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## *Simmons v. South Carolina*: Safeguarding a Capital Defendant's Right to Fair Sentencing

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# Notes

## *Simmons v. South Carolina*: Safeguarding a Capital Defendant's Right to Fair Sentencing

### I. INTRODUCTION

In *Simmons v. South Carolina*,<sup>1</sup> the United States Supreme Court held that, in a capital sentencing proceeding where the State argues future dangerousness, a defendant has the right to inform the sentencer<sup>2</sup> of his or her parole ineligibility.<sup>3</sup> The Court held that the Due Process Clause of the Fourteenth Amendment protects a capital defendant's right to present this information.<sup>4</sup> Two concurring Justices further argued that the Eighth Amendment also entitles a defendant to inform the sentencer of his or her parole ineligibility.<sup>5</sup>

The Court's decision safeguards capital defendants against unwarranted death sentences based on jurors' misperceptions about the true nature of sentencing alternatives. Because jurors may believe that a sentence of "life imprisonment" carries with it the possibility of parole,<sup>6</sup> a state which does not inform the sentencing jury that a

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1. 114 S. Ct. 2187 (1994).

2. Throughout this Note, the term "sentencer" refers to both sentencing juries and sentencing judges. *Simmons* impacts both of these groups. See *infra* part V.A-B.

3. *Simmons*, 114 S. Ct. at 2190 (plurality opinion); *id.* at 2201 (O'Connor, J., concurring).

4. *Id.* at 2190 (plurality opinion); *id.* at 2201 (O'Connor, J., concurring). The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV; see *infra* part II.B.

5. *Simmons*, 114 S. Ct. at 2198 (Souter, J., concurring). The majority of Justices declined to analyze the issue under the Eighth Amendment. See *id.* at 2193 n.4 (plurality opinion) (declining to reach the Eighth Amendment issue); *id.* at 2200-01 (O'Connor, J., concurring) (discussing only the Due Process Clause).

The Eighth Amendment proscribes "cruel and unusual punishment." U.S. CONST. amend. VIII. While the Eighth Amendment, on its face, applies only to the federal government, the Court incorporated it into the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660 (1962), thus making the Eighth Amendment's limits applicable to the states. In *Robinson*, the Court held that imposition of criminal punishment for narcotics addiction constituted "cruel and unusual" punishment because such punishment was disproportionate to the "offense." 370 U.S. at 667. See *infra* note 26 and accompanying text for a discussion of the Eighth Amendment's proscription on disproportionate punishment.

6. See *Simmons*, 114 S. Ct. at 2197 (plurality opinion) (refusing to ignore "the reality, known to 'the reasonable juror,' that, historically, life-term defendants have been eligible for parole" (quoting *State v. Smith*, 381 S.E.2d 724, 728 (S.C. 1989)

defendant is ineligible for parole presents the jury with a false choice.<sup>7</sup> Such states place defendants at risk of receiving unwarranted death sentences.<sup>8</sup> The *Simmons* Court held that the Due Process Clause protects a parole ineligible capital defendant in this situation, at least when the prosecution argues that the defendant will be a future danger to

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(Chandler, J., concurring in part and dissenting in part)); *see also infra* notes 212-14 and accompanying text (discussing possible consequences of jurors' misperception of life imprisonment).

7. *Simmons*, 114 S. Ct. at 2193 (plurality opinion) (stating that the jury's possible erroneous belief that the defendant was eligible for parole "creat[ed] a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration.").

In his brief, *Simmons* explained the development of the life without parole sentencing alternative and the corresponding need for changes in evidentiary rules:

[M]any states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. These state law rules developed in an era when release on parole was widely available for life-sentenced murderers, and the various states' prohibitions against instructions or jury argument concerning parole were designed to protect capital defendants from jury speculation concerning the likelihood of early parole release if the death penalty was not imposed. In recent years, however, with the steady expansion of "life without parole" statutes, parole for life-sentenced murderers has increasingly moved from a real possibility to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. And with this change, rules that once protected capital defendants from potentially harmful speculation now serve to increase the danger of death sentences based on jurors' misinformed fear of parole release. This case illustrates in stark form the unfairness that can result when the crucial fact of a defendant's lifelong parole ineligibility is withheld from the jury that must sentence him.

Brief for Petitioner at 13-14, *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994) (No. 92-9059) (footnotes omitted) (citation omitted) (citing *California v. Ramos*, 463 U.S. 992, 1013 n.30 (1983)).

Agreeing with the petitioner's analysis, Justice Blackmun stated:

It can hardly be questioned that most juries lack accurate information about the precise meaning of "life imprisonment" as defined by the States. For much of our country's history, parole was a mainstay of state and federal sentencing regimes, and every term . . . in practice was understood to be shorter than the stated term. Increasingly, legislatures have enacted mandatory sentencing laws with severe penalty provisions, yet the precise contours of these penal laws vary from State to State.

*Simmons*, 114 S. Ct. at 2197 (plurality opinion) (citations omitted).

Justice O'Connor also agreed. She stated that "[t]he rejection of parole by many States (and the Federal Government) is a recent development that displaces the long-standing practice of parole availability, and common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole." *Id.* at 2201 (O'Connor, J., concurring) (citation omitted).

8. *See infra* notes 212-13 and accompanying text for studies demonstrating the correlation between jurors' perception of the length of a life sentence and their propensity to sentence to death.

society.<sup>9</sup>

This Note explores the Court's development of procedural and substantive limits on capital sentencing under the Eighth Amendment<sup>10</sup> and the Due Process Clause of the Fourteenth Amendment.<sup>11</sup> This Note discusses the facts in *Simmons*,<sup>12</sup> and then discusses the *Simmons* plurality,<sup>13</sup> concurring,<sup>14</sup> and dissenting opinions.<sup>15</sup> Then, this Note analyzes the Justices' positions in *Simmons*.<sup>16</sup> Next, this Note explores the current impact of the *Simmons* decision on capital defendants and on state law, and predicts that the Court may eventually extend *Simmons* to require states to allow capital defendants to inform sentencers of parole ineligibility in all cases.<sup>17</sup> Finally, this Note concludes that the Court's decision in *Simmons* properly safeguards a capital defendant's right to fair sentencing.<sup>18</sup>

## II. BACKGROUND

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishment" upon criminals.<sup>19</sup> The Fourteenth Amendment guarantees an individual "due process of law" before any state can deprive that person of "life, liberty, or property."<sup>20</sup> In developing procedural and substantive limits on states' capital sentencing, the Supreme Court has traditionally relied on the language of these two Amendments.<sup>21</sup>

### A. Eighth Amendment Limits on Imposing the Death Penalty

In *Gregg v. Georgia*,<sup>22</sup> the Supreme Court held that the Eighth Amendment does not proscribe the death penalty as per se "cruel and unusual punishment."<sup>23</sup> Since *Gregg*, however, the Court has recog-

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9. *Simmons*, 114 S. Ct. at 2190 (plurality opinion); *id.* at 2201 (O'Connor, J., concurring).

10. *See infra* part II.A.

11. *See infra* part II.B.

12. *See infra* part III.A.

13. *See infra* part III.B.

14. *See infra* part III.C.

15. *See infra* part III.D.

16. *See infra* part IV.

17. *See infra* part V.

18. *See infra* part VI.

19. U.S. CONST. amend. VIII.

20. U.S. CONST. amend. XIV.

21. *See infra* part II.A-B.

22. 428 U.S. 153 (1976).

23. *Id.* at 169 (plurality opinion); *id.* at 207 (White, J., concurring) (declaring that

nized that the Eighth Amendment does place substantial restrictions upon the imposition of the death penalty.<sup>24</sup>

Under its plain meaning, the Amendment prohibits torture.<sup>25</sup> The Court has held that the Eighth Amendment also mandates that states impose punishments which are proportional to the crimes committed<sup>26</sup>

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the death penalty may be constitutionally imposed under the Georgia capital sentencing scheme).

As the plurality in *Gregg* explained, prior to *Furman v. Georgia*, 408 U.S. 238 (1972), the Court assumed the constitutionality of the death penalty when deciding whether the Eighth Amendment prohibited particular methods of execution. *Gregg*, 428 U.S. at 168 (plurality opinion). However, in *Furman*, the defendant challenged the death penalty as per se unconstitutional, claiming it constituted "cruel and unusual punishment" in violation of the Eighth Amendment. 408 U.S. at 239. In striking down the Georgia death penalty statute, the Justices wrote nine separate opinions. Four Justices stated that the death penalty was not per se unconstitutional. *Id.* at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting). Two Justices determined that the death penalty is always unconstitutional. *Id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring). Finally, three Justices held the death penalty unconstitutional as applied in the case before the Court, but declined to decide whether states could constitutionally impose the death penalty under other circumstances. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

The Court explicitly decided the constitutionality of the death penalty for the first time in *Gregg*. 428 U.S. at 168-69 (plurality opinion); *id.* at 207 (White, J., concurring). In that case, the State convicted the defendant on two counts of armed robbery and two counts of murder. *Id.* at 160 (plurality opinion). The court then sentenced him to death. *Id.* at 161 (plurality opinion). In place of the capital sentencing scheme which the Supreme Court invalidated in *Furman*, Georgia had implemented a bifurcated sentencing scheme. *Id.* at 162-63 (plurality opinion). See *infra* note 36 for more detail on the structure of the death penalty scheme used in *Gregg*. The Court held Georgia's death penalty scheme constitutional and affirmed the defendant's death sentence. *Gregg*, 428 U.S. at 207 (plurality opinion); *id.* (White, J., concurring). The majority of Justices, thus, declared that the Eighth Amendment does not prohibit imposition of the death penalty. *Id.* (plurality opinion); *id.* (White, J., concurring).

24. See *infra* part II.A.1-2.

25. See *Gregg*, 428 U.S. at 169-71 (plurality opinion) (discussing the history of the Eighth Amendment ban on "cruel and unusual punishment"); see also *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (noting that the Eighth Amendment proscribes "physically barbarous punishments" (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976))). See generally Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 841-42 (1969) (explaining that the framers of the Bill of Rights intended the cruel and unusual punishment clause to prohibit torture).

26. *Hutto*, 437 U.S. at 685; see also *Solem v. Helm*, 463 U.S. 277, 284 (1983) (noting that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed"). Applying this principle, the Court held the death penalty unconstitutional as disproportionate to the crime of robbery in *Enmund v. Florida*, 458 U.S. 782, 797 (1982), and to the crime of rape in *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

In *Gregg*, however, Justice Stewart, with two Justices joining the opinion, remarked that the death penalty does not invariably constitute disproportionate punishment: "It is an extreme sanction, suitable to the most extreme of crimes." 428 U.S. at 187

and which comport with modern ““concepts of dignity, civilized standards, humanity, and decency.””<sup>27</sup> Cognizant of the unique severity and finality of the death penalty,<sup>28</sup> the Supreme Court has scrutinized the constitutionality of capital sentencing proceedings with particular sensitivity.<sup>29</sup> Limits developed by the Supreme Court under an Eighth Amendment analysis are discussed in turn below.

### 1. Procedural Limits

The Eighth Amendment requires procedural safeguards on the imposition of the death penalty.<sup>30</sup> According to the Supreme Court, the Constitution prohibits mandatory imposition of the death penalty.<sup>31</sup>

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(plurality opinion).

27. *Hutto*, 437 U.S. at 685 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)); see also *Stanford v. Kentucky*, 492 U.S. 361, 369-71 (1989) (indicating that the Court must look to modern American society as a whole to discern evolving standards of decency); *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion) (noting that the Court will examine capital sentencing procedures against evolving standards in a civilized society); *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion) (stating that “[c]entral to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment”).

28. For example, in *Woodson*, the plurality noted that, while the Constitution does not generally require individualized sentencing determinations, the “fundamental respect for humanity underlying the Eighth Amendment” mandates individualized sentencing in capital cases. 428 U.S. at 304 (plurality opinion). The plurality reasoned that “the penalty of death is qualitatively different from a sentence of imprisonment, however long,” and, thus, concluded that heightened reliability is required in capital sentencing. *Id.* at 305 (plurality opinion). However, Supreme Court Justices have also recognized that the retributive function of the death penalty is “essential in an ordered society.” *Gregg*, 428 U.S. at 183 (plurality opinion).

29. See *Gregg*, 428 U.S. at 187 (plurality opinion).

30. In examining the constitutionality of imposing the death penalty, the Supreme Court has primarily focused on state procedures because states have traditionally dictated the substantive factors relevant to capital sentencing. See *id.* at 176 (plurality opinion) (reasoning that “[t]he deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for ‘these are peculiarly questions of legislative policy.’” (citation omitted) (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958))). The Court also quoted this exact language used by the *Gregg* plurality in *California v. Ramos*, 463 U.S. 992, 1000 (1983). See also *Romano v. Oklahoma*, 114 S. Ct. 2004, 2009 (1994) (remarking that “‘the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.’” (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990))).

31. *Roberts v. Louisiana*, 431 U.S. 633, 636-37 (1977) [hereinafter *Roberts II*]; *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (plurality opinion) [hereinafter *Roberts I*]; *Woodson*, 428 U.S. at 303 (plurality opinion).

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held several capital sentencing schemes unconstitutional because the schemes allowed sentencing juries unbridled discretion in choosing between death and life imprisonment. *Id.* at 310 (Stewart, J., concurring). The Court found that sentencers imposed death sentences “wantonly” and “freakishly,” and, thus, unconstitutionally. *Id.* (Stewart, J., concurring).

Thus, a state may not automatically impose a death sentence upon a defendant convicted for a particular crime.<sup>32</sup> Rather, the Eighth Amendment entitles defendants to individualized sentencing<sup>33</sup> to prevent arbitrary and capricious imposition of the death penalty.<sup>34</sup> To achieve individualized sentencing, states must genuinely narrow the class of defendants eligible for the death penalty<sup>35</sup> by using

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In response to *Furman*, several states enacted statutes mandating the imposition of the death penalty when the State convicted the defendant of certain narrowly defined crimes. See *Johnson v. Texas*, 113 S. Ct. 2658, 2665 (1993) (noting that, after *Furman*, at least 35 states abandoned sentencing schemes which gave the jury complete discretion and that some of those states adopted a mandatory death penalty for certain crimes). The Court, however, struck down mandatory death penalty statutes because they did not allow for individualized sentencing. See, e.g., *Roberts I*, 428 U.S. at 333-34 (plurality opinion) (holding Louisiana's mandatory death penalty statute unconstitutional); *Woodson*, 428 U.S. at 303 (plurality opinion) (holding North Carolina's mandatory death penalty statute unconstitutional).

32. See, e.g., *Woodson*, 428 U.S. at 305 (plurality opinion) (striking down North Carolina's automatic death sentence as unconstitutional).

33. See *infra* notes 60-63 and accompanying text.

34. *Gregg*, 428 U.S. at 189 (plurality opinion) (explaining that a capital sentencing scheme must "minimize the risk of wholly arbitrary and capricious action"). This exact language from *Gregg* has been quoted in several other seminal Supreme Court cases. See *Romano*, 114 S. Ct. at 2009 (discussing generally the Eighth Amendment limitations on the death penalty); *Arave v. Creech*, 113 S. Ct. 1534, 1540 (1993) (concluding that a finding of "utter disregard" for human life as a prerequisite to the imposition of the death penalty is constitutional); *Lewis v. Jeffers*, 497 U.S. 764, 766, 774 (1990) (finding constitutional the use of "especially heinous, cruel or depraved" as an aggravating circumstance); *Zant v. Stephens*, 462 U.S. 862, 874 (1982) (holding that the Georgia death penalty scheme sufficiently avoided arbitrary and capricious action); see also *Saffle v. Parks*, 494 U.S. 484, 493 (1990) (holding that "above all, capital sentencing must be reliable, accurate, and non-arbitrary"); *McCleskey v. Kemp*, 481 U.S. 279, 306-08 (1987) (discussing defendant's contention that Georgia's death penalty scheme operated arbitrarily and capriciously and, thus, unconstitutionally); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (holding that a finding of "outrageously or wantonly vile, horrible and inhuman" as a prerequisite to the imposition of the death penalty did not avoid arbitrary and capricious action); *Proffitt v. Florida*, 428 U.S. 242, 252-53 (1976) (plurality opinion) (finding Florida's capital sentencing scheme constitutional because it assures that the death penalty will not be imposed in an arbitrary or capricious manner).

Not only must the entire capital sentencing scheme operate to protect against arbitrary and capricious imposition of the death penalty, but when a state employs aggravating factors to determine which defendants are eligible for the death penalty, those factors must be construed and applied in a non-arbitrary manner. *Alabama v. Evans*, 461 U.S. 230, 233 (1983). See *infra* notes 35-41 and accompanying text for a discussion of the role of aggravating factors.

35. *Zant*, 462 U.S. at 877 (holding that an aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty"). Other Supreme Court cases have quoted this exact language from *Zant*. See *Romano*, 114 S. Ct. at 2009 (discussing generally the Eighth Amendment limitations on the death penalty); *Arave*, 113 S. Ct. at 1542 (concluding that a finding of "utter disregard" for human life as a prerequisite to the imposition of the death penalty is constitutional); *Lowenfield v. Phelps*, 484 U.S. 231,

aggravating factors.<sup>36</sup>

State legislatures may choose one of two ways to incorporate aggravating factors into death penalty sentencing schemes.<sup>37</sup> First, a state may adopt a bifurcated sentencing scheme in which the trier of fact determines the defendant's guilt before any consideration of possible sentences.<sup>38</sup> During the sentencing phase of the trial, the

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244 (1988) (clarifying that a capital sentencing scheme may narrow the death-eligible class of defendants by narrowly defining the crime or by using aggravating factors).

To narrow the class of defendants eligible for the death penalty, a state must ensure that only the most morally reprehensible defendants are eligible for the death penalty. See *Zant*, 462 U.S. at 877 & n.15 (noting that a state must justify the imposition of a more severe penalty, such as execution of the defendant, compared to sentences imposed on others found guilty of murder). See *infra* notes 37-41 and accompanying text for the methods of narrowing the class of defendants eligible for the death penalty which the Court has endorsed.

36. *Tuilaepa v. California*, 114 S. Ct. 2630, 2634 (1994). The *Tuilaepa* Court stated that "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent)." *Id.*

Black's Law Dictionary defines "aggravating circumstance" by reference to the term "aggravation." BLACK'S LAW DICTIONARY 65 (6th ed. 1990). "Aggravation" is defined as "[a]ny circumstance attending the commission of a crime . . . which increases its . . . enormity or adds to its injurious consequences." *Id.* Therefore, aggravating factors set death-eligible defendants apart from the majority of defendants convicted of a crime.

The Georgia death penalty scheme held constitutional in *Gregg* provides a good example of one way in which states use aggravating factors. See *Gregg*, 428 U.S. at 207 (plurality opinion); *id.* (White, J., concurring). The Georgia statute defined murder broadly as follows: "A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." GA. CODE ANN. § 26-1101 (1972). Convicted murderers, however, were not eligible for the death penalty unless the sentencer, in a post-trial sentencing proceeding, found the existence of at least one of ten statutory aggravating circumstances beyond a reasonable doubt. *Gregg*, 428 U.S. at 164-65 (plurality opinion). Examples of Georgia's statutory aggravating circumstances included: (1) the defendant was previously convicted of a capital felony; (2) the defendant knowingly created a great risk of death to more than one person in a public place; (3) the defendant committed murder for money; (4) the victim was a police officer; or (5) the murder was "outrageously or wantonly vile, horrible or inhuman." GA. CODE ANN. § 27-2534.1 (Supp. 1975). If a statutory aggravating circumstance existed, the sentencer was then required to decide whether or not to actually impose the death penalty. *Gregg*, 428 U.S. at 165-66 (plurality opinion).

For additional examples of statutory aggravating circumstances, see *Arave*, 113 S. Ct. at 1540; *Lewis*, 497 U.S. at 766, 774; see also *supra* note 34 (discussing specific aggravating factors which the Court has considered).

37. *Tuilaepa*, 114 S. Ct. at 2634.

38. *Id.* A bifurcated trial safeguards the defendant's right to a fair trial because much of the wide range of evidence which is relevant in the sentencing phase of the trial is irrelevant to the guilt phase. See *infra* notes 60-63 and accompanying text; see also *Gregg*, 428 U.S. at 190-92 (plurality opinion) (discussing the importance of a bifurcated proceeding). A bifurcated proceeding prevents the trier of fact in the guilt phase from considering irrelevant evidence, both positive and negative, in reaching the verdict. *Id.* (plurality opinion).

sentencer must find that at least one statutory aggravating factor exists before the convicted defendant becomes eligible for the death penalty.<sup>39</sup> Second, a state may incorporate aggravating factors into the definition of a crime.<sup>40</sup> Thus, all defendants convicted of the crime are eligible for the death penalty.<sup>41</sup>

Once the trier of fact determines that a defendant is eligible for the death penalty, the Eighth Amendment places further limits on the sentencer's decision.<sup>42</sup> States must direct and limit the sentencer's discretion to decide whether or not to impose the death penalty.<sup>43</sup> Clear and objective standards,<sup>44</sup> which provide specific and detailed

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39. See *Tuilaepa*, 114 S. Ct. at 2634 (explaining that aggravating factors may be considered in the penalty phase of a trial); *Zant*, 462 U.S. at 879 (approving the Georgia death penalty scheme in which aggravating factors were considered in the penalty phase of the trial to determine death eligibility); *Gregg*, 428 U.S. at 163-64, 207 (plurality opinion) (same).

40. *Tuilaepa*, 114 S. Ct. at 2635; see also *Lowenfield*, 484 U.S. at 244-45 (explaining that the function of an aggravating factor, namely narrowing the class of death-eligible defendants, may be accomplished by narrowing the definition of a crime).

41. Note the difference between this situation and mandatory imposition of the death penalty. Under mandatory death penalty schemes, once a defendant is convicted, imposition of death is automatic. See *supra* notes 31-32 and accompanying text. In contrast, when states narrow the definition of a crime to incorporate an aggravating factor, conviction merely makes the defendant eligible for imposition of the death penalty. The sentencer must still decide whether or not execution is the appropriate punishment for each eligible defendant.

See *infra* notes 53-59 and accompanying text for a discussion of the substantive restraints on aggravating factors.

42. When states incorporate an aggravating factor into the definition of a crime, the trier of fact in the guilt phase of the trial will determine death eligibility. See *supra* notes 40-41 and accompanying text. Otherwise, the aggravating factor will be considered by the sentencer in determining death eligibility. See *supra* note 36.

43. *Gregg*, 428 U.S. at 189 (plurality opinion) (explaining that the discretion of capital sentencers must be "suitably directed and limited"). Other Supreme Court opinions have quoted this exact language from *Gregg*. See, e.g., *Arave v. Creech*, 113 S. Ct. 1534, 1540 (1994); *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); see also *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (stating that a state capital sentencing scheme must channel and limit the sentencer's discretion).

The plurality in *Gregg* noted that a separate sentencing proceeding, in which the sentencer weighs aggravating and mitigating circumstances, satisfies this objective. *Gregg*, 428 U.S. at 193-94 (plurality opinion); see also *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976) (plurality opinion) (holding that unbridled jury discretion is constitutionally intolerable).

Note, however, that states may not limit a sentencer's discretion to consider mitigating factors. See *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987) (contrasting the limits that states must place on sentencers' consideration of aggravating factors with the wide discretion that states must allow sentencers in considering mitigating factors); see also *infra* notes 62-63 and accompanying text.

44. *Gregg*, 428 U.S. at 198 (plurality opinion) (approving Georgia's death penalty scheme because the sentencing jury's discretion was "controlled by clear and objective standards" (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974))). Several other

guidance to the sentencer, ensure the constitutionality of a death sentence.<sup>45</sup> Thus, a capital sentencer must make an individualized determination,<sup>46</sup> within a clear framework provided by the state, of whether the death penalty is the appropriate punishment for a defendant.<sup>47</sup> A state sentencing scheme thus ensures reliability, as mandated by the Eighth Amendment.<sup>48</sup>

Reliability is predicated on a capital sentencing scheme which meaningfully distinguishes between those cases in which a state imposes the death penalty and those in which it does not.<sup>49</sup> Accordingly, the Supreme Court has found that while the Eighth Amendment does not mandate proportionality review by higher courts,<sup>50</sup> it does require states to formulate rationally reviewable

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Supreme Court cases have quoted this exact language from *Gregg*. See, e.g., *Arave*, 113 S. Ct. at 1540; *Lewis*, 497 U.S. at 774; *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion); see also *Woodson*, 428 U.S. at 303 (plurality opinion) (holding that objective standards should guide the process of imposing death).

45. *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (plurality opinion) (discussing with approval the Florida capital sentencing scheme because it gave the sentencer "specific and detailed guidance" to assist in the decision of whether to impose the death penalty). Several other Supreme Court cases have quoted this exact language from *Proffitt*. See, e.g., *Arave*, 113 S. Ct. at 1540; *Lewis*, 497 U.S. at 774; *Godfrey*, 446 U.S. at 428 (plurality opinion); see also *Maynard*, 486 U.S. at 364 (finding that an aggravating factor of "especially heinous, atrocious, or cruel" did not sufficiently guide the sentencing jury).

46. See *infra* notes 60-63 and accompanying text.

47. See *supra* notes 33-45 and accompanying text.

48. *Saffle v. Parks*, 494 U.S. 484, 493 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Woodson*, 428 U.S. at 305 (plurality opinion); see also *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (declaring that procedures which diminish reliability are invalid).

Note that the discretion vested in state officials at various stages in a criminal proceeding is constitutionally permissible. See *Proffitt*, 428 U.S. at 254 (plurality opinion) (stating that the prosecutor's discretion whether to charge a capital offense, the prosecutor's discretion whether to plea bargain, and the Executive's discretion whether to commute a death sentence are constitutionally permissible).

49. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (stating that a capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which . . . [death] is imposed from the many cases in which it is not"). Other Supreme Court cases have quoted this exact language from *Furman*. See, e.g., *Godfrey*, 446 U.S. at 427-28 (plurality opinion) (holding unconstitutional an aggravating factor that the crime was "outrageously or wantonly vile, horrible and inhuman" because the factor could reasonably be applied to all murders); *Gregg*, 428 U.S. at 188, 207 (plurality opinion) (rejecting facial challenges to several Georgia aggravating factors); see also *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) (explaining that a state must administer the death penalty in a way that rationally distinguishes between those defendants "for whom death is an appropriate sanction and those for whom it is not"); *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (stating that an aggravating factor must reasonably justify the imposition of a more severe sentence on defendants eligible for the death penalty as compared to others found guilty of murder).

50. *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984); *Proffitt*, 428 U.S. at 258 (plurality

sentencing procedures.<sup>51</sup> The Eighth Amendment does not, however, require perfect congruence between similarly situated defendants and the severity of their punishments.<sup>52</sup>

## 2. Substantive Limits

The Eighth Amendment, as interpreted by the Supreme Court, also places substantive limits upon capital sentencing. The Supreme Court's intense scrutiny of capital sentencing procedures<sup>53</sup> does not usually extend to state substantive laws regarding which factors a sentencer should consider in deciding whether to impose the death penalty.<sup>54</sup> Instead, the Court generally defers to the states' choices.<sup>55</sup>

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opinion) (noting that the Eighth Amendment did not require the Florida Supreme Court to formulate a rigid objective test for review of death sentences).

It is important to note the difference between proportionality review and the Eighth Amendment prohibition of disproportionate punishment. Under proportionality review, the court evaluates the defendant's sentence as compared to the sentences of similarly situated defendants. *See generally Pulley*, 465 U.S. at 42-45 (discussing proportionality review generally and rejecting the defendant's claim that the Constitution requires proportionality review). The Eighth Amendment ban on disproportionate punishment refers to the correlation between the defendant's crime and the severity of the punishment. *Id.*; *see supra* note 26 and accompanying text.

51. *Woodson*, 428 U.S. at 303 (plurality opinion) (explaining that death penalty schemes must include objective standards to "make rationally reviewable the process for imposing a sentence of death"). This exact language from *Woodson* has been quoted in several other Supreme Court cases. *See, e.g., Arave v. Creech*, 113 S. Ct. 1534, 1540 (1993) (stating that statutory aggravating circumstances must provide objective standards); *Lewis*, 497 U.S. at 774 (same); *Godfrey*, 446 U.S. at 428 (plurality opinion) (same).

In using the "rationally reviewable" language, the Court appears to be indicating that death penalty schemes must clearly set forth the basis upon which a sentencer may impose death so that a reviewing court is able to reasonably determine if any reversible error was made.

52. *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987). The *McCleskey* Court rejected the defendant's contention that application of the Georgia capital punishment scheme was unconstitutional because McCleskey, who is African-American, was sentenced to death while similarly situated white defendants did not receive the death penalty. *Id.* at 283, 308. The Court found unconvincing a statistical study which showed a higher incidence of imposition of the death penalty for African-American defendants as compared to similarly situated white defendants. *Id.* at 312. The Court noted that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system," *id.* (footnote omitted), and that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" *id.* at 313 (quoting *Zant*, 462 U.S. at 884 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion)). The Court further noted that in 1984 Congress created the United States Sentencing Commission to develop sentencing guidelines to prevent "unwarranted" discrepancies. *Id.* at 312 n.35.

53. *See supra* part II.A.1.

54. *See Romano v. Oklahoma*, 114 S. Ct. 2004, 2009 (1994) (noting that "the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a

The Eighth Amendment, however, requires states to choose aggravating factors which provide a principled basis for imposing death over a lesser sentence.<sup>56</sup>

Thus, states cannot set forth aggravating factors which a sentencer could perceive to apply to all capital defendants.<sup>57</sup> Furthermore, if an aggravating factor is too vague, the Court will strike it down as unconstitutional because vague factors do not sufficiently guide the sentencer.<sup>58</sup> Under these circumstances, when the content of the

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basis for imposing death” (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983)) (emphasis in original)).

55. See generally *Ramos*, 463 U.S. at 1001 (explaining that, beyond delineating constitutional limitations on capital sentencing, the Court has deferred to the states’ choices of substantive sentencing factors). This deference is due to the traditional role of state legislatures in dictating what actions by a defendant will warrant a particular punishment. See *supra* note 30.

56. *Arave*, 113 S. Ct. at 1542 (upholding an Idaho aggravating factor as providing a principled basis for distinguishing between defendants who deserve capital punishment and defendants who do not); see also *Lewis*, 497 U.S. at 774 (citing *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)) (noting that death penalty statutes must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not); *Spaziano v. Florida*, 468 U.S. 447, 460 (1984) (citing *Zant*, 462 U.S. at 877) (noting that states must administer the death penalty “in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not”); *Godfrey*, 446 U.S. at 427 (plurality opinion) (noting that a state sentencing scheme must provide a ““meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not”” (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring))) (alteration in *Godfrey*)).

See *infra* note 58 for some examples of aggravating factors which the Court has declared fulfill this requirement.

57. *Arave*, 113 S. Ct. at 1542; see also *Tuilaepa v. California*, 114 S. Ct. 2630, 2635 (1994) (indicating that an aggravating factor may not apply to every defendant); *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) (finding unconstitutional an Oklahoma aggravating factor that the murder was “especially heinous, atrocious or cruel” because an ordinary person could honestly believe it applied to all murders); *Godfrey*, 446 U.S. at 428-29 (plurality opinion) (holding a Georgia aggravating circumstance unconstitutional because a person of ordinary sensibility could fairly characterize all murders in that way).

For the purposes of this Note, the term “capital defendant” refers to any defendant who commits a crime for which the death penalty is a possible punishment.

58. *Tuilaepa*, 114 S. Ct. at 2635; *Richmond v. Lewis*, 113 S. Ct. 528, 534 (1992); *Espinosa v. Florida*, 112 S. Ct. 2926, 2928 (1992); *Godfrey*, 446 U.S. at 428 (plurality opinion); see also *Maynard*, 486 U.S. at 361-62 (indicating that an aggravating factor is too vague under the Eighth Amendment if it leaves sentencers with open-ended discretion).

In *Tuilaepa*, the Court noted that “difficulty in application is not equivalent to vagueness.” 114 S. Ct. at 2637. In addition, vagueness review is “quite deferential.” *Id.* at 2635. Thus, the Court has often upheld aggravating factors against vagueness challenges. *Id.* at 2636; see *Arave* 113 S. Ct. at 1541-42 (upholding an aggravating

substantive factors jeopardizes procedural safeguards, the Court will declare a state's approach unconstitutional.<sup>59</sup>

The Court will also scrutinize the factors considered in capital sentencing proceedings to ensure that a jury has made an individualized sentencing decision.<sup>60</sup> Individualized sentencing requires that sentencers consider the character and the record of the individual defendant and the particular circumstances of the offense.<sup>61</sup> Finally,

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factor that the defendant was a "cold-blooded, pitiless slayer"); *Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) (upholding an aggravating factor that the defendant inflicted mental anguish or physical abuse before the victim's death); *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976) (plurality opinion) (upholding an aggravating factor that the defendant committed a conscienceless or pitiless crime which was unnecessarily torturous to the victim); *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976) (plurality opinion) (upholding an aggravating factor that the defendant would constitute a continuing threat to society).

Narrow construction by state courts can render unconstitutionally vague aggravating factors constitutional. See, e.g., *Arave*, 113 S. Ct. at 1541 (indicating that if an aggravating factor is too vague to provide guidance to the sentencer, the Court must determine if state courts have further defined the factor in a constitutionally sufficient manner); see also *Richmond*, 113 S. Ct. at 534 (noting that a court may rely upon an adequate narrowing construction of an unconstitutionally vague aggravating factor); *Lewis*, 497 U.S. at 774 (holding that a constitutionally narrow construction of a facially vague aggravating circumstance meets the Eighth Amendment requirement of channeling the sentencer's discretion); *Alabama v. Evans*, 461 U.S. 230, 233 (1983) (finding the application of an aggravating factor, as construed by the Alabama courts, constitutional). Compare *Gregg v. Georgia*, 428 U.S. 153 (1976), which rejected a facial attack on an aggravating factor that the crime was "outrageously or wantonly vile, horrible and inhuman," *id.* at 200 (plurality opinion), with *Godfrey v. Georgia*, 446 U.S. at 428, which struck down the same factor as applied by the Georgia courts, *id.* (plurality opinion).

59. See *supra* notes 33-45 and accompanying text.

60. See *Tuilaepa*, 114 S. Ct. at 2635 (explaining that sentencing in a capital case must be an "individualized determination on the basis of the character of the individual and the circumstances of the crime" (quoting *Zant*, 462 U.S. at 879)) (emphasis in original); *Saffle v. Parks*, 494 U.S. 484, 492 (1990) (stating that, in a capital case, sentencing must be an individualized assessment of the appropriateness of the death penalty (citing *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))).

See also *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (requiring that the sentencer treat the defendant as a "uniquely individual human bein[g]" (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (alteration in original)); *South Carolina v. Gathers*, 490 U.S. 805, 810 (1989) (noting that the defendant's punishment must be tailored to his or her personal responsibility).

61. *Tuilaepa*, 114 S. Ct. at 2635 (citing *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990)) (indicating that the individualized sentencing requirement is met when the sentencer "can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime"); *Zant*, 462 U.S. at 879 (noting that an individualized determination should be based on the character of the individual and the circumstances of the crime); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1981) (explaining that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a

under the Eighth Amendment's substantive limits, sentencers must also consider all relevant mitigating evidence<sup>62</sup> that the defendant offers as a basis for a sentence less than death.<sup>63</sup>

### *B. Due Process Clause Limits on Imposition of the Death Penalty*

In addition to the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment places limitations on capital sentencing

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constitutionally indispensable part of the process of inflicting the penalty of death'" (quoting *Woodson*, 428 U.S. at 304 (plurality opinion))).

62. Mitigating evidence is evidence of circumstances which "do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." BLACK'S LAW DICTIONARY 1002 (6th ed. 1990).

63. *Tuilaepa*, 114 S. Ct. at 2635; *Romano v. Oklahoma*, 114 S. Ct. 2004, 2009 (1994); *Blystone*, 494 U.S. at 305; *Sumner v. Shuman*, 483 U.S. 66, 76 (1987); *McCleskey v. Kemp*, 481 U.S. 277, 302 (1987); *Eddings*, 455 U.S. at 113-14; *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977); *Woodson*, 428 U.S. at 304 (plurality opinion); *see also* *Johnson v. Texas*, 113 S. Ct. 2658, 2666 (1993) (declaring that a state may not place relevant mitigating evidence beyond the sentencer's reach); *Graham v. Collins*, 113 S. Ct. 892, 902 (1993) (finding no error where the defendant was allowed to place all of his mitigating evidence before the jury); *Penry*, 492 U.S. at 319 (clarifying the *Eddings* holding that not only must states allow the defendant to present mitigating evidence, but the sentencer must also be able to give effect to that evidence); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (holding that the sentencer must consider nonstatutory as well as statutory mitigating evidence); *Brown*, 479 U.S. at 547 (Brennan, J., dissenting) (noting that a sentencing instruction is invalid if it precludes the sentencer from considering mitigating evidence); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (holding that evidence is mitigating if it serves as a basis for a sentence less than death).

In *McKoy v. North Carolina*, 494 U.S. 433 (1990), the Court struck down a state statute which required the sentencing jury to consider only those mitigating circumstances which the jury unanimously found present. *Id.* at 442. The Court clarified that "[t]he Constitution *requires* States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall." *Id.* (emphasis in original). Furthermore, "it is not relevant whether the barrier . . . is interposed by statute, by the sentencing court, or by an evidentiary ruling." *Mills v. Maryland*, 486 U.S. 367, 375 (1988) (citations omitted).

The *Simmons* plurality analogized *Simmons'* situation to that of the defendant in *Skipper*. *Simmons*, 114 S. Ct. at 2194 (plurality opinion) (citing *Skipper*, 476 U.S. at 5). In *Skipper*, the defendant sought to introduce into his capital sentencing proceeding evidence that he had adapted well to prison life. *Skipper*, 476 U.S. at 3. The prosecution argued that the defendant would be a future danger to other inmates if he were sentenced to life imprisonment rather than death. *Id.* at 5 n.1. The majority held that the State's refusal to admit that evidence violated the defendant's Eighth Amendment right to present all relevant mitigating evidence offered as a basis for imposing a sentence less than death. *Id.* at 4-5. The Court explained in a footnote that the Due Process Clause of the Fourteenth Amendment constituted an additional basis for the Court's holding. *Id.* at 5 n.1. The *Simmons* plurality emphasized the due process component of *Skipper*. *Simmons*, 114 S. Ct. at 2194 (plurality opinion).

schemes. The Supreme Court's due process analysis of criminal proceedings revolves around the concept of "fundamental fairness."<sup>64</sup>

The Due Process Clause entitles a criminal defendant to present evidence to rebut the prosecution's case.<sup>65</sup> A state may not prevent the defendant from introducing evidence in response to the prosecution's argument.<sup>66</sup> Due process, therefore, guarantees the defendant the opportunity to present information to permit the trier of fact to make a fully informed determination.<sup>67</sup>

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64. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985); see also *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (explaining that the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief when a trial is "fundamentally unfair"); *Lankford v. Idaho*, 500 U.S. 110, 121 (1991) (noting that the Due Process Clause of the Fourteenth Amendment is primarily concerned with fairness because the clause represents "a profound attitude of fairness . . . between the individual and government" (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951))); *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973) (citing *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969)) (explaining that the concept of due process embodies fundamental notions of fairness); *Specht v. Patterson*, 386 U.S. 605, 609-10 (1967) (noting that due process requires states to give criminal defendants "all those safeguards which are fundamental rights and essential to a fair trial").

65. See *Ake*, 470 U.S. at 83 (holding that Oklahoma's denial of the defendant's opportunity to rebut the prosecution's evidence of future dangerousness in a capital sentencing proceeding violated the Due Process Clause of the Fourteenth Amendment); see also *Skipper*, 476 U.S. at 5 n.1 (explaining that the defendant has a due process right to rebut the prosecutor's argument); cf. *Payne*, 501 U.S. at 825 (holding that victim impact statements are admissible in the sentencing phase of a capital trial despite the fact that the defendant may not find it prudent to rebut such evidence).

In particular, the Court has focused on the defendant's right to "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)). The *Crane* Court further clarified that defendants have a "fundamental constitutional right to a fair opportunity to present a defense." *Id.* at 687 (citing *Trombetta*, 467 U.S. at 485).

66. See *Crane*, 476 U.S. at 690 (indicating that a defendant's opportunity to present a complete defense would be meaningless if the State could exclude evidence which was central to the defendant's claim).

67. *Ake*, 470 U.S. at 82. The Court's language can be interpreted to mean that the State cannot prevent both sides of an issue from being presented to a trier of fact. For example, in a capital sentencing proceeding, if the State uses a psychiatrist's testimony to argue that an indigent defendant will be a future danger to society, the State must fund a psychiatrist for the defendant so that the defendant has a fair opportunity to argue that he will not be a danger. See *id.* at 83.

In analyzing some due process claims, the Court has weighed three factors in determining whether a particular state action violates the defendant's due process rights. See, e.g., *Ake*, 470 U.S. at 77 (using the factors to evaluate the guilt and sentencing phases of a capital trial); *Little v. Streater*, 452 U.S. 1, 13-16 (1981) (using the three factors to determine that an indigent putative father has a right to state-funded blood grouping tests in a paternity action); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (using the three factors to determine that an evidentiary hearing is not required prior to the termination of disability benefits). Specifically, the Court has weighed (1) the defendant's interest, (2) the state's interest, and (3) the probable value of the safeguard sought by the defendant and the risk of an erroneous deprivation of the defendant's

The Court recognized a criminal defendant's fundamental right to be heard<sup>68</sup> in both the guilt<sup>69</sup> and the sentencing phases of trials.<sup>70</sup> Like criminal trials, capital sentencing proceedings are adversarial.<sup>71</sup> Thus, when the prosecution argues for imposition of the death penalty, the Due Process Clause guarantees a defendant the right to rebut that argument.<sup>72</sup> Essentially, a state may not sentence a defendant to death on the basis of information which the defendant had "no opportunity to deny or explain."<sup>73</sup>

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interest without the safeguard. *Ake*, 470 U.S. at 77. In the context of capital sentencing, the Court has determined that both the defendant's interest and the state's interest lie primarily in fair, accurate imposition of the death penalty. *Id.* at 83-84. Because both of these interests indicate that defendants should be entitled to special safeguards in capital sentencing proceedings, the Court has focused primarily on the third factor to determine if the defendant is entitled to the additional safeguard that he or she seeks. *Id.* at 84.

68. *Crane*, 476 U.S. at 690 (citing *In re Oliver*, 333 U.S. 257, 273 (1948)); *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

69. See *Crane*, 476 U.S. at 690-91 (holding that Kentucky violated the defendant's due process rights when it banned evidence as to the environment in which his confession was made because that ban effectively disabled the defendant from attacking the credibility of the confession); *Ake*, 470 U.S. at 82-83 (holding that Oklahoma violated the defendant's due process rights by failing to fund a psychiatrist for the indigent defendant when the defendant's sanity was a significant factor in his defense at trial).

70. See *Lankford v. Idaho*, 500 U.S. 110, 126-27 (1991) (holding that Idaho violated the defendant's due process rights by failing to inform the defendant that the judge was considering death as a possible sentence, thus denying the defendant an opportunity to argue against the imposition of death); *Ake*, 470 U.S. at 83 (holding that Oklahoma violated the defendant's due process rights by failing to fund a psychiatrist for the indigent defendant when the State relied on psychiatric testimony of the defendant's future dangerousness in arguing for the death penalty); *Green v. Georgia*, 442 U.S. 95, 96-97 (1979) (per curiam) (holding that Georgia violated the defendant's due process rights by excluding, during the defendant's capital sentencing proceeding, testimony that the defendant was not present when the victim was killed); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion) (holding that the defendant's death sentence, which was based, in part, on a presentence report to which the defendant did not have access, and, thus, the opportunity "to deny or explain," violated due process).

71. *Lankford*, 500 U.S. at 127 (citing *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984)). In *Lankford*, the Court explained that a capital defendant may not be "denied the benefit of the adversary process" in the sentencing phase of a capital trial. *Id.* Similarly, in *Ake*, the Court noted that "fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" 470 U.S. at 77 (citation omitted) (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)).

72. See *supra* note 65-67 and accompanying text.

73. *Gardner*, 430 U.S. at 362 (plurality opinion). In *Gardner*, the sentencing judge relied, in part, on a presentence report in imposing the death penalty. *Id.* at 352-53 (plurality opinion). The report contained a confidential section which the State did not disclose to the defendant. *Id.* at 353 (plurality opinion). The Court held that the State violated the defendant's due process rights by sentencing him to death on the basis of information which he "had no opportunity to deny or explain." *Id.* at 362 (plurality

A state may also violate a defendant's due process rights even when it gives the defendant the opportunity to rebut the prosecution's case. When the prosecution introduces evidence or argument which may have inappropriately influenced the jury despite the defendant's rebuttal, the Court applies a fundamental fairness test.<sup>74</sup> In this situation, the Court will reverse a conviction or a death sentence if "the admission of evidence . . . so infected the . . . proceeding with unfairness as to render the [result] a denial of due process."<sup>75</sup>

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opinion).

See also *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) (noting that the opportunity to deny or explain is an "elemental due process requirement").

74. See *Romano v. Oklahoma*, 114 S. Ct. 2004, 2012 (1994) (applying the test to a prosecutor's remark in his closing statement); *Caldwell v. Mississippi*, 472 U.S. 320, 340 & n.7 (1985) (explaining that the prosecutor's suggestion that the appellate court would correct an erroneous death sentence affected "fundamental fairness"); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (applying the test to evidence introduced by the prosecutor).

75. *Romano*, 114 S. Ct. at 2012. In *Romano*, the trial jury found the defendant guilty of murder. *Id.* at 2008. In arguing for the death penalty, the prosecutor, in contravention of state law, introduced evidence that the defendant had already received the death penalty for a prior murder conviction. *Id.* The *Romano* jury imposed a second death sentence. *Id.* The defendant appealed, claiming that the prosecutor's remark constituted a denial of due process because it relieved the jurors of their sense of responsibility to impose an appropriate sentence. *Id.* The Court affirmed *Romano*'s death sentence, concluding that the admission of the evidence in question did not deprive the defendant of a fair sentencing proceeding. *Id.* at 2008-09.

The *Romano* Court relied on *Donnelly* for the standard it applied. *Id.* at 2012. In *Donnelly*, the State prosecuted the defendant for first-degree murder. 416 U.S. at 639. In his closing argument, the prosecutor suggested to the jury that the defense "hope[s] that you find him guilty of something a little less than first-degree murder." *Id.* at 640. The Court affirmed the defendant's conviction, concluding that the prosecutor's remark did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 643, 648.

The *Donnelly* Court explained that the Court examines criminal proceedings to determine if the state's action jeopardized a defendant's rights under a specific provision of the Bill of Rights. *Id.* at 643. If the Court finds a violation of a specific right, it will take "special care" to ensure that state action does not infringe on that right. *Id.* Absent a specific right, the Court will apply the fundamental unfairness test. *Romano*, 114 S. Ct. at 2012.

Justice Stevens, joined by Justice Ginsburg, focused on fundamental unfairness in his dissent from the Court's denial of certiorari in *Jacob v. Scott*, 115 S. Ct. 711 (1995) (Stevens, J., dissenting). In *Jacob*, the defendant kidnapped a woman, and a co-conspirator killed her. *Id.* at 711 (Stevens, J., dissenting). At *Jacob*'s trial, the prosecutor argued to the jury that *Jacob* killed the victim. *Id.* (Stevens, J., dissenting). The jury convicted the defendant of murder and sentenced him to death. *Id.* (Stevens, J., dissenting). At the co-conspirator's later trial, the prosecutor admitted his mistake, telling the co-conspirator's jury that *Jacob* had not killed the victim. *Id.* (Stevens, J., dissenting). *Jacob* appealed, but the Fifth Circuit held his death sentence constitutional. See *id.* at 711 (Stevens, J., dissenting). Justice Stevens, dissenting from the Supreme Court's denial of certiorari, indicated that "it would be fundamentally unfair to execute a person on the basis of a factual determination that the State has formally disavowed."

## III. DISCUSSION

The Supreme Court has interpreted the Eighth and Fourteenth Amendments as placing substantial restrictions on the imposition of the death penalty.<sup>76</sup> In particular, the Due Process Clause guarantees a capital defendant's right to a fair sentencing proceeding.<sup>77</sup> When the prosecution argues that a defendant poses a future danger to society if not sentenced to death, fairness dictates that a state allow the defendant to respond to that argument.<sup>78</sup> In *Simmons v. South Carolina*, where the State argued the defendant's future dangerousness, lower courts refused to allow Simmons to present evidence that he would be ineligible for parole if sentenced to life imprisonment.<sup>79</sup> On review, the Supreme Court held that a state may not hinder a defendant's due process right to present evidence of parole ineligibility when the prosecution argues future dangerousness.<sup>80</sup>

A. *The Facts of Simmons v. South Carolina*

The defendant Jonathan Simmons beat to death an elderly woman.<sup>81</sup> Due to Simmons' prior felony convictions, South Carolina law rendered him ineligible for parole if convicted of the woman's murder.<sup>82</sup> Prior to jury selection for Simmons' murder trial, the trial court granted the State's motion to bar the defense from asking any questions during *voir dire* regarding parole.<sup>83</sup> The jury convicted Simmons

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*Id.* at 712 (Stevens, J., dissenting).

76. *See supra* part II.

77. *See supra* part II.B.

78. *Simmons v. South Carolina*, 114 S. Ct. 2187, 2194 (1994) (plurality opinion).

79. *State v. Simmons*, 427 S.E.2d 175, 179 (S.C. 1993), *rev'd*, 114 S. Ct. 2187 (1994).

80. *Simmons*, 114 S. Ct. at 2193-94 (plurality opinion); *id.* at 2200-01 (O'Connor, J., concurring).

81. *Id.* at 2190 (plurality opinion).

82. *Id.* (plurality opinion). The week before his murder trial, Simmons "pleaded guilty to first degree burglary and two counts of criminal sexual conduct in connection with prior assaults on [three] elderly women," *id.* (plurality opinion), one of whom was his grandmother, *Simmons*, 427 S.E.2d at 177. Simmons' guilty pleas resulted in convictions for violent offenses. *Simmons*, 114 S. Ct. at 2190 (plurality opinion). He was sentenced to a life term and 30 days imprisonment. *Simmons*, 427 S.E.2d at 176. Under South Carolina law, S.C. CODE ANN. § 24-21-640 (Law. Co-op. 1989 & Supp. 1993), these convictions rendered the defendant parole ineligible if convicted of any subsequent violent offenses. *Simmons*, 114 S. Ct. at 2190 (plurality opinion).

83. *Simmons*, 114 S. Ct. at 2190 (plurality opinion). The trial court stated, without explanation, that it would not allow *voir dire* examination in regard to parole eligibility. Joint Appendix at 6-7, *Simmons*, 114 S. Ct. 2187 (1994) (No. 92-9059).

*Voir dire* is defined as "the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as

of murder.<sup>84</sup>

During the sentencing phase of the trial,<sup>85</sup> the State argued that Simmons posed a threat of future dangerousness to society and, therefore, should be put to death.<sup>86</sup> The defense introduced testimony that the defendant's dangerousness applied only to elderly women and that he "had adapted well to prison life."<sup>87</sup> The defense requested the trial judge to instruct the jury that the term "life imprisonment" carried no possibility of parole for Simmons.<sup>88</sup> The trial judge rejected the defense's request and also rejected an alternate request to instruct the jury that the defendant would actually spend the balance of his natural life in prison if sentenced to "life imprisonment."<sup>89</sup>

During its deliberations, the jury sent a note to the judge asking: "Does the imposition of a life sentence carry with it the possibility of parole?"<sup>90</sup> The trial judge responded that the jury should interpret the sentence terms by their plain meaning.<sup>91</sup> The jury returned a sentence

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jurors." BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

84. *Simmons*, 114 S. Ct. at 2190 (plurality opinion).

85. South Carolina employs a bifurcated capital sentencing procedure. See *Simmons*, 427 S.E.2d at 177-78. See also *supra* notes 37-39 for more detail on how states use bifurcated trials.

86. *Simmons*, 427 S.E.2d at 177-78. Specifically, the prosecutor argued that "the fact that [the death penalty] will deter him is plenty. That's all we are here to do is to de[t]er him." Joint Appendix at 102, *Simmons*, 114 S. Ct. 2187 (No. 92-9059). He further contended that the defendant would "prey on people who can't fight back, who can't resist. . . . [L]ooking for the old. Looking for the infirm. Looking for someone to victimize that can't hurt him. . . . He needs sex." *Id.* at 105. He also stated "[y]our verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Id.* at 110. He also directed the jury that "[w]e are concerned about what to do with him now that he is in our midst," *id.*, and concluded his argument with "[d]on't avoid your responsibility. It will be an act of self-defense," *id.* at 112.

87. *Simmons*, 114 S. Ct. at 2191 (plurality opinion). Witnesses for the defense and the State agreed that the defendant posed a continuing threat to elderly women. *Id.* at 2190. The trial court, however, precluded the defense from arguing that, because the defendant was ineligible for parole, he would never encounter elderly women if sentenced to life imprisonment. See Brief for Petitioner at 8, *Simmons*, 114 S. Ct. 2187 (No. 92-9059).

88. *Simmons*, 114 S. Ct. at 2191 (plurality opinion). The defense contended that the jury would otherwise misconstrue the true meaning of "life imprisonment" as applied to the defendant. *Id.* (plurality opinion). In support of its argument, the defense introduced into evidence a survey which indicated that only a small percentage (7.1%) of South Carolinians believed "life imprisonment" meant life without parole. *Id.* (plurality opinion). See *infra* notes 211-13 for more information on this survey.

89. *Simmons*, 114 S. Ct. at 2192 (plurality opinion).

90. *Id.* (plurality opinion).

91. *Id.* (plurality opinion). The judge's full response read: "You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain [sic] and ordinary

of death.<sup>92</sup>

On appeal to the South Carolina Supreme Court, Simmons claimed that the trial court's failure to instruct the jury about his parole ineligibility violated his Eighth Amendment and due process rights.<sup>93</sup> The court held that the trial judge's answer to the jury's query actually informed the jury of the defendant's parole ineligibility.<sup>94</sup> Thus, the court did not reach the merits of the defendant's constitutional claims.<sup>95</sup>

The United States Supreme Court granted Simmons' writ of certiorari.<sup>96</sup> The Court vacated his death sentence,<sup>97</sup> holding that South Carolina had violated Simmons' due process rights.<sup>98</sup>

### B. The Plurality Opinion

The plurality<sup>99</sup> in *Simmons* based its holding on the Due Process Clause of the Fourteenth Amendment.<sup>100</sup> The plurality reasoned that due process prohibits imposition of the death penalty when the sentencer considers information which the defendant had no opportunity to deny or explain.<sup>101</sup> The plurality explained that the sentencing

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meaning." *Id.* (plurality opinion).

92. *Id.* (plurality opinion). The jury deliberated only 25 minutes after receiving the judge's answer to its inquiry. *Id.* (plurality opinion).

93. *Simmons*, 427 S.E.2d at 178.

94. *Id.* at 179. The court stated: "[W]e conclude [that] the . . . charge given in this case satisfies in substance appellant's request for a charge on parole ineligibility." *Id.* The court included little explanation for this conclusion, merely stating that "[t]he test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." *Id.* (citing *State v. Bell*, 406 S.E.2d 165 (S.C. 1991), *cert. denied*, 502 U.S. 1038 (1992)). The court held: "We conclude [that] a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole. We therefore find appellant's argument without merit." *Id.*

95. *See id.* at 178-79.

96. *Simmons v. South Carolina*, 114 S. Ct. 57 (1993).

97. *Simmons*, 114 S. Ct. at 2198 (plurality opinion); *id.* at 2201 (O'Connor, J., concurring).

98. *Id.* at 2190 (plurality opinion); *id.* at 2201 (O'Connor, J., concurring).

99. Justice Blackmun wrote the plurality opinion, in which Justices Stevens, Ginsburg, and Souter joined. *Id.* at 2190 (plurality opinion).

100. *Id.* (plurality opinion). The plurality declined to analyze the defendant's claim under the Eighth Amendment. *Id.* at 2193 n.4 (plurality opinion). Justice Souter, joined by Justice Stevens, joined the plurality opinion but also wrote separately to explain his view that the Eighth Amendment serves as an alternate basis for vacating the defendant's death sentence. *Id.* at 2198 (Souter, J., concurring). Justice O'Connor did not analyze the defendant's Eighth Amendment claim in her separate concurrence, with which Chief Justice Rehnquist and Justice Kennedy joined. *See id.* at 2200-01 (O'Connor, J., concurring).

101. *Id.* at 2192-93 (plurality opinion) (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion)). In *Gardner*, the Court held that the State violated the

jury may have reasonably believed that Simmons would have been eligible for parole if not sentenced to death.<sup>102</sup> Further, the State repeatedly argued to the jury that Simmons would pose a future threat to society if it did not impose a death sentence.<sup>103</sup> Therefore, the plurality reasoned that the State secured the death penalty based, at least in part, on the defendant's future dangerousness to society while denying the defendant the opportunity to rebut that argument by explaining his ineligibility for parole.<sup>104</sup> Thus, the State violated the defendant's due process rights.<sup>105</sup>

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defendant's due process rights because it sentenced him to death based, in part, on information in a presentencing report which the defendant had not seen and, thus, had no opportunity to deny or explain. *Gardner*, 430 U.S. at 362 (plurality opinion).

102. *Simmons*, 114 S. Ct. at 2193 (plurality opinion). The plurality explained that this misperception by the sentencing jury created a false choice between death and a limited prison term. *Id.* (plurality opinion). See *supra* notes 85-92 and accompanying text for the details of Simmons' sentencing proceeding.

103. *Simmons*, 114 S. Ct. at 2193 (plurality opinion). The plurality noted that the State may properly place the issue of the defendant's future dangerousness before the sentencer. *Id.* (plurality opinion); see also *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (noting that consideration of a defendant's probable future behavior is inevitable); *California v. Ramos*, 463 U.S. 992, 1003 n.17 (1983) (indicating that the jury will properly consider the defendant's future behavior and the desirability of his release into society); *Jurek v. Texas*, 428 U.S. 262, 275 (1976) (plurality opinion) (explaining that any sentencer must predict a defendant's probable future conduct). See *supra* note 86 for the prosecutor's future dangerousness argument.

104. *Simmons*, 114 S. Ct. at 2193 (plurality opinion). The plurality indicated that the actual duration of the defendant's prison sentence is "indisputably relevant" to the sentencing jury's assessment of the defendant's future dangerousness. *Id.* at 2194 (plurality opinion). Thus, the defendant's parole ineligibility was "crucial to [the] sentencing determination." *Id.* (plurality opinion). The trial court's refusal to allow the defendant to proffer that information therefore "cannot be reconciled with . . . well-established precedents interpreting the Due Process Clause." *Id.* (plurality opinion).

105. *Id.* at 2193-94 (plurality opinion) (citing *Skipper*, 476 U.S. at 5; *Gardner v. Florida*, 430 U.S. 349, 362 (1977)). See *supra* note 63 for further discussion of the *Skipper* case and note 73 for further discussion of the *Gardner* case.

The plurality analogized Simmons' situation to that of the defendants in *Skipper*, 476 U.S. at 5, and *Gardner*, 430 U.S. at 349. The *Simmons* plurality explained that, like the defendants in *Skipper* and in *Gardner*, the State prevented Simmons from rebutting evidence it used to secure the death penalty. While the *Skipper* Court based its holding on the defendant's Eighth Amendment right to present all relevant mitigating evidence, 476 U.S. at 4-5, the *Simmons* plurality emphasized that the Due Process Clause also compelled the result in *Skipper*. *Simmons*, 114 S. Ct. at 2194 (plurality opinion); see also *Skipper*, 476 U.S. at 5 n.1 (explaining that due process formed an alternate basis for the Court's holding).

The *Simmons* plurality noted that the defendant in *Skipper* had a due process right to rebut the prosecutor's future dangerousness argument by introducing evidence of his positive adaptation to prison life. *Simmons*, 114 S. Ct. at 2194 (plurality opinion). The plurality explained that *Skipper* stands for the proposition that, where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, due process requires admission of the defendant's relevant evidence in rebuttal.

The plurality acknowledged that the Court generally defers to the State's judgment as to what information the sentencer should consider.<sup>106</sup> Nevertheless, a defendant's due process right to deny or explain the State's future dangerousness argument supersedes the State's traditional power to prescribe sentencing factors.<sup>107</sup>

The plurality also rejected the South Carolina Supreme Court's conclusion that the trial judge adequately informed the jury of Simmons' parole ineligibility.<sup>108</sup> Justice Blackmun explained that most jurors do not understand the precise meaning of the term "life imprisonment."<sup>109</sup> He concluded that a reasonable juror may not have understood the "plain and ordinary meaning" of life imprisonment to constitute life without parole.<sup>110</sup>

Finally, the plurality concluded that the State may choose the method by which it informs the sentencer of the defendant's parole ineligibility. The State may allow argument by defense counsel or an instruction from the court.<sup>111</sup>

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*Id.* (plurality opinion) (citing *Skipper*, 476 U.S. at 5 n.1).

The *Simmons* plurality also focused on the *Gardner* Court's holding that the Due Process Clause prohibits a state from sentencing a defendant to death on the basis of information which the defendant had no opportunity to deny or explain. *Gardner*, 430 U.S. at 362 (plurality opinion).

106. *Simmons*, 114 S. Ct. at 2196 (plurality opinion) (citing *California v. Ramos*, 463 U.S. 992, 1000 (1983)).

107. *Id.* at 2195 n.5 (plurality opinion). The plurality stated: "The Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole under state law." *Id.* (plurality opinion).

The plurality rejected the State's argument that information about the defendant's parole ineligibility would be misleading due to the possibility of commutation, clemency, escape, or legislative changes. *Id.* at 2195 (plurality opinion). The plurality reasoned that first, as the State admitted, the defendant was legally ineligible for parole. *Id.* (plurality opinion). Second, the plurality noted that the State's argument was undermined by the fact that most states which employ life imprisonment as an alternative to the death penalty inform the sentencer of the defendant's parole ineligibility. *Id.* (plurality opinion). The plurality's reference to other state practices suggests that, because the states appear to be in consensus that parole ineligibility information is not misleading, South Carolina's concerns are unfounded.

The plurality did, however, expressly limit its holding to situations where the defendant is ineligible for parole: "In a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding parole." *Id.* at 2196 (plurality opinion).

108. *Id.* at 2196-97 (plurality opinion). See *supra* part III.A for a summary of the trial court proceedings and the South Carolina Supreme Court decision.

109. *Simmons*, 114 S. Ct. at 2197 (plurality opinion).

110. *Id.* (plurality opinion).

111. *Id.* at 2196 (plurality opinion).

### C. *The Three Concurring Opinions*

#### 1. Justice Souter's Concurrence

Justice Souter, with whom Justice Stevens joined, filed a concurring opinion.<sup>112</sup> While both Justices joined the plurality opinion,<sup>113</sup> Justice Souter wrote separately to clarify his viewpoint on two issues. First, he believed that the Eighth Amendment, in addition to the Due Process Clause, compelled the Court's result.<sup>114</sup> Second, he argued that the trial court should inform the jury of the defendant's parole ineligibility, as opposed to relying on mere defense counsel argument.<sup>115</sup>

Justice Souter explained that the Eighth Amendment also predicates a defendant's right to present parole ineligibility information.<sup>116</sup> He indicated that, because the Court has interpreted the Eighth Amendment as requiring heightened reliability in capital sentencing proceedings, defendants may demand accurate instruction on the meaning of sentencing terms whenever the jury may reasonably misunderstand such terms.<sup>117</sup> Thus, Justice Souter argued that the defendant's Eighth Amendment right turns on jury perceptions, and not on the State's argument of future dangerousness.<sup>118</sup>

Justice Souter agreed with Justice Blackmun that juries, in general, are likely to misunderstand the meaning of the term "life imprisonment."<sup>119</sup> Therefore, he argued, to ensure reliability in capital sentencing, the Eighth Amendment requires courts to instruct juries as to the precise meaning of life imprisonment.<sup>120</sup> While he joined the

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112. *Id.* at 2198 (Souter, J., concurring).

113. *Id.* at 2190 (plurality opinion).

114. *Id.* at 2198 (Souter, J., concurring). See *supra* notes 99-111 and accompanying text for the plurality's analysis; see *infra* notes 130-35 and accompanying text for Justice O'Connor's concurring viewpoint.

115. *Simmons*, 114 S. Ct. at 2198-99 (Souter, J., concurring). See *supra* note 111 and accompanying text for the plurality's conclusion; see *infra* note 136 and accompanying text for Justice O'Connor's concurrence.

116. *Simmons*, 114 S. Ct. at 2198 (Souter, J., concurring).

117. *Id.* (Souter, J., concurring).

118. *Id.* (Souter, J., concurring).

119. *Id.* at 2199 (Souter, J., concurring). See *supra* notes 109-10 and accompanying text for the plurality's viewpoint; see *infra* note 135 and accompanying text for Justice O'Connor's concurring position.

120. *Simmons*, 114 S. Ct. at 2199 (Souter, J., concurring). Because the plurality did not reach the Eighth Amendment issue, it did not decide whether the term "life imprisonment" adequately achieves reliability. The plurality instead focused on whether the jury's perception of the meaning of the term gave the jury adequate information about the defendant's future dangerousness. *Id.* at 2197-98 (plurality opinion).

plurality in holding that, at a minimum, states should permit defense counsel to provide the sentencer with parole ineligibility information, Justice Souter wrote separately to argue that a jury instruction would better serve to protect the defendant's constitutional rights.<sup>121</sup>

## 2. Justice Ginsburg's Concurrence

Justice Ginsburg, who also joined the plurality opinion,<sup>122</sup> filed a short separate concurring opinion clarifying her view that "[t]his case is most readily resolved under a core requirement of due process, the right to be heard."<sup>123</sup> She explained that South Carolina denied Simmons a full and fair opportunity to rebut the State's argument of future dangerousness.<sup>124</sup> She agreed with the plurality that the defendant's opportunity to rebut the prosecution's argument must include the right to inform the jury of his parole ineligibility.<sup>125</sup> Justice Ginsburg also explained that both the plurality and Justice O'Connor in a separate concurrence concluded that the Due Process Clause allows either the trial court or defense counsel to convey parole ineligibility information to the sentencer.<sup>126</sup>

## 3. Justice O'Connor's Concurrence

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, filed an opinion concurring in the judgment only.<sup>127</sup> Justice O'Connor did not explicitly indicate her reason for declining to join the

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121. *Id.* at 2198-99 (Souter, J., concurring). Justice Souter explained that "on matters of law, arguments of counsel do not effectively substitute for statements by the court. '[A]rguments of counsel generally carry less weight with a jury than do instructions from the court.'" *Id.* (Souter, J., concurring) (alteration in original) (quoting *Boyde v. California*, 494 U.S. 370, 384 (1990)).

122. *Id.* at 2190 (plurality opinion).

123. *Id.* at 2199 (Ginsburg, J., concurring) (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

124. *Id.* (Ginsburg, J., concurring).

125. *Id.* (Ginsburg, J., concurring). See *supra* notes 103-07 and accompanying text for the plurality's explanation of this right. See also *infra* notes 130-31 and accompanying text for Justice O'Connor's concurrence.

126. Compare *Simmons*, 114 S. Ct. at 2199 (Ginsburg, J., concurring) ("Justice O'Connor's opinion clarifies that the due process requirement is met if the relevant information is intelligently conveyed to the jury; . . . I do not read Justice Blackmun's opinion to say otherwise.") with *id.* at 2196 (plurality opinion) ("[D]ue process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.") and with *id.* at 2200-01 (O'Connor, J., concurring) ("I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness.").

127. *Id.* at 2200 (O'Connor, J., concurring).

plurality opinion, but she apparently disagreed with the broad scope of the plurality's holding.<sup>128</sup> In contrast to the plurality, Justice O'Connor explicitly limited the Court's holding to the factual situation before it, finding that a capital defendant has a due process right to inform the jury of his or her parole ineligibility only when the prosecutor specifically argues future dangerousness.<sup>129</sup>

Justice O'Connor confirmed that due process requires states to allow capital defendants to rebut the prosecution's case.<sup>130</sup> She explained that, where the prosecution specifically relies on future dangerousness in asking for the death penalty, due process guarantees a defendant's right to introduce evidence to rebut that argument.<sup>131</sup> Like the plurality, Justice O'Connor acknowledged the Court's typical deference to the states regarding sentencing factors.<sup>132</sup> She also agreed with the plurality that due process does not warrant such deference when a state prohibits the defendant from offering parole ineligibility information to rebut evidence of future dangerousness.<sup>133</sup> Instead, she asserted that due process protects a defendant's right to present such information.<sup>134</sup>

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128. Justice Scalia pointed this out in his dissent. *Id.* at 2203 (Scalia, J., dissenting). According to Justice Scalia, Justice Blackmun's plurality opinion seems to go further than Justice O'Connor's concurrence. *Id.* (Scalia, J., dissenting). The plurality indicated that the Due Process Clause requires states to admit the fact of parole ineligibility even when the prosecution does not argue future dangerousness. *Id.* (Scalia, J., dissenting).

129. *Id.* at 2200-01 (O'Connor, J., concurring) (explaining that if the prosecution does not argue future dangerousness, the State may prohibit the defendant from presenting parole ineligibility information). See also *infra* part IV.B for a comparison of the plurality and concurring positions on whether *Simmons* extends to situations where the state does not argue future dangerousness.

130. *Simmons*, 114 S. Ct. 2200-01 (O'Connor, J., concurring) (citing *Clemmons v. Mississippi*, 494 U.S. 738, 746 (1990)). See *supra* notes 99-111 and accompanying text for the plurality's analysis in reaching this same conclusion.

131. *Simmons*, 114 S. Ct. at 2200-01 (O'Connor, J., concurring) (citing *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986)). Like the plurality, Justice O'Connor emphasized the due process requirement mentioned by the *Skipper* Court, despite the *Skipper* Court's reliance on the Eighth Amendment. See *supra* note 105. Justice O'Connor suggested that *Simmons*' evidence in rebuttal of the State's future dangerousness argument was even more probative than the defendant's evidence in *Skipper*. See *Simmons*, 114 S. Ct. at 2200-01 (O'Connor, J., concurring) (noting that, unlike *Skipper*, who sought to introduce testimony regarding his good behavior, *Simmons* sought to show that state law prohibited his eligibility for parole).

132. *Id.* at 2201 (O'Connor, J., concurring); cf. *id.* at 2196 (plurality opinion) (noting that the Court will generally defer to a state's determination as to what the jury should be told about sentencing).

133. *Id.* at 2201 (O'Connor, J., concurring). See *supra* notes 106-07 and accompanying text for the plurality's agreement with this point.

134. *Simmons*, 114 S. Ct. at 2201 (O'Connor, J., concurring). Justice O'Connor further explained that "the fact that [the defendant] will never be released from prison

Justice O'Connor also agreed with the plurality that the trial judge's instruction to interpret "life imprisonment" according to its plain and ordinary meaning did not adequately inform the jury that the defendant was ineligible for parole.<sup>135</sup> Finally, Justice O'Connor agreed with the plurality that the state may choose a court instruction or a defense counsel argument to inform the jury of the defendant's parole ineligibility.<sup>136</sup>

#### D. The Dissenting Opinion

Justice Scalia, joined by Justice Thomas, dissented, disagreeing with the Court's holding that the Due Process Clause of the Fourteenth Amendment compelled the Court's decision.<sup>137</sup> Instead, Justice Scalia suggested that state action denies a defendant due process only when that action is "incompatible with our national traditions of criminal procedure."<sup>138</sup>

First, Justice Scalia argued that the United States has no uniform current practice, amounting to a national tradition, of informing sentencing juries of a defendant's parole ineligibility.<sup>139</sup> Second, Justice Scalia criticized the plurality and Justice O'Connor for opining that the jury based Simmons' death sentence, at least in part, on the basis of his future dangerousness.<sup>140</sup> Justice Scalia stated that he was "sure it was the sheer depravity of [the] crimes," rather than the defendant's future dangerousness, which prompted the jury to impose death.<sup>141</sup>

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will often be the only way that a violent criminal can successfully rebut the State's case." *Id.* at 2200 (O'Connor, J., concurring).

135. *Id.* at 2201 (O'Connor, J., concurring); *see also* text accompanying notes 108-10 (discussing the plurality opinion's treatment of the meaning of "life imprisonment"). Justice O'Connor explained that life without parole is a recent development in the country's long-standing practice of allowing parole release. *Simmons*, 114 S. Ct. at 2201 (O'Connor, J., concurring). Therefore, common sense indicates that jurors might not know whether a life sentence included the possibility of parole. *Id.* (O'Connor, J., concurring). Justice O'Connor noted that Simmons' jury was apparently unaware that he was ineligible for parole, as evidenced by the question that the jury sent to the judge. *Id.* (O'Connor, J., concurring).

136. *Id.* at 2200-01 (O'Connor, J., concurring).

137. *Id.* at 2201 (Scalia, J., dissenting); *see supra* notes 99-107, 130-35, and accompanying text for the majority of the Justices' due process rationale.

138. *Simmons*, 114 S. Ct. at 2201 (Scalia, J., dissenting).

139. *Id.* (Scalia, J., dissenting).

140. *Id.* at 2202 (Scalia, J., dissenting); *cf. id.* at 2196 (plurality opinion) (discussing the defendant's right to deny future dangerousness by showing that he was ineligible for parole); *id.* at 2201 (O'Connor, J., concurring) (same). The plurality and concurrence determined that the defendant's death sentence was based, at least in part, on the defendant's future dangerousness. *Id.* at 2196 (plurality opinion); *id.* at 2201 (O'Connor, J., concurring).

141. *Id.* at 2202-03 (Scalia, J., dissenting).

Therefore, Justice Scalia argued that due process does not provide the defendant with the right to combat the prosecution's future dangerousness argument with parole ineligibility information.<sup>142</sup>

Justice Scalia emphasized the states' traditional authority to determine what constitutes evidence relevant to the sentencing decision.<sup>143</sup> He argued that, in this case, the State should retain that authority unless the exclusion of parole ineligibility evidence renders the sentencing proceeding "fundamentally unfair."<sup>144</sup> He concluded that South Carolina's prohibition on parole ineligibility information did not render Simmons' sentencing proceeding fundamentally unfair.<sup>145</sup>

#### IV. ANALYSIS

The majority of Justices in *Simmons* agreed that South Carolina denied the defendant his due process right to rebut the State's argument of future dangerousness.<sup>146</sup> This Part analyzes the varying constitutional concerns of the Justices. It compares the plurality's and Justice Ginsburg's due process analyses<sup>147</sup> with Justice Souter's Eighth Amendment approach<sup>148</sup> and Justice Scalia's fundamental fairness test.<sup>149</sup> In addition, this Part discusses the practical scope of *Simmons* in light of Justice O'Connor's narrow holding<sup>150</sup> and the plurality's seemingly broad one.<sup>151</sup>

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142. *Id.* at 2203 (Scalia, J., dissenting).

143. *Id.* at 2204 (Scalia, J., dissenting) (citing *Skipper v. South Carolina*, 476 U.S. 1, 11 (1986)). Justice Scalia explained that "[a]s a general matter, the Court leaves it to the [s]tates to strike what *they* consider the appropriate balance among the many factors . . . that determine whether evidence ought to be admissible." *Id.* at 2203-04 (Scalia, J., dissenting) (emphasis in original). Justice Scalia criticized the Court for effectively creating a piecemeal "Federal Rules of Death Penalty Evidence." *Id.* at 2205 (Scalia, J., dissenting).

144. *Id.* at 2204 (Scalia, J., dissenting). Justice Scalia drew the fundamental fairness standard from the Court's decision in *Romano v. Oklahoma*, 114 S. Ct. 2004 (1994). In *Simmons*, Justice Scalia argued that the admission of evidence considered in *Romano* did not differ from the exclusion of evidence before the Court. *Simmons*, 114 S. Ct. at 2204 (Scalia, J., dissenting) (citing *Romano*, 114 S. Ct. at 2012). See *supra* note 75 for a discussion of *Romano* and fundamental unfairness.

145. *Simmons*, 114 S. Ct. at 2204 (Scalia, J., dissenting). Justice Scalia found "far-fetched" the idea that the jury imposed the death penalty "just in case" Simmons might be released on parole. *Id.* (Scalia, J., dissenting).

146. *Id.* at 2190 (plurality opinion); *id.* at 2201 (O'Connor, J., concurring).

147. *Id.* at 2190 (plurality opinion); *id.* at 2199 (Ginsburg, J., concurring). Justice O'Connor largely agreed with the plurality's due process analysis in her separate concurrence. See *id.* at 2200-01 (O'Connor, J., concurring).

148. *Id.* at 2198 (Souter, J., concurring).

149. *Id.* at 2204 (Scalia, J., dissenting).

150. See *supra* notes 128-31 and accompanying text.

151. See *supra* note 128 and accompanying text.

### A. *The Varying Constitutional Concerns of the Justices*

In *Simmons*, seven Justices<sup>152</sup> agreed that the Due Process Clause of the Fourteenth Amendment formed the basis for the defendant's right to rebut the prosecutor's argument of future dangerousness.<sup>153</sup> Although the Justices agreed on the basis of the right, they differed on the precise scope of the right.<sup>154</sup>

The plurality's analysis rested on the defendant's right to rebut information upon which the sentencer *may have relied* in imposing the death penalty.<sup>155</sup> The plurality concluded that a state must allow a defendant to rebut the prosecution's argument of future dangerousness by informing the jury of his or her parole ineligibility.<sup>156</sup>

Justice O'Connor agreed with this reasoning, explaining that "the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case."<sup>157</sup> Both opinions noted the Court's traditional deference to the states regarding informing the jury of early release,<sup>158</sup> but found that deference inapplicable when a state's practice violates the defendant's constitutional rights.<sup>159</sup> Justice Ginsburg, joining the plurality, wrote separately to clarify her view that the right to be heard is the fundamental due process protection which underlies the defendant's right to rebut, deny, and explain the State's argument.<sup>160</sup> Thus, a

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152. Justice Blackmun wrote the plurality opinion, in which Justices Souter, Stevens, and Ginsburg joined. *Simmons*, 114 S. Ct. at 2190 (plurality opinion). Justice O'Connor wrote an opinion concurring only in the judgment, in which Chief Justice Rehnquist and Justice Kennedy joined. *Id.* at 2200 (O'Connor, J., concurring).

153. *Id.* at 2190 (plurality opinion); *id.* at 2201 (O'Connor, J., concurring).

154. *See infra* part IV.B.

155. *Simmons*, 114 S. Ct. at 2194 (plurality opinion). In particular, the plurality noted that the "petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death." *Id.* (plurality opinion).

156. *Id.* at 2196 (plurality opinion).

157. *Id.* at 2200 (O'Connor, J., concurring). Justice O'Connor stated 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." *Id.* (O'Connor, J., concurring).

158. The plurality explained that the Court "generally will defer to a State's determination as to what a jury should and should not be told about sentencing." *Id.* at 2196 (plurality opinion). Justice O'Connor noted that "[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the States." *Id.* at 2200 (O'Connor, J., concurring).

159. *Id.* at 2196 (plurality opinion); *id.* at 2201 (O'Connor, J., concurring).

160. *Id.* at 2199 (Ginsburg, J., concurring); *see, e.g., Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (observing that an essential component of procedural fairness is an opportunity to be heard and that the opportunity is "empty" if the State excludes evidence that is central to the defendant's claim). *See supra* part II.B. for more detail on this due process right.

majority of the Justices held that due process requires a state to allow a defendant to present parole ineligibility information to the sentencer when the State argues future dangerousness.<sup>161</sup>

The dissent<sup>162</sup> disagreed with the Court's due process analysis, contending that the Due Process Clause should play no role in dictating states' substantive sentencing laws in the absence of "fundamental unfairness."<sup>163</sup> Justice Scalia argued that, contrary to the assertions of the plurality and concurrences,<sup>164</sup> the jury did not sentence the defendant to death on the basis of information which the defendant could not deny or explain.<sup>165</sup> Instead, Justice Scalia found "far-fetched" the notion that the jury relied on future dangerousness in sentencing the defendant to death.<sup>166</sup> Therefore, he concluded that the due process precedents cited by the plurality were inapposite.<sup>167</sup>

Justice Scalia instead based his analysis on a "fundamental unfairness" standard.<sup>168</sup> He concluded that the South Carolina prohibition against informing the jury of the defendant's parole ineligibility was not "fundamentally unfair" and, thus, the Court should affirm the defendant's death sentence.<sup>169</sup>

Only Justice Souter,<sup>170</sup> who joined the plurality but wrote a separate concurrence, discussed the applicability of the Eighth Amendment to the defendant's claim.<sup>171</sup> Justice Souter argued that, because the

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161. Justice Blackmun wrote the plurality opinion, in which Justices Souter, Stevens, and Ginsburg joined. *Simmons*, 114 S. Ct. at 2190 (plurality opinion); Justice O'Connor wrote an opinion concurring only in the judgment, in which Chief Justice Rehnquist and Justice Kennedy joined. *Id.* at 2200 (O'Connor, J., concurring).

162. Justice Scalia, joined by Justice Thomas, dissented. *Id.* at 2201 (Scalia, J., dissenting).

163. *Id.* at 2204 (Scalia, J., dissenting).

164. See *supra* notes 155-61 and accompanying text for the plurality and concurring positions.

165. *Simmons*, 114 S. Ct. at 2204 (Scalia, J., dissenting). Cf. *supra* note 155 and accompanying text.

166. *Simmons*, 114 S. Ct. at 2204 (Scalia, J., dissenting).

167. *Id.* at 2202 (Scalia, J., dissenting); see *supra* part III.B-C.

168. *Simmons*, 114 S. Ct. at 2204 (Scalia, J., dissenting). See *supra* note 75 and accompanying text for a discussion of *Romano v. Oklahoma*, 114 S. Ct. 2004, 2012 (1994), from which Justice Scalia drew the fundamental unfairness standard.

169. *Simmons*, 114 S. Ct. at 2204-05 (Scalia, J., dissenting). Note, however, that the Court has typically limited the application of the fundamental fairness standard in review of death sentences to situations where the defendant claims that evidence or argument introduced by the prosecutor prejudiced the defendant despite the defendant's opportunity to rebut. See *supra* notes 74-75 and accompanying text.

170. Justice Souter wrote a concurring opinion in which Justice Stevens joined. *Simmons*, 114 S. Ct. at 2198 (Souter, J., concurring).

171. *Id.* (Souter, J., concurring). The plurality, on the other hand, "express[ed] no opinion on the question whether the result . . . is also compelled by the Eighth

Eighth Amendment requires heightened reliability in capital sentencing,<sup>172</sup> states must instruct the jury on the true meaning of sentencing terms. Thus, he argued that courts should instruct the jury whether "life imprisonment" carries with it a possibility of parole, regardless of whether the prosecutor argues the defendant's future dangerousness.<sup>173</sup> However, because the majority of Justices did not adopt this view, the due process analysis discussed above governs the *Simmons* holding.

### B. The Scope of Simmons

The plurality opinion and Justice O'Connor's concurrence appear to differ on the issue of exactly when the Constitution requires states to allow defendants to introduce evidence of parole ineligibility.<sup>174</sup> The opinions agree that this result applies when the State specifically argues to the sentencer that the defendant will be a future danger to society.<sup>175</sup> Justice O'Connor explicitly limited her opinion to this situation,<sup>176</sup> thus narrowing the Court's holding to the specific facts before it.

The language of the plurality opinion, however, suggests a much broader holding. As Justice Scalia pointed out in his dissent, the plurality appears to require the admission of parole ineligibility even when the prosecution does not *argue* future dangerousness.<sup>177</sup> The plurality stated that where the defendant's future dangerousness is "at issue," due process requires that a state give the defendant the opportunity to inform the sentencing jury of his or her parole ineligibility.<sup>178</sup>

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Amendment." *Id.* at 2193 n.4 (plurality opinion).

172. See *supra* notes 48-52 and accompanying text for the Eighth Amendment reliability requirement.

173. *Simmons*, 114 S. Ct. at 2198-99 (Souter, J., concurring).

174. See *supra* notes 99-105, 128-31, and accompanying text.

175. *Simmons*, 114 S. Ct. at 2193 (plurality opinion); *id.* at 2200-01 (O'Connor, J., concurring). *Skipper v. South Carolina*, 476 U.S. 1 (1986), provided a factually similar precedent for this holding. See *id.* at 3. *Skipper* differed, however, in two important respects. First, the State in *Skipper* presented evidence and argument about the defendant's future dangerousness, as opposed to the mere argument proffered in *Simmons*. *Id.* at 2. Second, the *Skipper* Court based its holding on the Eighth Amendment, noting in dicta that the Due Process Clause applied as well. *Id.* at 5 & n.1. See *supra* note 63 for more detail on the *Skipper* decision.

176. *Simmons*, 114 S. Ct. at 2201 (O'Connor, J., concurring). Justice O'Connor stated that "if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death is life imprisonment without possibility of parole." *Id.* at 2200 (O'Connor, J., concurring).

177. *Id.* at 2203 (Scalia, J., dissenting).

178. *Id.* at 2190 (plurality opinion).

The plurality recognized that future dangerousness is "at issue" even when the State does not argue the point because "a defendant's future dangerousness bears on *all* sentencing determinations."<sup>179</sup> Thus, the plurality did not limit its holding to situations where the prosecution specifically argues future dangerousness. Despite the broad scope suggested by the plurality, the Court's holding in *Simmons* is limited to situations where the State specifically argues future dangerousness because a majority of Justices agreed only with this more limited holding.<sup>180</sup>

The majority of Justices also agreed that both defense counsel argument and court instruction as to the defendant's parole ineligibility adequately protect the defendant's due process rights.<sup>181</sup> Justice Souter's concurrence argued that the Court should require the trial judge to tender that information because "arguments of counsel do not effectively substitute for statements by the court."<sup>182</sup> The difference of opinion on this point appears to rest on the alternate constitutional basis for the decision discussed by Justice Souter.

Justice Souter stated that the Eighth Amendment requires states to precisely define the term "life imprisonment" for the sentencer.<sup>183</sup> As the duty to define sentencing terms generally lies with the trial court, Justice Souter advocated placing the burden of defining life imprisonment on the trial court.<sup>184</sup> The plurality and Justice O'Connor's concurrence, however, did not reach the Eighth Amendment issue<sup>185</sup> and, therefore, did not analyze the need for precise definition of sentencing terms. Instead, they held that due process guarantees capital defendants the right to rebut the prosecution's argument of future dangerousness.<sup>186</sup> Therefore, the majority of Justices held that due process tolerates either court instruction or defense counsel

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179. *Id.* at 2193 (plurality opinion) (emphasis added). The plurality noted that "any sentencing authority must predict a convicted person's probable future conduct . . . ." *Id.* (plurality opinion) (quoting *Jurek v. Texas*, 428 U.S. 262, 275 (1976) (plurality opinion)).

180. Although Justice O'Connor, Chief Justice Rehnquist, and Justice Kennedy joined in the judgment, they declined to join in the plurality opinion. *Id.* at 2200 (O'Connor, J., concurring). The plurality opinion consisted of only four justices. *Id.* at 2190 (plurality opinion).

181. *See id.* at 2196 (plurality opinion) (stating that a state may permit either court instruction or defense counsel argument); *id.* at 2200-01 (O'Connor, J., concurring) (stating that a state may permit either court instruction or defense counsel argument).

182. *Id.* at 2198-99 (Souter, J., concurring).

183. *Id.* (Souter, J., concurring).

184. *Id.* (Souter, J., concurring).

185. *Id.* at 2193 n.4 (plurality opinion); *id.* at 2200-01 (O'Connor, J., concurring).

186. *Id.* at 2194 (plurality opinion); *id.* at 2200-01 (O'Connor, J., concurring).

argument to provide the jury with sufficient rebuttal information.<sup>187</sup>

## V. IMPACT

### A. *The Current Impact of Simmons*

Even when held to its precise facts, the *Simmons* decision will change the present law in several states and clarify the law in several others. Prior to *Simmons*, Pennsylvania, South Carolina, and Virginia specifically denied capital defendants the opportunity to inform the sentencing jury of parole ineligibility.<sup>188</sup> *Simmons* will operate to change the law in these states. Defendants who are ineligible for parole under state law will now have the right to inform the sentencing jury in capital sentencing proceedings where the prosecution argues future dangerousness.

Prior to *Simmons*, Florida, South Dakota, and Wyoming were undecided concerning the appropriateness of parole eligibility as a subject for sentencing jury consideration.<sup>189</sup> In these states, *Simmons* will clarify and affirmatively protect capital defendants' rights.

*Simmons* may also affect defendants' rights in four additional states: Arizona, Idaho, Montana, and Nebraska. These states leave the capital sentencing decision in the hands of a judge or a panel of judges.<sup>190</sup> While judges in these states previously were presumably aware of the defendant's parole eligibility status, *Simmons* now clarifies that due process requires judges to weigh a defendant's parole ineligibility as a factor militating against the imposition of death.

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187. *Id.* at 2196 (plurality opinion); *id.* at 2200-01 (O'Connor, J., concurring).

188. See *Commonwealth v. Henry*, 569 A.2d 929, 941 (Pa. 1990) (holding that parole is not a proper consideration for a sentencing jury), *cert. denied*, 499 U.S. 931 (1991); *State v. Torrence*, 406 S.E.2d 315, 321 (S.C. 1991) (Chandler, J., concurring) (joined by a majority of Justices, prohibiting capital sentencing juries from receiving parole information); *O'Dell v. Commonwealth*, 364 S.E.2d 491, 507 (Va.) (rejecting the defendant's contention that he should be entitled to inform his capital sentencing jury of his parole ineligibility), *cert. denied*, *O'Dell v. Virginia*, 488 U.S. 871 (1988).

189. Statutory and decisional laws in Florida, South Dakota, and Wyoming are silent on whether the defendant may inform the jury of his or her parole ineligibility. FLA. STAT. ch. 775.082(1) (Supp. 1995); S.D. CODIFIED LAWS ANN. § 24-15-4 (1988); WYO. STAT. §§ 6-2-101(b), 7-13-402(a) (Supp. 1994). The Florida Supreme Court, however, approved for publication pattern jury instructions which inform capital sentencing juries of the sentence of life without the possibility of parole for 25 years. See *Standard Jury Instructions—Criminal Cases*, 603 So. 2d 1175, 1201 (Fla. 1992).

190. ARIZ. REV. STAT. ANN. § 13-703(B) (Supp. 1994); IDAHO CODE § 19-2515(d)-(f) (1987); MONT. CODE ANN. § 46-18-301 (1993); NEB. REV. STAT. § 29-2520 (1989).

One state has already applied *Simmons* beyond its precise facts to a situation where state law did not render the defendant ineligible for parole. In *Clark v. Tansy*,<sup>191</sup> a New Mexico jury convicted the defendant of kidnapping and murder, and sentenced him to death.<sup>192</sup> In arguing for the death penalty, the prosecutor told the jury that the defendant posed a future danger to society and suggested that the defendant might be eligible for parole in ten years.<sup>193</sup> However, the defendant would have actually been eligible for parole, at the earliest, in fifty-five years.<sup>194</sup> Relying on the plurality's rationale in *Simmons*, the New Mexico Supreme Court vacated the defendant's death sentence.<sup>195</sup> The court reasoned that "[t]he jury must have had a fundamental misunderstanding of the alternatives it faced."<sup>196</sup> Therefore, the State violated the defendant's due process rights by securing a death sentence on the basis of the defendant's future dangerousness, while concealing the true meaning of the non-capital alternatives.<sup>197</sup> Thus, the New Mexico Supreme Court extended *Simmons* to a situation where the defendant was eligible for parole.

Nevertheless, not all states have extended *Simmons* beyond its precise holding. In *State v. Price*,<sup>198</sup> the North Carolina Supreme Court rejected the application of *Simmons* to a defendant who was technically eligible for parole.<sup>199</sup> The court reasoned that *Simmons* applies only to capital defendants whom state law renders ineligible for parole.<sup>200</sup> Thus, the court declined to adopt an expansive reading of

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191. 882 P.2d 527 (N.M. 1994).

192. *Id.* at 529.

193. *Id.* at 530.

194. *Id.*

195. *Id.* at 536.

196. *Id.* at 533.

197. *Id.* (quoting *Simmons*, 114 S. Ct. at 2193 (plurality opinion)).

198. 448 S.E.2d 827 (N.C. 1994), *petition for cert. filed*, (U.S. Jan. 17, 1995) (No. 94-7672).

199. *Id.* at 831. When convicted of murder in North Carolina, the defendant was already serving a life sentence in Virginia. *Id.* at 828. Defense counsel requested permission to argue to the jury that the court could impose a life sentence which would begin at the end of the life sentence imposed by Virginia. *Id.* Defense counsel reasoned that such a sentence, in effect, would force the defendant to spend the rest of his natural life in prison and, thus, that *Simmons* controlled. *Id.*

200. *Id.* at 831; *accord Allridge v. Scott*, 41 F.3d 213, 221-22 (5th Cir. 1994) (holding *Simmons* inapplicable because state law did not render the defendant technically ineligible for parole); *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir.) (restricting *Simmons* to "cases in which the sentencing alternative to death is life without parole"), *cert. denied*, 115 S. Ct. 660 (1994); *Burgess v. State*, 450 S.E.2d 680, 693 (Ga. 1994) (limiting *Simmons* to situations where state law would prohibit a defendant's release on parole); *State v. Robinson*, 451 S.E.2d 196, 206 (N.C. 1994) (confining *Simmons* to cases in which the defendant would not be eligible for parole);

*Simmons* to include defendants who are de facto parole ineligible.

In addition, the South Carolina Supreme Court refused to apply *Simmons* to a case where the prosecution agreed to refrain from arguing future dangerousness.<sup>201</sup> The court reasoned that the prosecutor had not placed the defendant's future dangerousness at issue and, therefore, rejected *Simmons* as inapposite.<sup>202</sup>

### B. Future Implications of *Simmons*

As *Clark* demonstrates, the future implications of *Simmons* reach beyond its precise holding.<sup>203</sup> The Court may extend *Simmons* to require states to allow capital defendants to inform the sentencing jury of their parole ineligibility even when the State does not argue future dangerousness—as suggested by the *Simmons* plurality.<sup>204</sup> Justice O'Connor's concurrence did not adopt this viewpoint, but instead limited the Court's holding to the precise facts before the Court.<sup>205</sup> Nevertheless, following the logic of the plurality, a majority of Justices may extend *Simmons* when the issue before the Court is a defendant's right to present parole ineligibility information in the absence of State argument of future dangerousness.

The Court has clearly endorsed the view that capital sentencing juries should and do consider factors outside those specifically

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State v. Payne, 448 S.E.2d 93, 99-100 (N.C. 1994) (finding *Simmons* inapplicable when a defendant is eligible for parole); State v. Bacon, 446 S.E.2d 542, 558-59 (N.C. 1994) (recognizing *Simmons*, but finding it inapplicable in states where the defendant would eventually be eligible for parole), *cert. denied*, 63 U.S.L.W. 3626 (U.S. Feb. 21, 1995) (No. 94-7039); State v. Skipper, 446 S.E.2d 252, 275-76 (N.C. 1994) (holding *Simmons* inapplicable because, under state law, the defendant would eventually be eligible for parole), *cert. denied*, 115 S. Ct. 953 (1995); Cardwell v. Commonwealth, 450 S.E.2d 146, 155 (Va. 1994) (stating that *Simmons* does not apply when the defendant is eligible for parole); Wright v. Commonwealth, 450 S.E.2d 361, 363 (Va. 1994) (holding that *Simmons* does not affect a defendant who is eligible for parole); Ramdass v. Commonwealth, 450 S.E.2d 360, 361 (Va. 1994) (applying *Simmons* only to cases where the defendant would not be eligible for parole); *see also* Ingram v. Zant, 26 F.3d 1047, 1054 n.5 (11th Cir. 1994) (holding *Simmons* inapposite because Georgia law did not provide for life without parole at the time the jury sentenced the defendant), *cert. denied*, 63 U.S.L.W. 3626 (U.S. Feb. 21, 1995) (No. 94-7318).

201. State v. Southerland, 447 S.E.2d 862, 868 (S.C. 1994), *cert. denied*, 63 U.S.L.W. 3626 (U.S. Feb. 21, 1995) (No. 94-7302).

202. *Id.* As a secondary matter, the court also explained that defense counsel argued throughout the sentencing proceeding that the defendant would never be released from prison. *Id.*; *see also* Del Vecchio v. Illinois Dept. of Corrections, 31 F.3d 1363, 1385 n.5 (7th Cir. 1994) (holding that *Simmons* does not impose an affirmative duty on the State to present parole ineligibility evidence to the sentencer).

203. *See supra* notes 191-97 and accompanying text.

204. *See supra* notes 177-79 and accompanying text.

205. *See supra* notes 175-76 and accompanying text.

presented by the State or defense counsel.<sup>206</sup> The Constitution, as interpreted by the Supreme Court, does not require the capital sentencing jury to ignore factors which the parties do not present.<sup>207</sup> Instead, the jury may consider a myriad of factors,<sup>208</sup> including future dangerousness, regardless of whether the State argues the issue.<sup>209</sup> Furthermore, as the Court has acknowledged,<sup>210</sup> empirical evidence demonstrates that juries place heavy emphasis on the defendant's future dangerousness in deciding whether to impose the death penalty.<sup>211</sup>

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206. See *infra* notes 207-09 and accompanying text.

207. *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (citing *Gregg v. Georgia*, 428 U.S. 153, 164 (1976) (plurality opinion)).

208. *California v. Ramos*, 463 U.S. 992, 1008 (1983). See also *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (noting that the jury should not decide such an issue in a vacuum).

209. See *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (remarking that sentencing juries inevitably consider future dangerousness); *Ramos*, 463 U.S. at 1003 n.17 (noting that the sentencing jury should properly consider the defendant's potential for reform and release); *Jurek v. Texas*, 428 U.S. 262, 275 (1976) (plurality opinion) (explaining that any sentencing authority must predict probable future conduct); see also *Simmons*, 114 S. Ct. at 2193 (plurality opinion) (explaining that "a defendant's future dangerousness bears on *all* sentencing determinations . . . ." (emphasis added)).

*Simmons* does not hold that sentencing juries may not consider a defendant's future dangerousness if the prosecution does not argue the issue. Rather, the *Simmons* plurality implies that a capital defendant's future dangerousness is at issue regardless of whether the State forwards that argument. See *supra* note 179 and accompanying text.

210. See *Simmons*, 114 S. Ct. at 2197 n.9 (plurality opinion) (citing with approval empirical studies which indicate the importance of future dangerousness to jury deliberations); see also *Jurek*, 428 U.S. at 275-76 (plurality opinion) (holding that a state may require the jury to consider future dangerousness because such a requirement is "no different from the task performed countless times each day throughout the American system of criminal justice").

211. See Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) for one such study. The article discusses the results of a survey of 114 South Carolina jurors who participated in 31 capital sentencing proceedings. *Id.* at 3. The authors conclude that "[e]xpectations about future dangerousness play a substantial role in juror deliberations." *Id.* at 4. Furthermore, jurors usually conclude that the defendant will be dangerous. *Id.* at 6. This conclusion is evidenced by the 95% of jurors who found future dangerousness in cases where death was imposed as opposed to the 74% of jurors who found future dangerousness in cases where life imprisonment was imposed. *Id.* at 6-7.

See also William W. Hood III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1623-24 & n.102 (1989) (citing National Legal Research Group, Inc., Jury Research and Trial Simulation Services, Report on Jurors' Attitudes Concerning the Death Penalty (Dec. 6, 1988) (unpublished report)) (interpreting a survey of Virginia residents as indicating that 79% of the population believe that the actual length of the defendant's prison term if sentenced to life imprisonment is important to the decision of whether to impose death); Anthony Paduano & Clive A. Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 222-

In addition, the true meaning of “life imprisonment” eludes juries. Studies indicate that most people believe that a defendant sentenced to “life imprisonment” will actually serve much less than a life term.<sup>212</sup> Therefore, any jury which decides between “death” and “life imprisonment” may sentence a parole ineligible defendant to death on the erroneous belief that he or she would actually serve only a few years of a life sentence.<sup>213</sup>

The *Simmons* plurality recognized the possibility of this misperception about the true duration of a life sentence, stating that a jury, uninformed about the defendant’s parole ineligibility, would be forced to make a false choice between death and a limited prison term.<sup>214</sup> Because juries generally consider future dangerousness,<sup>215</sup> but generally misunderstand the true meaning of life imprisonment,<sup>216</sup> the Court may eventually decide that defendants have the right to present parole ineligibility information in all cases, regardless of whether the

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23 (1987) (discussing a survey of a capital defendant’s veniremen in Georgia in which two-thirds of the potential jurors stated that they would be more likely to impose a sentence of life if assured that the defendant would serve at least 25 years). *Simmons*’ defense counsel conducted a survey of 504 South Carolina residents. Joint Appendix at 152, *Simmons*, 114 S. Ct. 2187 (1994) (No. 92-9059). More than three-quarters of those surveyed (76.5%) responded that the actual length of a defendant’s prison term would be extremely or very important to their decision of whether to impose the death penalty. *Id.* at 155 tbl. 3.

212. For example, in *Eisenberg & Wells*, *supra* note 211, survey respondents were asked: “How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison before returning to society?” *Id.* at 7. The mean answer for jurors involved in death cases was a mere 16.8 years. *Id.* Compare that term to the 23.8-year mean for jurors who served on juries which imposed life imprisonment. *Id.*

Hood, *supra* note 211, at 1624, found the same low estimation of the actual duration of a life imprisonment term. On average, the respondents expected only a 10-year prison sentence. *Id.* at 1624. In *Paduano & Smith*, *supra* note 211, the respondents expected only a seven-year term, on average. *Id.* at 222.

In the study conducted by *Simmons*’ defense counsel, 32% of respondents believed that defendants would serve between 10 and 19 years for a life sentence. Joint Appendix at 154 tbl. 2, *Simmons*, 114 S. Ct. 2187 (No. 92-9059).

213. See *Eisenberg & Wells*, *supra* note 211, at 4, 7 (concluding that misguided fears of early release generate death sentences because jurors who believe that the alternative to death is a relatively short time in prison tend to impose a sentence death).

214. *Simmons*, 114 S. Ct. at 2193 (plurality opinion). The plurality further explained that the jury may have reasonably entertained a “grievous misperception” that the defendant would be eligible for parole, thus “creating a false choice between sentencing [the defendant] to death and sentencing him to a limited period of incarceration.” *Id.* (plurality opinion).

215. See *supra* notes 206-11 and accompanying text; see also *Simmons*, 114 S. Ct. at 2193 (plurality opinion) (stating that “a defendant’s future dangerousness bears on all sentencing determinations made in our criminal justice system”).

216. See *supra* notes 212-14 and accompanying text.

prosecution specifically argues future dangerousness.<sup>217</sup>

Not only does this conclusion logically flow from *Simmons*, the plurality itself suggested this result.<sup>218</sup> The plurality did not limit its holding to cases where the State argues future dangerousness, but rather extended its rationale to all cases where future dangerousness is “at issue.”<sup>219</sup> As discussed above, future dangerousness is “at issue” in all capital sentencing proceedings because juries consider it as a factor.<sup>220</sup> Therefore, the defendant should have a due process right to “deny” future dangerousness in all cases by informing the jury of his or her parole ineligibility.<sup>221</sup> If a state prevents the defendant from tendering this parole information, the defendant will be “prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death.”<sup>222</sup> The Court’s recognition that “the practical and human limitations of the jury system cannot be ignored”<sup>223</sup> supports this conclusion. States which prevent a defendant from informing the jury of his or her parole ineligibility deny the defendant the right to rebut the jury’s consideration of future dangerousness. As a “practical and human” matter,<sup>224</sup> the jury will consider future dangerousness even when the prosecution does not raise the issue.<sup>225</sup>

Furthermore, the Court has held that: “[s]tates cannot limit the sentencer’s consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty.”<sup>226</sup> The *Simmons* plurality recognized that the defendant’s parole ineligibility meets this criterion.<sup>227</sup> Therefore, because a defendant’s parole ineligibility

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217. See also Eisenberg & Wells, *supra* note 211, at 8 (arguing that states should accurately inform jurors about the non-death alternative because expected non-death sentences play a major role in sentencing deliberations).

218. See *supra* part IV.B.

219. *Simmons*, 114 S. Ct. at 2190 (plurality opinion).

220. See *supra* notes 206-11 and accompanying text.

221. See *Simmons*, 114 S. Ct. at 2196 (plurality opinion) (explaining that truthful information about parole ineligibility allows the defendant to deny future dangerousness).

222. *Id.* at 2194 (plurality opinion).

223. *Bruton v. United States*, 391 U.S. 123, 135 (1968).

224. *Id.*

225. See *supra* notes 206-11 and accompanying text.

226. *Romano v. Oklahoma*, 114 S. Ct. 2004, 2009 (1994) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987)).

227. See *Simmons*, 114 S. Ct. at 2194 (plurality opinion) (“[T]he actual duration of the defendant’s prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not.”); see also Eisenberg & Wells, *supra* note 211, at 4 (“Holding other factors constant, a defendant

serves as a basis for a sentence of less than death, the Court may extend *Simmons* to situations where the State does not argue future dangerousness when that issue is presented to the Court.

## VI. CONCLUSION

The Supreme Court's decision in *Simmons v. South Carolina* safeguards a capital defendant's right to a fair sentencing proceeding. The Court declared that when the prosecution argues that the defendant will be a future danger to society in asking for the death penalty, a state may not prohibit the defendant from informing the sentencer of the fact that he or she is ineligible for parole.<sup>228</sup> Due process guarantees capital defendants this opportunity to rebut the prosecution's argument.<sup>229</sup> The Court further determined that either an instruction from the trial court or argument by defense counsel satisfies the due process requirement.<sup>230</sup> *Simmons* grants capital defendants the right to ensure that the sentencer makes an informed choice between the death penalty and life imprisonment without the possibility of parole, at least when the prosecutor argues future dangerousness.<sup>231</sup> As the plurality suggests, however, the Court may eventually extend *Simmons* to ensure that capital sentencers are always fully informed of their sentencing alternatives.<sup>232</sup>

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likely to be released after a shorter time could be viewed as more dangerous than the same defendant expected to serve a longer sentence."'). Perception of a defendant's future dangerousness is a relevant circumstance that could cause the jury to decline to impose death.

228. *Simmons*, 114 S. Ct. at 2190 (plurality opinion); *id.* at 2201 (O'Connor, J., concurring).

229. *See id.* at 2196 (plurality opinion); *id.* at 2200-01 (O'Connor, J., concurring).

230. *Id.* (plurality opinion); *id.* at 2199 (Ginsburg, J., concurring); *id.* at 2200-01 (O'Connor, J., concurring).

231. *See supra* parts III-IV.

232. *See supra* part V.

