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SIMMONS v. SOUTH CAROLINA 114 S. Ct. 2187 (1994) United States Supreme Court

SIMMONS v. SOUTH CAROLINA

114 S. Ct. 2187 (1994)
United States Supreme Court

FACTS

In July 1990, Jonathan Dale Simmons confessed to having beaten to death an elderly woman, Josie Lamb, in her home in Columbia, South Carolina. Shortly after his arrest for this crime, Simmons confessed that he had sexually assaulted three other elderly women, including Estelle Simmons, his grandmother. Upon these confessions, Simmons pleaded guilty to first degree burglary and two counts of criminal sexual conduct.

These guilty pleas resulted in convictions for violent offenses which, under South Carolina law, made Simmons ineligible for parole if convicted for any subsequent violent-crime offenses.[1]

Prior to the selection of the jury, the State moved, over the objection of defense counsel, for the trial court to "exclude any mention of parole throughout this trial."[2] This motion was granted, barring the defense from mentioning parole or specifically asking the jurors if they understood the definition of a "life" sentence under South Carolina law. In the guilt phase of the trial, defense counsel conceded that Simmons had in fact murdered Ms. Lamb[3] and after a three-day trial, Simmons was convicted of the murder.[4] During the penalty phase, the defense offered mitigating evidence showing that Simmons' violent behavior reflected a serious mental disorder. Though there was some disagreement concerning the extent of the "disorder," both sides agreed that Simmons posed a continuing danger to elderly women.[5]

The prosecutor's closing argument claimed that Simmons' future dangerousness was "a factor for the jury to consider when fixing the appropriate punishment."[6] The prosecutor asserted that the question for the jury was "what to do with [petitioner] now that he is in our midst" and further urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense."[7]

The defense attempted to rebut these assertions of the prosecution by offering evidence that the defendant's dangerousness was limited to elderly women, and that there was no reason to believe that he would be a threat to commit future acts of violence to anyone if incarcerated. In support of this argument, the defense offered witnesses who were employees of the jail where Simmons had been held prior to trial. These witnesses testified that he had not been violent to any other inmates or staff during his incarceration there. The defense also offered expert opinion by a clinical social worker and former correctional employee, who testified that Simmons would successfully adapt to prison if he was sentenced to life imprisonment.

Defense counsel moved the trial court to define "life imprisonment" to the jury according to South Carolina law.[8] To bolster the argument for giving this charge to the jury, the defense proffered evidence conclusively establishing Simmons' parole ineligibility, offered testimony by attorneys for the South Carolina Department of Probation, Parole and Pardons confirming that Simmons' was ineligible for parole, and offered the results of a University of South Carolina statewide opinion poll which showed widespread misunderstanding about the meaning of "life imprisonment" in South Carolina.[9] According to this evidence, the defense argued that the apparent misunderstanding of "life imprisonment" in South Carolina caused a reasonable likelihood that the jury would vote for the death penalty just because they thought that Simmons would be released on parole, when that was not a possibility. The state opposed the proposed instruction, requesting again that the court not allow any mention of parole. Citing *State v. Torrence*,[10] the trial court refused the defense's proposed instruction. The defense then asked that a "plain meaning" instruction be given, but the trial judge also refused to give this instruction.[11]

After ninety minutes of deliberation the jury sent a note to the judge asking: "Does the imposition of a life sentence carry with it the possibility of parole?"[12] In response, the judge instructed the jury that they were not to consider parole or parole eligibility and that life imprisonment and the death sentence "are to be understood in their plan [sic] and ordinary meaning."[13] Shortly after receiving this instruction, the jury returned to the courtroom with a sentence of death.[14]

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[1] S.C. Code Ann. § 24-21-640 (Supp. 1993) states: "The board [of Probation, Parole and Pardon] must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60." Simmons' convictions for burglary in the first degree and criminal sexual assault in the first degree were violent offenses under § 16-1-60.

[2] *Simmons v. South Carolina*, 114 S. Ct. 2187, 2190 (1994).

[3] *State v. Simmons*, 427 S.E.2d 175, 176 (S.C. 1993).

[4] *Simmons*, 114 S. Ct. at 2190.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] For language of S.C. Code § 24-21-640, *See supra* note 1.

[9] *Simmons*, 114 S. Ct. at 2191.

[10] 406 S.E.2d 315 (S.C. 1991) (court reversed death sentence because the trial judge committed prejudicial error in denying a request to charge the jury based upon S.C. Code Ann. § 24-21-640, which would not allow parole after a second violent crime conviction). *See supra* note 1 for language of § 24-21-640.

[11] *Simmons*, 114 S. Ct. at 2192 (quoting App. 162). The proposed instruction read as follows:

> I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that he be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.
>
> In your deliberations, you are not to speculate that these sentences mean anything other than what I have just told you, for what I have told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

[12] *Id.*

[13] *Id.*

[14] *Simmons*, 114 S. Ct. at 2192.

On appeal to the Supreme Court of South Carolina, Simmons argued that the trial court's failure to give accurate parole information violated the Eighth Amendment and the Fourteenth Amendment Due Process Clause. Declining to reach the merits, the court concluded that the trial court's instruction properly followed *State v. Norris*[15] and that a reasonable juror would have understood from the charge given that life imprisonment meant life without parole.[16]

Simmons appealed and the United States Supreme Court granted certiorari.[17]

HOLDING

The Supreme Court reversed the decision of the Supreme Court of South Carolina and remanded for further proceedings, finding that because the state had brought up future dangerousness, Simmons' due process rights were violated by the refusal of the trial court to instruct the jury that the alternative to death was life imprisonment that carried no opportunity for parole[18] and that an "ordinary meaning" instruction was insufficient to satisfy this requirement.[19]

ANALYSIS/APPLICATION IN VIRGINIA

Simmons' appeal was argued on three related constitutional grounds, based upon the Eighth and Fourteenth Amendments. Citing *Skipper v. South Carolina*,[20] Simmons argued that his parole ineligibility was "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'"[21] and therefore, under the Eighth Amendment, he was entitled to inform the jury of his parole ineligibility. He also asserted that withholding this information from the jury diminished the reliability of the jury's verdict that death was the appropriate punishment.[22] This reliability of determination requirement also stems from the Eighth Amendment. Relying on *Gardner v. Florida*,[23] Simmons also argued that his due process rights had been violated because he was limited in his ability to rebut the prosecution's assertions of future dangerousness by his inability to show the jury that a noncapital sentence could adequately protect society.[24]

Seven members of the Court voted to reverse the Supreme Court of South Carolina. A plurality opinion, by Justice Blackmun,[25] was decided upon a Fourteenth Amendment Due Process analysis. The plurality declined to express an opinion on the Eighth Amendment arguments.[26] Justice Blackmun quoted *Gardner*, which held that the Due Process Clause does not allow the execution of a person "on the basis of information which he had no opportunity to deny or explain."[27] Future dangerousness has been recognized as bearing on the sentencing determination and the Court has approved its use in the penalty phase of capital trials.[28] The plurality opinion also stated: "In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant"[29] and "[t]he trial court's refusal to apprise the jury of information so crucial to its sentencing determination, . . . cannot be reconciled with our well-established precedents interpreting the Due Process Clause."[30] The Court's opinion in *Skipper* further supports this position by noting that the refusal to admit evidence of the defendant's good behavior in prison is a denial of the Due Process Clause,[31] especially because it denies the defendant the right to rebut the evidence and argument used against him.[32] Although the Court in *Skipper* determined that the defendant's good behavior was evidence in mitigation under the Eighth Amendment, the opinion expressly noted that the this conclusion was also compelled by the Fourteenth Amendment Due Process Clause.[33]

The State of South Carolina's brief to the Court claimed that giving information to the jury on parole ineligibility was inherently misleading because future exigencies, such as legislative reform, commutation, clemency and escape might allow the petitioner to be released into society.[34] The plurality replied: "Certainly, such an instruction is more accurate than no instruction at all, which leaves the jury to speculate whether 'life imprisonment' means life without parole or something else."[35] The State admitted that the instruction informing the jury of the petitioner's parole ineligibility was legally accurate.[36] To further bolster the argument that this instruction is necessary and appropriate, the Court explained that of the twenty-six states that use juries in capital sentencing and that provide life imprisonment without parole as an alternative to capital punishment, seventeen of these states expressly inform the jury of the defendant's ineligibility of parole. Of the remaining nine states, three require such information when it is accurate, three have not considered the question, and three do not give the jury this information.[37]

The states that do not provide information on parole ineligibility to their juries rely on *California v. Ramos*,[38] which stands for the proposi-

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[15] 328 S.E.2d 339 (S.C. 1985) (established the requirement for a "plain meaning" charge of the terms "life imprisonment" and "death").

[16] *State v. Simmons*, 427 S.E.2d 175, 179 (S.C. 1993).

[17] 114 S. Ct. 57 (1993).

[18] *Simmons*, 114 S. Ct. at 2190.

[19] *Id.* at 2198.

[20] 476 U.S. 1 (1986).

[21] *Id.* at 4-5 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

[22] *Simmons*, 114 S. Ct. at 2192 n.3.

[23] 430 U.S. 349 (1977) (holding that reliance by court on confidential presentence report that was not made available to the defendant violated the Eighth and Fourteenth Amendments, because it undermined the right to reliable procedures at sentencing phase of capital trial and denied him an opportunity to "deny or explain" such information).

[24] *Simmons*, 114 S. Ct. at 2192 n.3.

[25] *Id.* at 2190.

[26] *Id.* at 2193 n.4. A brief concurring opinion by Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, also rests on the Due Process right to rebut the state's case for death.

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

[28] See *Jurek v. Texas*, 428 U.S. 262 (1976); *California v. Ramos*, 463 U.S. 992 (1983).

[29] *Simmons*, 114 S. Ct. at 2194.

[30] *Id.*

[31] *Skipper*, 476 U.S. at 5.

[32] *Id.* at 8. *See also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (holding that due process entitles defendant to a meaningful opportunity to present a complete defense); *Ake v. Oklahoma*, 470 U.S. 68, 83-87 (1985) (holding that due process entitles indigent defendant to assistance of psychiatrist to rebut evidence of future dangerousness against him).

[33] 476 U.S. at 5 n.1.

[34] *Simmons*, 114 S. Ct. at 2195.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 2195-96 n.7. The three states which refuse to inform the jury of parole ineligibility are Pennsylvania, South Carolina, and Virginia.

[38] 463 U.S. 992 (1983).

tion that the Supreme Court will generally defer to a State's determination of what information is allowed to be used in making sentencing decisions. When a state raises the issue of "future dangerousness" however, the fact that the defendant would be ineligible for parole undermines the argument of the State. According to a plurality of the Court, not allowing accurate information on the parole ineligibility of the defendant in this situation would deny the defendant an opportunity to "'deny or explain' the showing of future dangerousness" and "due 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."[39]

Responding to the decision of the Supreme Court of South Carolina that the "plain meaning" instruction given to the jury was adequate to convey the proper meaning of life imprisonment to the jury, the plurality stated that "[i]t can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States."[40] An instruction by a court that the jury should use the "plain and ordinary" meaning is useless in explaining the definition of "life imprisonment" due to these misperceptions by jurors. The plurality concluded that even if this instruction had prevented the jury from considering parole eligibility, the petitioner's due process rights were still violated, because his future dangerousness was at issue and he was not given an opportunity to inform the jury of his parole ineligibility.

From the Court's holding, it is clear that under the Due Process clause of the Fourteenth Amendment, if the Commonwealth seeks the death penalty on the basis that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society"[41] and the defendant is ineligible for parole, Virginia courts must allow the defendant, by either argument of counsel or jury instruction, to inform the jury that he is ineligible for parole. If the defendant is ineligible for parole, defense counsel should attempt to have the prosecution stipulate to that fact or be prepared to offer evidence that the defendant is ineligible under Virginia law.[42] Once ineligibility is proven, defense counsel should be able to argue this ineligibility to rebut the state's future dangerousness claim and to seek a jury instruction that explains the precise definition of life imprisonment under Virginia law.

The question of whether capital murder defendants who would have a statutory right to parole consideration at some future time if sentenced to life imprisonment should be able to provide evidence of the minimum sentences they must serve is not directly addressed in *Simmons*. The opinion does, however, provide support for the contention that such evidence should be admissible. As previously cited, Justice Blackmun asserted that "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant."[43] He also stated that "such an instruction is more accurate than no instruction at all, which leaves the jury to speculate whether 'life imprisonment' means life without parole or something else."[44] It is possible in some cases that if a capital defendant would at any time be eligible for parole if sentenced to life imprisonment and the jury were instructed of that fact that this may cause them to vote for the death penalty. However, the minimum duration of a prison sentence for any capital murder defendant will normally be much longer than what the average juror believes it to be. Studies have revealed that people believe that a capital defendant, if sentenced to life imprisonment, will serve only seven to ten years in prison before being released on parole.[45] Another study found that more than two-thirds of those questioned would be more likely to favor a life sentence over a death sentence if they knew the defendant would have to serve at least twenty-five years before becoming eligible for parole.[46] Since a capital defendant in Virginia, barring good conduct credit,[47] must serve at least twenty-five years before becoming eligible for parole,[48] clearing up any misconceptions of the jury as to the true duration of the imprisonment that defendant must serve if sentenced to life imprisonment would appear to be the proper tactical choice in virtually every case.[49]

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[39] *Simmons*, 114 S. Ct. at 2196.

[40] *Id.* at 2197. For a comprehensive analysis of juror's misperceptions, see Paduano & Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211 (1987); Hood, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989); Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993); Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 Law & Society 157 (1993).

[41] Va. Code Ann. § 19.2-264.4(C) (1990).

[42] Va. Code Ann. §§ 19.2-297.1, 53.1-151(B) (Supp. 1994). According to § 53.1-151(B), any person sentenced to die, convicted of three separate felony offenses of murder, rape or robbery by the presenting of a deadly weapon, or convicted of three separate felony offenses for the manufacturing, selling, giving, distributing or possessing controlled substances shall not be eligible for parole. Also, according to § 53.1-151(E), "a person convicted of an offense and sentenced to life imprisonment after being paroled from a previous life sentence shall not be eligible for parole." At the time this Digest went to print, the Virginia General Assembly was considering legislation to abolish parole for several offenses, including capital murder. If enacted, the law would, under *Simmons*, require that defendants be permitted to inform juries of parole ineligibility. The law would be applicable to offenses committed after January, 1, 1995.

[43] *Simmons*, 114 S. Ct. at 2194.

[44] *Id.* at 2195.

[45] *See, e.g.*, Hood, *The Meaning of "Life,"* 75 Va. L. Rev. 160, 1624.

[46] *See* Paduano & Smith, *Deathly Errors*, 18 Colum. Hum. Rts. L. Rev. 211, 223 (citing Codner, *The Only Game in Town: Crapping Out in Capital Cases Because of Juror Misconceptions About Parole* (Jan. 24, 1986) (unpublished study supervised by the Southern Prisoners' Defense Committee)).

[47] Va. Code Ann. § 53.1-199 (Supp. 1994). With maximum good conduct credits, a first time capital defendant could lower the minimum time requirement to just under twenty-one years before becoming eligible for parole.

[48] Va. Code Ann. § 53.1-151 (Supp. 1994). Any person sentenced to life imprisonment for the first time for a Class 1 felony violation shall be eligible for parole after serving twenty-five years. Any person sentenced to two or more life sentences, at least one of which was for a Class 1 felony violation, shall be eligible for parole only after serving thirty years.

[49] The plurality opinion suggests that the prosecution may give parole information when it stated: "Concomitantly, nothing in the Constitution prohibits the prosecution from arguing any truthful information relating to parole or other forms of early release." *Simmons*, 114 S. Ct. at 2196.

Ultimate resolution of this issue is rendered uncertain by the dicta of the court in both Justice Blackmun's opinion and Justice O'Connor's concurring opinion.[50] Based on *California v. Ramos*,[51] Justice Blackmun stated that the Court "generally will defer to the State's determination as to what a jury should and should not be told about sentencing" and that in a state where 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 the jury of information regarding parole."[52]

Justice O'Connor asserted that the decision of whether to inform the jury of parole information is generally left to the States. She asserted that: "In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact."[53] She cited *Ramos* to the effect that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon, or parole."[54]

The plurality opinion by Justice Blackmun helps to clarify this question. His discussion of a State's determination looks at a state's decision to withhold such information as grounded in a desire to provide "'greater protections in [the State's] criminal justice system than the Federal Constitution requires.'"[55] The concern is apparently that allowing this information would somehow harm the rights of the defendant. If this is the concern, the states should not be allowed to limit the defense in presenting parole information in mitigation or in rebuttal to claims of future dangerousness, even when the defendant is eligible for parole.

It would be a reasonable extension of these statements to show that under the misconceptions held by most jurors as evidenced in various studies,[56] combined with the mandatory minimum sentence requirements for capital defendants under Virginia law, that if the prosecution bases death eligibility on future dangerousness, the defense, by its own choosing, should have the right to argue and have jury instructions concerning the duration of time that must be spent in prison, even where parole is possible. Even though the information might not be as compelling as the argument in cases where parole is not an option, it is still relevant evidence that may be used to rebut the state's case for death.

This argument is also strengthened by the difference in the law between South Carolina and Virginia. Under South Carolina law, "statutes do not mandate consideration of the defendant's future dangerousness in capital sentencing," but "the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances."[57] In Virginia, "the penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence... that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman...."[58] Therefore future dangerousness is one of two alternative statutory requirements that must be proven before a defendant may be eligible for a death sentence in Virginia. When future dangerousness is used in Virginia, it is a statutory basis for finding a sentence of death and not merely evidence in aggravation. This fact strengthens the argument that the defense should be able to use parole law evidence to rebut the prosecution's claim of future dangerousness, even when the defendant is eligible for parole.

The Court expressly declined to address Simmons' Eighth Amendment arguments. The first of those arguments is that parole law evidence is 'mitigating' evidence which may serve as a basis for a sentence less than death. *Lockett v. Ohio*[59] and its progeny explicitly prohibit states from limiting the sentencer's consideration of any relevant evidence that could allow it to decline to impose a sentence of death. The actual duration that a capital defendant must serve may be "mitigating" in showing a jury that life imprisonment is a sufficiently harsh penalty. It may also be "mitigating" in the sense that it would provide affirmative evidence that the defendant does not pose a future threat to society. Though the Court declined to address this argument, its opinion could still be used to bolster an argument on these grounds by citing Justice Blackmun's statement that "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant."[60]

The other argument asserted by Simmons under the Eighth Amendment is that by withholding his parole law evidence, the trial court diminished the reliability of the jury's determination that death was the appropriate punishment. Though not addressed by the plurality opinion, Justice Souter, joined by Justice Stevens, directly addressed this argument in a concurring opinion. He stated that the Court determined in *Woodson v. North Carolina*[61] that the Eighth Amendment "imposes a heightened standard 'for reliability in the determination that death is the appropriate punishment in a specific case.'"[62] To assure this reliability, the capital defendant may demand instruction to the jury whenever there is a reasonable likelihood that a sentencing term may be misunderstood. He agreed with Justice Blackmun that juries generally misunderstand the meaning of "life imprisonment" and determined that the "judge **must** tell the jury what the term means when the defendant so requests."[63]

This discussion by Justice Souter lends support to the argument that all parole evidence should be admissible. Defense counsel can demonstrate, through various studies, the misconceptions of jurors about the actual duration of "life imprisonment." On this basis, it could be established that barring information about parole that is requested by the defense would allow these misconceptions to be the basis of the sentencing decision, thus undermining its reliability. These factors combined would violate the Eighth Amendment.

From *Simmons* it is clear that those capital defendants whom the Commonwealth convicts on the basis of their future dangerousness have the right to argue and require an instruction to the jury if they are ineligible for parole. *Simmons'* impact is much broader, however, because it strengthens the argument that all parole information should be available to the jury upon the request of the capital defendant to assure

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[50] *Simmons*, 114 S. Ct. at 2200 (O'Connor, J., concurring, joined by Chief Justice Rehnquist and Justice Kennedy).

[51] 463 U.S. 992 (1983).

[52] *Simmons*, 114 S. Ct. at 2196.

[53] *Id.* at 2200.

[54] *Id.* at 2200 (citing *California v. Ramos*, 463 U.S. at 1013).

[55] *Id.* at 2196 (quoting *California v. Ramos*, 463 U.S. at 1014).

[56] For several articles concerning jurors' misconceptions of life imprisonment, see *supra* note 41, and Straube, *The Capital Defendant and Parole Eligibility*, Capital Defense Digest, Vol. 5, No. 1, p. 45 (1992).

[57] *Simmons*, 114 S. Ct. at 2193.

[58] Va. Code Ann. § 19.2-264.4(C) (1990).

[59] 438 U.S. 586 (1978).

[60] *Simmons*, 114 S. Ct. at 2194.

[61] 428 U.S. 280 (1976).

[62] *Simmons*, 114 S. Ct. at 2198 (Souter, J., concurring) (quoting *Woodson*, 428 U.S. 280, 305 (1976)).

[63] *Id.* at 2199 (emphasis added).

that the defendant's due process rights are protected, to assure that all mitigating evidence is admitted to the jury, and to assure the reliability of the sentencing determination of the jury. In all but the rarest case it is imperative that counsel seek to have juries accurately informed of parole law on all three *Simmons* grounds. For assistance in litigating the case and avoiding default where the defendant is technically eligible for parole, please contact the Virginia Capital Case Clearinghouse.

Summary and analysis by:
Timothy B. Heavner

TUILAEPA v. CALIFORNIA
PROCTOR v. CALIFORNIA

114 S. Ct. 2630 (1994)
United States Supreme Court

FACTS

In October 1986, Paul Palalaua Tuilaepa and an accomplice entered a Long Beach bar and, at gunpoint, demanded money from all persons within. After one patron resisted, Tuilaepa opened fire and killed the patron and seriously and permanently injured three others. The State sought the death penalty against Tuilaepa, charging him with first degree murder and one statutory **special circumstance**, murder during the course of a **robbery**.[1]

In April 1982, William Arnold Proctor entered the Shasta county home of Bonnie Stendal where he tortured, raped and strangled the fifty-five year-old schoolteacher. The state sought the death penalty, charging Proctor with murder and several **special circumstances**, including murder during the commission of a **rape**, murder during the commission of a **burglary**, and infliction of **torture** during a murder.[2]

A defendant in California becomes death eligible when a jury finds guilt of first degree murder and at least one of the nineteen special circumstances listed in the California Penal Code, section 190.2. The case then proceeds to the sentencing phase where the jury must consider numerous other factors set forth in section 190.3 in deciding whether to impose death. Section 190.3 sets forth a list of open-ended subject matters for the jury's perusal in its consideration of the individual defendant and his unique circumstances.

Against the California statutory framework, both Tuilaepa and Proctor were convicted of first degree murder and unanimously sentenced to death. Both defendants appealed to the California Supreme Court, which affirmed their convictions and death sentences.[3] The United States Supreme Court granted certiorari to review petitioners' contention that three of the section 190.3 selection factors are defined in open-ended and therefore vague terms in contravention of the Constitution and, as a consequence, it was error to instruct their respective juries to consider these factors.[4] Both Tuilaepa and Proctor challenged factor (a) which requires the sentencer to consider "[t]he **circumstances of the crime** of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . ."[5] Tuilaepa challenged two additional factors: factor (b) which requires consideration of "[t]he **presence or absence of criminal activity** by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence,"[6] and factor (i) which contemplates "[t]he **age** of the defendant at the time of the crime."[7]

HOLDING

The United States Supreme Court found that the California 190.3 selection factors are not unconstitutionally vague under the Eighth Amendment. In so holding, the Court announced that open-ended selection factors such as 190.3 (a), (b) and (i) are not constitutionally deficient if they are phrased in language comprehensible to the layman. Open-ended selection factors facilitate individualized sentencing, thereby reducing the risk of arbitrary and capricious punishment.[8]

ANALYSIS/APPLICATION IN VIRGINIA

In rejecting the vagueness claims of defendants, the majority spoke at length of the capital decision making process mandated by the Eighth Amendment. This process is designed to guard against the risk of "wholly arbitrary and capricious action."[9] Essentially, the inquiry is twofold. First the trier of fact must determine whether the defendant is eligible to receive the death penalty. If the defendant is found eligible, the trier must then decide whether or not to impose the death sentence. Each step serves a different but constitutionally necessary purpose and thus each requires a different analytical approach.

The threshold decision places metes and bounds on death eligibility by fitting the crime within a legislatively defined category. A defendant is cast into the ring of death eligible defendants if the sentencer convicts

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1 *Tuilaepa v. California*, 114 S. Ct. 2630 (1994).
2 *Id.*
3 *Id.*
4 *Id.*
5 Cal. Penal Code Ann. § 190.3 (a) (1988) (emphasis added).
6 Cal. Penal Code Ann. § 190.3 (b) (1988) (emphasis added).
7 Cal. Penal Code Ann. § 190.3 (i) (1988) (emphasis added).
8 *Tuilaepa*, 114 S. Ct. at 2630.
9 *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).