1981 (Stevens, J., dissenting). The dissent contended that "the broad consensus in favor of giving the jury accurate information in fact underscores the importance of the rule applied in *Simmons*." *Id.* (Stevens, J., dissenting).

211. *See id.* (Stevens, J., dissenting) (citing Frank Green, *Death Sentences Decline in Virginia—Life Term Without Parole is Factor in Change*, RICHMOND TIMES-DISPATCH, Nov. 24, 1996, at A1). Due to Virginia's new requirement that juries be informed of the alternative sentence of life-without-parole, since 1995, only two juries have recommended that a defendant be sentenced to death. *See id.* (Stevens, J., dissenting). In contrast, in 1994 alone, juries recommended 10 death sentences. *See id.* (Stevens, J., dissenting).

212. *See id.* at 1981 (Stevens, J., dissenting) (citing *Beck v. Alabama*, 447 U.S. 625, 637 (1980)) (stating that "the likelihood that a jury would find an obviously guilty defendant eligible for the death penalty was significantly increased when an arguably more appropriate sentencing alternative was not available").

213. *See id.* at 1981 (Stevens, J., dissenting). Specifically, the dissent stated that "even if the rule in *Simmons* could properly be viewed as a 'new' rule, it is of such importance to the accuracy and fairness of a capital sentencing proceeding that it should be applied consistently to all prisoners whose death sentences were imposed in violation of the rule, whether they were sentenced before *Simmons* was decided or after." *Id.* (Stevens, J., dissenting).

2. Dissent Determines that *Simmons* Is Not New Under *Teague*

Although the dissent first decided that the *Simmons* rule fell within *Teague*'s second exception, the dissent further determined that the rule was not new under *Teague*.²¹⁴ The dissent began this section of analysis by relying on both *Gardner* and *Skipper*.²¹⁵ The dissent reasoned that, in deciding *Simmons*, Justice Blackmun specifically stated that both *Gardner* and *Skipper* "compel[led]" the Court's decision in *Simmons*.²¹⁶ Further, the dissent found fault with the majority's reading of *Gardner*, which stated that Justice White's Eighth Amendment-based concurrence provided the rule for that case.²¹⁷ The dissent noted that, in *Skipper*, Justice White "squarely adopted" *Gardner*'s due process holding.²¹⁸ Moreover, the dissent stated that all nine Justices in *Skipper* endorsed *Gardner*'s holding that a sentencing determination violates due process if it derives in part from information that a defendant has no opportunity to deny or explain.²¹⁹ With regard to *Skipper*, the dissent found fault with the majority's distinction between evidence of a defendant's past behavior and evidence to educate the jury on post-sentencing legal issues.²²⁰ The dissent found the distinction irrelevant.²²¹

214. See *id.* (Stevens, J., dissenting) (asserting that "distinguishing new rules from those that are not new under our post-*Teague* jurisprudence is not an easy task, but it is evident to me that if there is such a thing as a rule that is not new for these purposes, the rule announced in *Simmons* is one").

215. See *id.* at 1981-83 (Stevens, J., dissenting); see also *supra* notes 71-84 (discussing *Gardner* and *Skipper*).

216. See *id.* at 1982 (Stevens, J., dissenting) (stating that "the principle announced in *Gardner* was reaffirmed in *Skipper*, and it compels our decision today" (quoting *Simmons v. South Carolina*, 512 U.S. 154, 164-65 (1994))).

217. See *id.* (Stevens, J., dissenting) (stating that "[t]he first misstep in the Court's analysis is its treatment of *Gardner*"); see also *supra* notes 182-84 and accompanying text (providing the majority's view that Justice White's opinion constitutes the controlling rule in *Gardner*).

218. *O'Dell*, 117 S. Ct. at 1982 (Stevens J., dissenting). Justice Stevens expressed that although Justice White agreed with *Skipper*'s Eighth Amendment reliance, he "went out of his way" to comment in a footnote that due process provided "even more basic justification" for *Skipper*'s holding. *Id.*; see also *supra* notes 79-84 and accompanying text (discussing the Court's holding in *Skipper*).

219. See *O'Dell*, 117 S. Ct. at 1982 (Stevens, J., dissenting). The dissent noted that when the majority adopted Justice White's concurrence for the rule in *Gardner*, it ignored the fact that Justice White, in the later decision of *Skipper*, adopted the *Gardner* plurality's holding based on Due Process instead of the Eighth Amendment argument. See *id.* (Stevens, J., dissenting). Further, the dissent stated that Justice Powell's concurrence in *Skipper* also relied on the *Gardner* rule. See *id.* (Stevens, J., dissenting).

220. See *id.* at 1983 (Stevens, J., dissenting).

221. See *id.* (Stevens, J., dissenting) (stating that "[t]his distinction is simply not enough to make the rule in *Simmons* 'new' . . . [t]he rule in *Skipper* and *Gardner* . . . simply cannot turn on whether [a defendant's] rebuttal relies on the fact that he is

Further, although the dissent and majority both relied on *Ramos* and *Caldwell*,²²² unlike the majority, the dissent found that *Ramos* and *Caldwell* provided additional support for the proposition that the *Simmons* rule was not new under the *Teague* doctrine.²²³ With regard to *Ramos*, the dissent disagreed with the majority's assertion that *Simmons* carves out an exception to *Ramos*.²²⁴ The dissent found that the general rule in *Ramos* merely permits state courts to instruct juries accurately in order to avoid the possibility that juries will be misled about sentencing options.²²⁵ In addition, the dissent found the majority's reading of *Caldwell* to be "equally unpersuasive."²²⁶ The dissent stated that a jury instruction regarding appellate review or post-sentencing proceedings is entirely different from a jury instruction regarding sentencing alternatives.²²⁷

The dissent concluded by reaffirming the particular importance that the Court has continuously placed in the accuracy of sentencing proceedings.²²⁸ The dissent maintained that the majority discarded that concern by relying on a "nonexistent tension" between *Gardner* and

ineligible for parole or on the fact that he is a model prisoner").

222. See *supra* notes 187-93 and accompanying text.

223. See *O'Dell*, 117 S. Ct. at 1983 (Stevens, J., dissenting). Justice Stevens stated, "The two cases on which the majority relies to argue that a reasonable jurist in 1988 would have thought that *O'Dell* did not have a right to rebut the prosecutor's future dangerousness arguments simply provide further support for the conclusion that *Simmons* did not announce a new rule of law." *Id.* (Stevens, J., dissenting).

224. See *id.* (Stevens, J., dissenting); see also *supra* note 189 (explaining the majority's view that *Simmons* is essentially an exception to *Ramos*).

225. See *O'Dell*, 117 S. Ct. at 1983 (Stevens, J., dissenting). Justice Stevens noted that the *Ramos* Court cited the Model Penal Code, section 210.6, which states that if the jury decides against the death penalty, the jury should be informed about the possibilities of imprisonment sentencing, including the possibility of the defendant's parole. See *id.* n.10 (Stevens, J., dissenting) (citing *California v. Ramos*, 463 U.S. 962, 1009 n.23 (1983)).

226. *Id.* at 1983 (Stevens, J., dissenting); see also *supra* notes 189-91 (discussing the majority's reading of *Caldwell*).

227. See *O'Dell*, 117 S. Ct. at 1984 (Stevens, J., dissenting). The dissent stated: Apart from the fact that an instruction describing a sentencing alternative does not relate to 'post sentence procedures,' I see no basis for assuming that concerns about describing the process of appellate review to a jury might have anything to do with the necessity for providing the jury with accurate information about sentencing options when the prosecutor makes the misleading argument that the death penalty is the only way to prevent a defendant's future dangerousness 'outside of the prison system.'

Id. (Stevens, J., dissenting).

228. See *id.* (Stevens, J., dissenting). Justice Stevens stated that "[t]he Court has consistently, and appropriately, shown a particular concern for procedures that protect the accuracy of sentencing determinations in capital cases." *Id.* (Stevens, J., dissenting).

Skipper and Ramos and Caldwell to support its refusal to retroactively apply the *Simmons* rule to this case.²²⁹

IV. ANALYSIS

Perhaps no recent Supreme Court decision is as controversial and divided as the *O'Dell* decision.²³⁰ At both the appellate and Supreme Court stages of the case, only one justice's opinion separated the otherwise even amount of majority and dissenting judges.²³¹ Thus, it would be unrealistic to say that either the majority or dissenting

229. See *id.* (Stevens, J., dissenting).

230. See *The Death March*, 1997 PROGRESSIVE 8, 8-9:

Of all the Supreme Court's decisions that came down in June, the most incomprehensible—and the most unpardonable—had to do with the death penalty.

....

... [U]nbelievably, the Supreme Court refused to allow O'Dell to use that precedent [the *Simmons* rule] to gain a new sentencing hearing This callousness to the rights of defendants, especially those on death row, is almost ghoulish.

Id.; see also Joan Biskupic, *Court Continues Tightening Curbs on Death Row Appeals*, WASHINGTON POST, June 20, 1997, at A9 (opining that "[t]he ruling is another step in the Supreme Court's march to limit state inmates in their ability to bring their cases to federal court"); *One More Time*, USA TODAY, June 20, 1997, at 14A. The *USA Today* editorial stated "the court [sic] ruled its 1994 [*Simmons*] decision was not important enough to be made retroactive to 1986. What? The principal of informed jury decision-making is not important enough to be made retroactive? That surely deserves a second look." *One More Time*, *supra*. Indeed, prior to his execution, Joseph O'Dell gained worldwide support, including clemency appeals from the Italian government, Pope John Paul II, the European Parliament, Sister Helen Prejean (author of *DEAD MAN WALKING*), Lori Urs, a law student who married O'Dell in prison hours before his execution, and 1,500 civic groups. See Richard Boudreaux, *To Italy, at U.S. Convict Symbolized The Crime Of Capital Punishment*, L.A. TIMES, Aug. 17, 1997, at A11 ("[H]ow a drifter with 14 felony convictions in the United States ended up with a VIP funeral in a foreign land—which flew his body over by chartered jet—is a story of international politics and Italian idiosyncrasy"); see also Editorial, *Proper Punishment?*, RICHMOND-TIMES DISPATCH, Aug. 26, 1997, at A6, available in LEXIS, News Library, Rehtmd File (remarking that "[m]urderers have the luxury of pleading their own cases for years; the slain remain silent. Ironically killers have so long . . . to portray themselves as victims of a cruel and unfair justice system because the system is so scrupulous about reviewing evidence and providing every opportunity for appeal"). O'Dell's tombstone reads: "Joseph R. O'Dell III, beloved husband of Lori Urs O'Dell, honorary citizen of Palermo, killed by Virginia, U.S.A. in a merciless and brutal justice system." Boudreaux, *supra*, at A11.

231. See *O'Dell v. Netherland*, 95 F.3d 1214, 1218 (4th Cir. 1996) (en banc), *cert. granted in part*, 117 S. Ct. 631 (1996), *aff'd*, 117 S. Ct. 1969 (1997). Seven of the judges sitting on the Fourth Circuit, *en banc* found that *Simmons* was new and did not fit into either *Teague* exception, while six judges concluded that the *Simmons* rule was not new. See *id.* at 1218, 1256; see also *O'Dell*, 117 S. Ct. at 1971, 1979. The Supreme Court decision constituted a five-to-four split between the majority and the dissenting opinions. See *id.*

opinions are clearly or undeniably correct.²³² However, after reviewing the surrounding case law,²³³ it appears that the majority in *O'Dell* correctly concluded that the *Simmons* rule²³⁴ is new under *Teague v. Lane*.²³⁵ The majority erred, however, in refusing to retroactively apply the *Simmons* rule by allowing it to fall within the second exception to the *Teague* doctrine.²³⁶ When assessing whether the *Simmons* rule fit under the second exception, the majority performed only a cursory analysis, and failed to consider strong arguments supporting the rule's qualification under the exception.²³⁷ As a result, it was unconstitutional to prohibit O'Dell's use of *Simmons* to overturn his already finalized death sentence on collateral review.²³⁸

A. *Simmons* Constitutes a New Rule Under *Teague v. Lane*

The requirements for a rule to be considered "old"²³⁹ for purposes of the *Teague* doctrine are difficult to meet, given the Supreme Court's reluctance to upset a holding and to allow retroactive application of the law.²⁴⁰ Indeed, even the dissenting justices in post-*Teague* opinions recognize the arguably high standard a rule must meet to be considered "old" under *Teague*.²⁴¹ Upon examining *Teague* and its progeny, the

232. Even Justice Stevens, who authored the dissent in *Simmons*, admits that "[d]istinguishing new rules from those that are not new under our post-*Teague* jurisprudence is not an easy task." *O'Dell*, 117 S. Ct. at 1981 (Stevens, J., dissenting).

233. See *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *California v. Ramos*, 463 U.S. 992 (1983); *Gardner v. Florida*, 430 U.S. 349 (1977).

234. Justice O'Connor's concurrence contains the *Simmons* rule. See *supra* note 103 and accompanying text.

235. See *O'Dell*, 117 S. Ct. at 1978; see also *supra* notes 169-87 and accompanying text (discussing the *O'Dell* majority's analysis of whether *Simmons* constitutes a new rule under *Teague*).

236. See *O'Dell*, 117 S. Ct. at 1978.

237. See *infra* Part IV.B (examining the significance of the *Simmons* rule and why it should fall within *Teague*'s second exception).

238. See *O'Dell*, 117 S. Ct. at 1979.

239. See *id.* at 1973. When a rule is "old" under *Teague*, it can be applied retroactively.

240. See WHITE, *supra* note 36, at 23 (stating that the "'new rule' criterion defined an 'old' rule as that which all reasonable jurists in the country would find to be dictated by precedent").

241. See *O'Dell v. Netherland*, 95 F.3d 1214, 1222 n.2 (4th Cir. 1996) (en banc), cert. granted in part, 117 S. Ct. 631 (1996), *aff'd*, 117 S. Ct. 1969 (1997). The Fourth Circuit provided examples of dissenting justices' language that illustrates how difficult it is for a rule to be considered old under *Teague*. See *id.* For example, in *Wright v. West*, Justice Souter, stated: "'To survive *Teague*, [a rule] must be 'old' enough to have predated the finality of the prisoner's conviction, and specific enough to dictate the rule

Supreme Court has varied in its explanations of what constitutes a "new rule."²⁴² For example, the Court stated in *Teague* that a rule is new if it "breaks new ground," "imposes a new obligation," or was not "dictated by precedent existing at the time the defendant's conviction became final."²⁴³ Since *Teague*, the Court has described a new rule as one that is "susceptible to debate among reasonable minds,"²⁴⁴ or "reasonable jurists."²⁴⁵ A rule is new unless, on the date the defendant's conviction was finalized, a reasonable jurist "would have felt compelled by existing precedent to rule in [the defendant's] favor."²⁴⁶ Despite the Supreme Court's use of different language in defining a new rule under *Teague*, the fundamental test remains the same: a rule is deemed new unless it would have been objectively unreasonable for a jurist to not extend the rule at the time the defendant's conviction became final.²⁴⁷ In determining whether a jurist would have acted unreasonably in failing to extend the rule sought to be applied, one must examine the existing precedent at the time of the defendant's finalized conviction.²⁴⁸

At the time O'Dell's sentence became final, a reasonable jurist would have considered the four cases constituting the "legal

on which the conviction may be held to be unlawful.'" *Id.* (Souter, J., concurring) (quoting *Wright v. West*, 505 U.S. 277, 311 (1992)) (italics omitted). Even Justice Brennan stated that "'a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was so clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist.'" *Id.*; *Butler v. McKellar*, 494 U.S. 407, 417-18 (1990) (Brennan, J., dissenting).

242. See *O'Dell*, 117 S. Ct. at 1983 (Stevens, J., dissenting); see also Part II.C.2 (examining the Court's interpretation of what constitutes a "new" rule). Unlike an "old" rule, a "new" rule cannot be applied retroactively unless it fits under one of *Teague*'s exceptions. See *O'Dell*, 117 S. Ct. at 1973.

243. *Teague v. Lane*, 489 U.S. 288, 301 (1989).

244. *Butler*, 494 U.S. at 415; see also *supra* notes 125-30 and accompanying text (examining the Court's definition of a "new" rule).

245. *Sawyer v. Smith*, 497 U.S. 227, 234 (1990); see also *supra* note 125 and accompanying text (discussing the Court's definition of what makes a rule "new").

246. *Graham v. Collins*, 506 U.S. 461, 467 (1993) (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)).

247. See *O'Dell*, 117 S. Ct. at 1973, 1977; *O'Dell v. Netherland*, 95 F.3d 1214, 1223-24, 1229 (4th Cir. 1996) (en banc), cert. granted in part, 117 S. Ct. 631 (1996), aff'd, 117 S. Ct. 1969 (1997); see also *Butler*, 494 U.S. at 414 (stating "The 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions"). Congress codified and even strengthened the *Teague* doctrine. See 28 U.S.C.A. § 2254(d) (Law Co-op. 1992 & Supp. 1997), amended by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214; Respondent's Brief, *supra* note 151, at *13. For the text of section 2254, see *supra* note 110.

248. See *O'Dell*, 117 S. Ct. at 1975.

landscape" surrounding the *Simmons* issue, to determine whether the law required the parole-ineligible jury instruction that O'Dell requested.²⁴⁹ When deciding *Simmons* in 1988, the Court relied on *Gardner v. Florida*,²⁵⁰ and *Skipper v. South Carolina*,²⁵¹ while also finding *California v. Ramos*²⁵² persuasive in reaching its decision.²⁵³ Importantly, those cases produced an assortment of differing opinions from the justices,²⁵⁴ making the outcomes of those cases "susceptible to debate among reasonable minds . . . or jurists."²⁵⁵ Thus, from these varying opinions alone, it appears that the rule in *Simmons* was not definitively dictated by existing precedent, and was therefore, a new rule.²⁵⁶

In addition to the "mixed signals" extending from the justices' differing opinions that a jurist confronts upon examining these cases,²⁵⁷ the controlling opinions of these cases are also generally narrow and somewhat fact-specific.²⁵⁸ The opinions are not easily translated into broad holdings that a jurist could apply to other cases that differ factually from *Gardner*, *Skipper*, *Ramos*, and *Caldwell*.²⁵⁹ Consequently, even a surface examination of these cases' holdings and opinions supports the majority's ruling that the *Simmons* rule is new under *Teague*.

Admittedly *Gardner*, holding that the Eighth Amendment precludes the examination of secret information in sentencing a defendant to

249. See *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *California v. Ramos*, 463 U.S. 992 (1983); *Gardner v. Florida*, 430 U.S. 349 (1997).

250. See *supra* notes 71-78 and accompanying text.

251. See *supra* notes 81-84 and accompanying text (explaining the facts and analysis in *Skipper*).

252. See *supra* notes 87-88 and accompanying text.

253. See *Simmons v. South Carolina*, 512 U.S. 154, 161-66 (1994).

254. *Gardner* produced seven separate opinions. See *supra* note 76. In *Skipper*, six Justices constituted the majority while three others joined in a concurrence. See *Skipper*, 476 U.S. at 9. In *Ramos*, five justices made up the majority, two Justices filed dissenting opinions, one Justice joined a dissent, and another Justice joined a dissenting opinion in part and also wrote a separate dissenting opinion. See *Ramos*, 463 U.S. at 994. Finally, the *Caldwell* Court produced a five-member majority, a separate concurrence, and a three-member dissent. See *Caldwell*, 472 U.S. at 322.

255. *Supra* text accompanying notes 244-45; see also *supra* note 254 (surveying the differing opinions in *Gardner*, *Skipper*, *Ramos*, and *Caldwell*).

256. See *supra* note 249.

257. See generally Respondent's Brief, *supra* note 151, at *17 (noting that *Gardner*, *Skipper*, *Ramos*, and *Caldwell* contained "no fewer than sixteen separate opinions").

258. See *O'Dell v. Netherland*, 117 S. Ct. 1969, 1976 (1997).

259. See *supra* note 254 (surveying the differing opinions in *Gardner*, *Skipper*, *Ramos*, and *Caldwell*).

death,²⁶⁰ and *Skipper*, holding that a defendant must be allowed to introduce mitigating evidence of his good behavior in prison if the prosecutor argues his future dangerousness,²⁶¹ lend support to the idea that the *Simmons* rule is not new. Like *Simmons*, both of these cases corrected unconstitutional procedures at the states' penalty trials.²⁶² However, both the controlling opinion in *Gardner* and the majority opinion in *Skipper* were decided on Eighth Amendment grounds, rather than the due process grounds on which *Simmons* was decided.²⁶³ This fact is significant because *Gardner* and *Skipper* did not rely on the same constitutional analysis on which *Simmons* relied. Therefore, the dissent in *O'Dell* was forced to focus on a footnote in *Skipper* which states that, in accordance with due process, a defendant must not receive the death penalty "on the basis of information which he had no opportunity to deny or explain."²⁶⁴ Thus, looking only at *Gardner* and *Skipper*, a reasonable jurist may have concluded that the rule in *Simmons* was not new.²⁶⁵

However, upon examining *Ramos* and *Caldwell*, a reasonable jurist would have encountered conflicting authority on the issue of what must be disclosed to a jury during death sentencing procedures.²⁶⁶ *Ramos* stands for the proposition that the Court will defer to the states' judgment regarding what information must be disclosed to a jury when deciding whether to sentence a defendant to death.²⁶⁷ In fact, both the majority and dissenting opinions in *Ramos* specifically approved the prevailing practice of prohibiting jury consideration of a defendant's possibility of parole.²⁶⁸ Thus, the *O'Dell* majority was correct in

260. See *Gardner v. Florida*, 430 U.S. 349, 364 (1977) (White, J., concurring). Justice White's narrow concurrence constitutes the "rule" in *Gardner*. See *supra* note 77.

261. See *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986).

262. See *id.* at 2; *Gardner*, 430 U.S. at 351-52. See generally *O'Dell v. Netherland*, 95 F.3d 1214, 1225 (4th Cir. 1996) (en banc) (summarizing the issues in *Gardner* and *Skipper*), cert. granted in part, 117 S. Ct. 631 (1996), *aff'd*, 117 S. Ct. 1969 (1997).

263. See *Skipper*, 476 U.S. at 4-5; *Gardner*, 430 U.S. at 363-64. See generally *O'Dell*, 117 S. Ct. at 1975 (setting forth petitioner's argument that *Simmons* relied on *Gardner* and *Skipper*).

264. See *O'Dell*, 117 S. Ct. at 1982 (citing *Skipper*, 476 U.S. at 5 n.1). The majority in *Skipper* extracted that language directly from *Gardner*'s plurality opinion. See *Skipper*, 476 U.S. at 5 n.1 (quoting *Gardner*, 430 U.S. at 362).

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

266. See *id.* at 1231 (stating "[a] reasonable jurist in 1988, thus, would have found himself in something of a quandary").

267. See *Ramos*, 463 U.S. at 999-1014.

268. See *id.* at 1013 n.30; see also *O'Dell*, 95 F.3d at 1227-28. "[N]ot only the majority, but the full Court, recognized and approved, as constitutionally permissible, the practice of nearly every jurisdiction which has considered the question of not 'permitt[ing][juries] to consider commutation and parole.'" *Id.* (quoting *California v.*

concluding that *Simmons* essentially carved out an exception to *Ramos*' rule of general deference to state decisions on jury education in capital sentencing proceedings.²⁶⁹ This assertion suggests that *Simmons* is a new rule.²⁷⁰ *Caldwell* also supports the proposition that states can decide what information to disclose to jurors in sentencing procedures.²⁷¹ Thus, viewing the legal landscape at the time O'Dell's conviction became final, a reasonable jurist could have concluded that the *Simmons* rule was not constitutionally mandated, and was possibly even prohibited, since the decision in *Simmons* to allow information regarding the defendant's parole ineligibility was not left to the states' discretion.²⁷²

Moreover, the O'Dell dissent incorrectly stated that *Ramos* and *Caldwell* "[s]imply provide further support for the conclusion that *Simmons* did not announce a new rule of law."²⁷³ Although correct in concluding that *Ramos* did not *mandate* a state to inform sentencing juries about specific information,²⁷⁴ the dissent missed the point. The test is what a reasonable jurist would have concluded in viewing the existing precedent at the time O'Dell's conviction became final.²⁷⁵ In viewing *Ramos* and *Caldwell*, a reasonable jurist would have concluded that the Court had deferred to the states' judgment in deciding what information to disclose to sentencing juries.²⁷⁶ Apparently, many jurists concluded just that.²⁷⁷ The dissent failed to recognize that even the *Simmons* plurality had conceded that those states that opted not to inform their sentencing juries of a defendant's

Ramos, 463 U.S. 992, 1025 (1983)).

269. See *O'Dell*, 117 S. Ct. at 1977.

270. See *id.*; see also *id.* at 1975-76 n.2 (stating that although the language in *Simmons* plurality opinion is "evidence tending to prove that the rule of *Simmons* was not new . . . it is far from conclusive").

271. Justice O'Connor's controlling opinion in *Ramos* concluded that a state could choose whether or not to "instruct the jurors on the sentencing procedure, including the existence and limited nature of appellate review," so long as any information it chose to provide was accurate." *Id.* (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 342 (1985) (O'Connor, J., concurring in part and concurring in the judgment)).

272. See *O'Dell*, 95 F.3d at 1231-32.

273. *O'Dell*, 117 S. Ct. at 1983 (Stevens, J., dissenting).

274. The specific information in that case involved informing the jury of the governor's ability to change a defendant's life sentence without parole to a life sentence with parole. See *California v. Ramos*, 463 U.S. 992, 995 (1983).

275. See *supra* note 246 and accompanying text.

276. See *supra* Part II.B.3 (discussing the Court's decisions in *Ramos* and *Caldwell*).

277. See *O'Dell*, 95 F.3d at 1233; *Ramos*, 463 U.S. at 1014 n.30. The *Ramos* Court cited several state courts that prohibited jury consideration of a defendant's possible parole. See *id.*

parole ineligibility had relied on *Ramos* as authority.²⁷⁸ If several states believed that *Ramos* provided them with the discretion to decide whether or not to educate juries on parole information, then it is not unreasonable to believe that the failure to extend the *Simmons* rule to defendants in 1988 was constitutional.²⁷⁹

Further, the *O'Dell* dissent criticized the majority for factually distinguishing *Simmons* from *Skipper*.²⁸⁰ The dissent then proceeded to distinguish, on factual grounds, *Simmons* from *Caldwell*.²⁸¹ If both the majority and dissenting justices wished to distinguish *Simmons*' precedent on factual grounds, then clearly *Ramos* serves as the case most factually akin to *Simmons* since it specifically discusses instructing sentencing juries on a defendant's parole possibilities.²⁸²

In light of the complex and conflicting legal landscape in 1988, the variety of justices' opinions surrounding jury education in sentencing proceedings, as well as the tension between *Gardner/Skipper*²⁸³ and *Ramos/Caldwell*,²⁸⁴ it would not have been unreasonable for a jurist to conclude that the Constitution does not require that O'Dell be permitted to inform a jury of his ineligibility of parole. Further, *Ramos* certainly addresses the *Simmons* issue more directly than *Skipper*, given *Ramos*' factual similarities to *Simmons*.²⁸⁵ Regardless, the conflicting

278. See *Simmons v. South Carolina*, 512 U.S. 154, 167-68 (1994) (stating that "[t]he few States that do not provide capital sentencing juries with any information regarding parole ineligibility seem to rely, as South Carolina does here, on the proposition that *California v. Ramos* held that such determinations are purely matters of state law") (citations omitted).

279. See *O'Dell*, 95 F.3d at 1235.

280. See *O'Dell v. Netherland*, 117 S. Ct. 1969, 1983 (1997) (Stevens, J., dissenting). Justice Stevens concluded that "the only distinction the majority is able to draw between [*Skipper*] and *Simmons* is that the defendant in *Skipper* sought to introduce 'evidence of his past behavior' while *Simmons* wished 'an opportunity to describe the extant legal regime' . . . [t]his distinction is simply not enough to make the rule in *Simmons* 'new.'" *Id.* (Stevens, J., dissenting).

281. See *id.* at 1983-84 (Stevens, J., dissenting) (stating "[a]part from the fact that an instruction describing a sentencing alternative does not relate to 'postsentence procedures,' I see no basis for assuming that concerns about describing the process of appellate review to a jury might have anything to do with the necessity for providing the jury with accurate information about sentencing options . . ."). The majority relied on *Caldwell* to support its proposition that the rule in *Simmons* was new. See *supra* notes 186-93 and accompanying text.

282. See *supra* notes 86-88 and accompanying text (discussing *Ramos*).

283. See generally *supra* notes 71-84 and accompanying text (discussing the constitutionality of procedures that allow death sentences to be decided based on evidence not fully disclosed to the defendant or which deny the sentencing jury access to relevant information).

284. See generally *supra* notes 85-95 and accompanying text (discussing how the Court left the question of jury instruction as to post-sentencing laws to the states).

285. The only support for the idea that due process, rather than the Eighth

authority alone mandates that, *whatever* a jurist would have concluded in 1988—whether the jurist believed that *Gardner/Skipper* controlled *Simmons* more directly than *Ramos/Caldwell*, or vice versa—the conclusion could not be deemed “unreasonable.”²⁸⁶ Thus, it would not have been objectively unreasonable for a jurist not to extend the *Simmons* rule to O’Dell at the time O’Dell’s sentence became final.²⁸⁷

B. The Simmons Rule Qualifies Under Teague’s Second Exception

Regardless of whether *Simmons* is or is not a new rule, the majority should have applied it in O’Dell’s case because it falls under *Teague*’s second exception. As it stands, *Teague*’s second exception allows the retroactive application of “watershed rules of criminal procedure” or “bedrock procedural elements” that improve accuracy and implement fundamental fairness in criminal proceedings.²⁸⁸ This second exception will only be extended to those procedures that are likely to have a serious effect on the accuracy of the conviction.²⁸⁹ This standard is certainly difficult to meet, especially in light of the fact that the Court cites *Gideon*’s right to counsel as an example of the type of rule that would fall within the exception.²⁹⁰ Further, since *Teague*, no Supreme Court case has ever found a rule to qualify under *Teague*’s second exception.²⁹¹

Amendment, required the *Simmons* rule lies in a mere footnote in *Skipper*’s majority opinion. See *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1985). As the Chief Justice stated, “[a footnote is] a strange place to find doctrine.” Transcript of Oral Arg. at *5, *O’Dell v. Netherland*, 1997 WL 136241 (March 18, 1997) (No. 96-6867). However, it is significant to note that both the plurality in *Simmons* and Justice O’Connor’s concurrence cited to this footnote in the text of their *Simmons*’ opinions. See *Simmons v. South Carolina*, 512 U.S. 154, 164, 175 (1994).

286. See *O’Dell*, 95 F.3d 1214, 1225, 1236-38 (4th Cir. 1996), *cert. granted in part*, 117 S. Ct. 631 (1996), *aff’d*, 117 S. Ct. 1969 (1997).

287. See *id.* at 1238.

288. *Teague v. Lane*, 489 U.S. 288, 311, 315 (1989); see also *supra* Part II.C.2.b (discussing *Teague*’s second exception).

289. See *Teague*, 489 U.S. at 313. The Court stated: “Finally we believe that Justice Harlan’s concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.” *Id.*

290. See *supra* notes 142-43 and accompanying text (discussing defendant’s affirmative right to counsel in felony cases).

291. See *supra* notes 140-44 and accompanying text; see also *Teague*, 489 U.S. at 313 (noting the unlikelihood of emergence of many components of basic due process that would meet *Teague*’s second exception).

1. The Right to Rebut as a Hallmark of Due Process

Nevertheless, like the affirmative right to counsel in felony cases, one of the "hallmarks of due process" is a defendant's right to rebut the prosecution's case against him.²⁹² Arguably, little else could be more "bedrock" or "fundamental to the fairness" of a criminal proceeding.²⁹³ The justice system is premised on the notion that, when two sides zealously advocate with a referee ensuring that a jury hears only relevant, accurate and not unduly prejudicial information, the truth will emerge.²⁹⁴ However, because the system is not perfect, courts must step in to insure the system's accuracy, particularly in criminal, and more importantly, in death penalty cases.²⁹⁵ The *Simmons* rule upholds a defendant's ability to rebut the prosecution's case against him.²⁹⁶ In capital cases, where the issue is literally a matter of life or death, the Supreme Court has emphasized that the jury be permitted to hear all relevant and mitigating evidence.²⁹⁷ In doing so, the Court has stressed the importance of ensuring the accuracy of death sentence proceedings.²⁹⁸

2. Accuracy of Sentencing

Of significance is the effect of the *Simmons* rule on juries, an effect that the *O'Dell* majority fails to even consider.²⁹⁹ Studies show that many jurors believe that a defendant sentenced to life imprisonment will be back on the streets in about ten years, and that a life-sentence

292. See *Simmons v. South Carolina*, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring) (stating that "one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him") (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)); see also *O'Dell v. Netherland*, 117 S. Ct. 1969, 1980 (1997) (Stevens, J., dissenting). Several other rules have been considered hallmarks of due process. See *Moody v. Miller*, 864 F.2d 1178, 1180 (5th Cir. 1989) (stating that notice, the right of an arrestee to submit a written statement, the right to be represented by counsel, and the right to call witnesses are hallmarks of due process); *Patterson v. Ramsey*, 413 F. Supp. 523, 535-36 (D. Md. 1976) (characterizing notice and specification of charges, opportunity to be heard and to confront accusers, and an impartial tribunal as "ingredients of due process"), *aff'd*, 552 F.2d 117 (4th Cir. 1977).

293. See *O'Dell*, 117 S. Ct. at 1980 (Stevens, J., dissenting).

294. See Kenneth J. Drexler, *Honest Attorneys, Crooked Clients and Innocent Third Parties: A Case for More Disclosure*, 6 GEO. J. LEGAL ETHICS 393, 396 n.12 (1992).

295. See *supra* Part II.A.1 (discussing the Supreme Court's imposition of procedural and substantive safeguards on death penalty state statutes in the 1970s and 1980s).

296. See *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring).

297. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604-08 (1978); see also *supra* note 55 and accompanying text (discussing the procedural safeguards in sentencing with regard to the introduction of a defendant's mitigating and aggravating factors).

298. See *Lockett*, 438 U.S. at 605.

299. See *O'Dell v. Netherland*, 117 S. Ct. 1969, 1981 (1997) (Stevens, J., dissenting).

essentially constitutes a "get out of jail free" card.³⁰⁰ Those jurors will inevitably be more apt to impose the death penalty, particularly where a prosecutor argues the defendant's future dangerousness.³⁰¹ As a result, if a juror was informed that a defendant's only alternative to death is life *without parole*, the result would be much more reliable and accurate.³⁰²

Prior to *Simmons*, a majority of states recognized the importance of providing juries with the life-without-parole alternative, and required that information regarding this sentencing option be provided to the jury.³⁰³ For example, in Virginia, the state in which O'Dell was sentenced, the number of death sentences imposed by capital juries decreased significantly after Virginia implemented the requirement that juries be instructed on the life-without-parole alternative.³⁰⁴ The effect of the *Simmons* rule on juries suggests that the rule is fundamental to the fairness of a criminal proceeding. In failing to qualify *Simmons* under *Teague's* second exception, the Court stepped away from its history of treating capital punishment cases "differently" and of requiring a heightened level of scrutiny in death penalty reviews.³⁰⁵

300. See Cooper, *supra* note 98, at 1573 n.2 (citing William M. Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1606, 1620-25 (1989); Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 211-14 (1987)); see also Mary Zaug, Note, *Simmons v. South Carolina: Safeguarding a Capital Defendant's Right to Fair Sentencing Proceeding*, 26 LOY. U. CHI. L.J. 511, 544 n.211 (1995) (citing Theodore Eisenberg and Martin T. Wells, *Deadly Confusion: Jury Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993)).

301. See *O'Dell*, 117 S. Ct. at 1981 (Stevens, J., dissenting).

302. See *id.* at 1981 (Stevens, J., dissenting) (stating that "the likelihood that a jury would find an obviously guilty defendant eligible for the death penalty was significantly increased when an arguably more appropriate sentencing alternative was not available").

303. See *id.* (Stevens, J., dissenting).

304. See *id.* (Stevens, J., dissenting) (stating that "[o]nly two death sentences have been imposed in Virginia for crimes committed after January 1, 1995—whereas ten were imposed in 1994 alone—and the decline in the number of death sentences has been attributed to the fact that juries in Virginia must now be informed of the life-without-parole alternative") (citing Frank Green, *Death Sentences Decline in Virginia—Life Term Without Parole is Factor in Change*, RICHMOND TIMES-DISPATCH, Nov. 24, 1996, at A1).

305. See *Saffle v. Parks*, 494 U.S. 484, 505 (1990) (Brennan, J., dissenting).

C. *Death Is Different*

Death is different.³⁰⁶ In a majority of Supreme Court cases involving capital punishment, justices recognize that no punishment, even a life sentence, equates in gravity to the death penalty.³⁰⁷ The *O'Dell* Court failed to adhere to this precedent when it refused to place the *Simmons* rule within *Teague's* second exception.

The justifications for the *Teague* doctrine are generally sound.³⁰⁸ The doctrine promotes finality of decisions, which is crucial to the proper functioning of the criminal justice system,³⁰⁹ and it limits the excessive costs of retroactive application of new rules that often outweigh the advantages of such application.³¹⁰ Finally, the doctrine encourages lower courts to have the confidence to apply the current law, rather than forcing them to anticipate future changes in the law.³¹¹ However, these many justifications for *Teague* become less convincing where the penalty is death.³¹²

As recognized by the justices, because death is "qualitatively different" from any other sentence, procedures in capital sentencing are of paramount importance.³¹³ The sentence "should reflect a reasoned moral response to the defendant's background, character, and crime."³¹⁴ Thus, whether one agrees or disagrees with the death penalty on a personal level, one cannot deny that a death sentence

306. See, e.g., *Harris v. Alabama*, 513 U.S. 504, 516 (1995) (Stevens, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part). Justice Stevens stated:

[E]very member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

Spaziano, 468 U.S. at 468; see also *Simmons v. South Carolina*, 512 U.S. 154, 185 (1994) (discussing the "death-is-different jurisprudence").

307. See *Harris*, 513 U.S. at 516 n.1 (listing several Supreme Court cases that have stressed the notion that "death is a fundamentally different kind of penalty").

308. See Metzner, *supra* note 108, at 183-84.

309. See *id.* at 188-89.

310. See *id.*

311. See *Teague v. Lane*, 489 U.S. 288, 308-09 (1989).

312. See *Penry v. Lynaugh*, 492 U.S. 302, 341 (1989) (Brennan, J., concurring in part and dissenting in part) (stating "a person may be killed although he or she has a sound constitutional claim that would have barred his or her execution had this Court only announced the constitutional rule before his or her conviction and sentence became final"); Cooper, *supra* note 98, at 1602.

313. See *supra* notes 306-07 and accompanying text.

314. See *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

should meet every Constitutional safeguard in order to ensure the accuracy of the sentence.³¹⁵ Yet, under the *O'Dell* Court's limited reading of *Teague's* second exception, the Court essentially holds that, despite the fact that *O'Dell's* sentence was unconstitutional, unfair, and based on misleading information, it should not be "upset" because it was finalized before *Simmons*.³¹⁶ As Justice Brennan stated, "[T]he difference between life and death should [not] turn on such a fortuity of timing" ³¹⁷

V. IMPACT

The *O'Dell* Court's determination that *Simmons* is a new rule will lead to some future favorable results in that it will allow lower courts to confidently apply existing law to cases before them. Courts will no longer be forced to predict the future actions of the Supreme Court, rather, they will be able to focus on existing precedent, providing consistency and certainty in the varying and changing course of case law.³¹⁸

Despite this one positive outcome of precedent, the Court's refusal to apply *Teague's* second exception to *Simmons* will detrimentally impact future capital defendants by upholding death sentences imposed by procedures which are later deemed unconstitutional. This is extremely problematic given that life is at stake.

Historically, the Court has recognized the fundamental difference between capital and non-capital cases, and has appropriately mandated that stricter procedural requirements be followed in death sentencing cases.³¹⁹ In fact, one could argue that *any* defect in a death sentencing procedure that results in a constitutional error should be considered fundamental or "bedrock," given the permanent and controversial nature of the death penalty.³²⁰ Yet, the Court continues to hastily

315. See Metzner, *supra* note 108, at 183 (stating that the death penalty "[s]hould be imposed only when the state has complied with every procedural requirement of the Constitution").

316. See *O'Dell v. Netherland*, 117 S. Ct. 1969, 1980 (1997) (Stevens, J., dissenting).

317. *Penry*, 492 U.S. at 341 (Brennan, J., dissenting). Justice Brennan, in *Penry* further stated that it was "[b]eyond my comprehension that a majority of this Court will so blithely allow a State to take a human life though the method by which sentence was determined violates our Constitution." *Id.* (Brennan, J., dissenting).

318. See Metzner, *supra* note 108, at 186-87.

319. See *supra* Part II.A.1 (describing the Court's imposition of strict substantive and procedural requirements on state death penalty statutes).

320. See generally Metzner, *supra* note 108, at 183. (stating that "it offends all core notions of civilization . . . to execute a person . . . because the powers that be did not determine the existence of its prejudicial nature until after the defendant had crossed the

extend the *Teague* doctrine in its totality to capital cases without holding to its tradition of treating capital and noncapital cases differently.³²¹ In order to live with the idea that a human being will be killed under a jury's instruction, it is necessary to ensure that the decision to sentence another to death is the right one. Accordingly, the restrictive definition that the Supreme Court provides for the second exception to *Teague* should be modified to allow for a more lenient application of this exception in capital cases.³²²

In *O'Dell*, the Court should have qualified O'Dell's claim under the second exception to *Teague*. If the Court continues to construe the second exception so narrowly, it appears that no habeas petitioner will ever be permitted to retroactively apply a new rule, even if that new rule establishes that the petitioner's sentencing hearing was unfair or unconstitutional.³²³ As it stands, the Court will uphold the utmost punishment on a person even where that punishment admittedly does not satisfy procedural safeguards.³²⁴ Such a result is not compatible with the goals of our justice system. Therefore, when determining whether a new rule should qualify under the second exception to *Teague*, courts should adopt a more lenient application of *Teague*'s second exception for capital cases.

VI. CONCLUSION

The Supreme Court's decision in *O'Dell v. Netherland* promotes expediency in post-sentencing appeals over Constitutional guarantees that ensure a defendant's right to a fair and accurate capital sentencing proceeding. Although the Court correctly held that *Simmons v. South*

Rubicon").

321. See, e.g., *Saffle v. Parks*, 494 U.S. 484 (1980); *Butler v. McKellar*, 494 U.S. 407 (1990); *Penry*, 492 U.S. at 302.

322. See Metzner, *supra* note 108, at 184-85; see also *Saffle*, 494 U.S. at 505 (Brennan, J., dissenting). The dissent stated:

The determination with which the Court refuses to apply [*Teague*'s second] exception to a capital sentencing error is most disturbing and is remarkably insensitive to the fundamental premise upon which our Eighth Amendment jurisprudence is built. This Court has consistently 'recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.' If the irrevocable nature of the death penalty is not sufficient to counsel against application of Justice Harlan's doctrine of limited retroactivity for collateral review altogether, it should at least inform the determination of the proper scope of the second *Teague* exception in capital cases.

Saffle, at 505-06 (Brennan, J., dissenting) (citations omitted).

323 See *Saffle*, 494 U.S. at 505-06.

324 See *O'Dell v. Netherland*, 117 S. Ct. 1969, 1979 (1997) (Stevens, J., dissenting).

Carolina constitutes a new rule for purposes of the *Teague* doctrine, the Court inappropriately concluded that a criminal defendant's right to meet a state's case against him was not a "bedrock element of fundamental fairness." By failing to allow a broader definition of *Teague's* second exception for capital punishment appeals, the Court continues to stray from its historical practice of recognizing that "death is different" from any other sentence. Instead, the Court's decision to uphold an admittedly unfair and inaccurate sentence on the basis of its timing violates the criminal system's traditional notions of justice.

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