Capital Defense Journal

Volume 7 | Issue 1 Article 11

Fall 9-1-1994

IF AT FIRST YOU DON'T SUCCEED: THE REAL AND POTENTIAL IMPACT OF SIMMONS V. SOUTH CAROLINA IN VIRGINIA

BARBRA ANNA POHL

CAMERON P. TURNER

IF AT FIRST YOU DON'T SUCCEED: THE REAL AND POTENTIAL IMPACT OF *SIMMONS V. SOUTH CAROLINA* IN VIRGINIA

BY: BARBRA ANNA POHL AND CAMERON P. TURNER[1]

I. INTRODUCTION

For several years prior to the holding of the United States Supreme Court in *Simmons v. South Carolina*,[2] the Virginia Capital Case Clearinghouse had urged defense attorneys to raise the issue of the capital jury's right to be provided with accurate parole information. The Clearinghouse provided assistance in preserving and briefing the issue on grounds ultimately presented to the Supreme Court in *Simmons*. Time and again, the Supreme Court of Virginia rejected this claim.[3] The Virginia court based its decision upon "a fear that juries will not impose a just punishment for the defendant's crimes, but will try to adjust a sentence based on speculation over parole."[4] Another justification was grounded in "a separation of powers argument concerning the proper functioning of the executive and judicial branches."[5] The Supreme Court of South Carolina followed this same reasoning and, in addition, stated that the disbursement of accurate parole eligibility information to the jury offered practical problems in application.[6]

One of these grounds is plainly inapplicable to capital cases. The concern that a jury will take it upon itself to estimate when the defendant will be eligible for parole and adjust its sentence accordingly is not a problem in a capital case because the jury does not have to decide between prison terms of varying durations. Its choices are limited to a sentence of life imprisonment or death.

Some attorneys who did not succeed in the Supreme Court of Virginia pressed on and preserved the *Simmons* issue. Many who **knew** it would be rejected in the Supreme Court of Virginia nevertheless raised and preserved it before and during trial. The clients of these attorneys are the actual and potential beneficiaries of the decision in *Simmons*. Unfortunately, there are other cases where the issue should have appeared but did not. *Simmons* reinforces the message sent years ago in the case of Michael Marnell Smith.[7] Smith was executed in spite of a meritorious claim of error. The psychiatrist who examined him did not inform him that the statements he made could be used against him, that he had the right to remain silent or that he could have had counsel present. This mistake was a violation of Smith's constitutional rights under *Estelle v. Smith*.[8] His attorney adhered to an appellate practice strategy that is quite reasonable in a **non-capital** case. He omitted the claim because it had been previously rejected by the Supreme Court of Virginia.

Like *Smith*, *Simmons* is a reminder that **all** non-frivolous claims must be raised and preserved in capital cases regardless of the position of the Supreme Court of Virginia. An attorney who wants to conduct proper appellate litigation should not do so by picking only those issues on which the Supreme Court of Virginia has granted relief in the past.[9]

This article will examine (a) the retroactivity of *Simmons*, (b) the direct application of *Simmons* in Virginia, and (c) the applicability of the *Simmons* rationale to "parole eligible" capital defendants. Arguments on behalf of the first class of defendants may well not succeed in the Supreme Court of Virginia. The history of *Simmons* claims themselves, however, is a reminder that the fight must not stop there.

II. WHEN "LIFE" MEANS LIFE WITHOUT PAROLE

Many jurors are confused about the amount of time a defendant must actually serve in prison if sentenced to "life." This confusion was understandable before *Simmons* since jurors were not told two things:

---

[1] Sections II-VI by Pohl, VII-X by Turner.

[2] 114 S. Ct. 2187 (1994).

[3] *See, e.g., Mickens v. Commonwealth*, 247 Va. 395, 404-05, 442 S.E.2d 678, 685 (1994), and case summary of *Mickens*, Capital Defense Digest, this issue; *Wright v. Commonwealth*, 245 Va. 177, 197, 427 S.E.2d 379, 392 (1993); *Mueller v. Commonwealth*, 244 Va. 386, 408-09, 422 S.E.2d 380, 394-95 (1992), *cert. denied*, 113 S. Ct. 1880 (1993); *King v. Commonwealth*, 243 Va. 353, 367-68, 416 S.E.2d 669, 677, *cert. denied*, 113 S. Ct. 417 (1992); *Yeatts v. Commonwealth*, 242 Va. 121, 127, 410 S.E.2d 254, 258 (1991), *cert. denied*, 112 S. Ct. 1500 (1992); *Quesinberry v. Commonwealth*, 241 Va. 364, 371, 402 S.E.2d 218, 223, *cert. denied*, 112 S. Ct. 113 (1991); *Eaton v. Commonwealth*, 240 Va. 236, 248-49, 397 S.E.2d 385, 392-93 (1990), *cert. denied*, 112 S. Ct. 88 (1991); *Spencer v. Commonwealth*, 240 Va. 78, 85, 393 S.E.2d 609, 613, *cert. denied*, 498 U.S. 908 (1990); *Watkins v. Commonwealth*, 238 Va. 341, 351, 385 S.E.2d 50, 56 (1989), *cert. denied*, 494 U.S. 1074 (1990); *Turner v. Commonwealth*, 234 Va. 543, 551-52, 364 S.E.2d 483, 487-88, *cert. denied*, 486 U.S. 1017 (1988); *O'Dell v. Commonwealth*, 234 Va. 672, 701, 364 S.E.2d 491, 507, *cert. denied*, 488 U.S. 871 (1988); *Williams v. Commonwealth*, 234 Va. 168, 178-80, 360 S.E.2d 361, 367-68 (1987), *cert. denied*, 484 U.S. 1020 (1988); *Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836-37, *cert. denied*, 474 U.S. 865 (1985); *Clanton v. Commonwealth*, 223 Va. 41, 54-55, 286 S.E.2d 172, 179-80 (1982); *Clark v. Commonwealth*, 220 Va. 201, 214, 257 S.E.2d 784, 792 (1979), *cert. denied*, 444 U.S. 1049 (1980); *Stamper v. Commonwealth*, 220 Va. 260, 277-78, 257 S.E.2d 808, 821 (1979), *cert. denied*, 445 U.S. 972 (1980).

[4] *See* Straube, *The Capital Defendant and Parole Eligibility*, Capital Defense Digest, Vol. 5, No. 1, p. 45, 46 (1992).

[5] *Id.*

[6] *State v. Torrence*, 406 S.E.2d 315, 323 (1991) (Chandler, J. concurring) (stating, in addition to the court's holding that parole information is irrelevant to a capital sentence determination, that there are practical problems such as a trial judge having to find parole ineligibility prior to the jury even making a preliminary capital sentencing determination).

[7] *Smith v. Murray*, 477 U.S. 527 (1986).

[8] 451 U.S. 454 (1981).

[9] Since *Ball v. Commonwealth*, 221 Va. 754, 273 S.E.2d 790 (1981)(holding that an **attempted** robbery is insufficient to support a capital murder conviction for murder during the course of a robbery), the Supreme Court of Virginia has granted relief only twice—both times on fact-specific issues involving application of the triggerman statute. *See Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990); *Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621 (1991).

whether the defendant would be eligible for parole, and if so, when the defendant would be eligible.

In Virginia there are currently four instances in which the defendant becomes ineligible for parole. Ineligibility results when a prisoner sentenced to life escapes from custody;[10] when a person is convicted of three separate felonies (murder, rape, or armed robbery);[11] when a person is convicted of three separate felonies involving controlled substances;[12] or when a person previously paroled from a life sentence receives a second life sentence.[13]

When 1994 draws to a close, the applicability of the four above instances will be sharply reduced. All crimes committed after January 1, 1995, will render the perpetrator statutorily ineligible for parole. Current parole law, including provisions for ineligibility, is applicable to crimes committed prior to that date, no matter when the trial occurs. With the passage of much of Governor George Allen's Proposal X on September 30, 1994, a life sentence in Virginia will soon always mean life without any chance of parole.[14]

III. ESTABLISHING PAROLE INELIGIBILITY AT TRIAL

Once the new statutory abolition of parole applies to all cases in the courts, the issue of proving parole eligibility under *Simmons* will no longer be relevant. Until that time comes, however, the issue of establishing parole ineligibility is a crucial one, for the benefit to be directly derived from *Simmons* can only be realized when the defendant is shown to be parole ineligible.[15]

The Court of Appeals of Virginia has stated unequivocally that courts cannot properly determine parole eligibility.[16] It is the sole province of members of the Parole Board to make such determinations, and courts may not intervene absent a showing that the agency's parole eligibility determination was "arbitrary or capricious."[17] Likewise, the Supreme Court of Virginia consistently has refused in capital cases to permit accurate parole information to be communicated to jurors.[18]

In order to establish a defendant's parole ineligibility in capital cases, counsel should ask the Commonwealth to stipulate that the defendant will never be eligible for parole if convicted of the charge and sentenced to life in prison rather than death. If the prosecution refuses to do this, counsel should bring a member of the Parole Board[19] to court to testify that the defendant is in fact parole ineligible.

IV. DOES *TEAGUE* SAVE THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS?

A. The *Teague* Decision

Who, in addition to those not yet tried, gets the benefit of the *Simmons* rule? All death sentenced prisoners who tried to inform their juries of their parole ineligibility if sentenced to life in prison? Prisoners in that situation whose cases were on direct appeal when *Simmons* was decided on June 17, 1994? Those whose cases had already proceeded to state or federal habeas? The answer depends upon the application of a retroactivity doctrine announced in 1989 by the United States Supreme Court in its *Teague v. Lane*[20] decision. Under that doctrine the Attorney General currently argues against retroactivity of *Simmons* as its last chance to avoid resentencing hearings.[21]

When the United States Supreme Court decided *Teague* it refused to allow habeas petitioners to benefit from favorable new decisions, even those establishing constitutionally mandated rules. *Teague* was grounded in a determination that the only purpose of habeas corpus is to deter egregious errors of which state courts should have been aware at the time of trial or direct appeal.[22] Consequently many of these potentially life

---

[10] Va. Code Ann. § 53.1-151(B) (Supp. 1994).

[11] Va. Code Ann. § 53.1-151(B)(1) (Supp. 1994).

[12] Va. Code Ann. § 53.1-151(B)(2) (Supp. 1994) ("manufacturing, selling, giving, distributing or possessing with the intent to manufacture, sell, give or distribute").

[13] Va. Code Ann. § 53.1-151(E) (Supp. 1994).

[14] Frank Green, *Parole act puts risk in play, critics say*, Richmond Times-Dispatch, Oct. 2, 1994, at A1.

[15] For a discussion of the potential impact of the *Simmons* decision on those who are technically eligible, see section IX. *See also Ramdass v. Virginia*, 114 S. Ct. 2701 (1994), which involved a remand in light of *Simmons* for the purpose of determining whether the defendant was in fact ineligible for parole. The court on remand held that although Ramdass had two prior separate felony convictions, his third conviction could not be considered a conviction for purposes of making him parole ineligible because a judgment had not yet been entered on the guilty verdict. Ramdass received no relief as a result of *Simmons*; his case demonstrates the importance of establishing parole ineligibility at trial since it is an issue that is sometimes hotly contested.

[16] *Garrett v. Commonwealth*, 14 Va. App. 154, 157, 415 S.E.2d 245, 247 (1992) (citing *Jackson v. Shields*, 438 F. Supp. 183, 184 (1977)).

[17] *Id.*

[18] *See Eaton*, 240 Va. 236, 248, 397 S.E.2d 385, 392 (1990), *cert. denied*, 112 S. Ct. 623 (1991) ("Information regarding parole is not relevant evidence to be considered by the jury...."), which cited, among others: *Watkins v. Commonwealth*, 238 Va. 341, 351, 385 S.E.2d 50, 56 (1989), *cert. denied*, 494 U.S. 1074 (1990) (Where defense proposed informing the jury that the defendant would be ineligible for parole for over 20 years, the court stated that its "decisions have consistently foreclosed evidence or instructions informing the jury of a defendant's parole eligibility in the event of a life sentence."); *Williams v. Commonwealth*, 234 Va. 168, 178-79, 360 S.E.2d 361, 367-68 (1987), *cert. denied*, 484 U.S. 1020 (1988) ("Since the Commonwealth is not permitted to argue about the possibility of a reduced sentence by way of probation, parole, or pardon, because the jury might be inclined to 'handicap' the length of its sentence to factor in that possibility, the obverse is equally true. If the defendant is permitted to argue his inability to obtain a reduced sentence, there is an equal danger that the jury may reduce its sentence because of its feeling that probation, parole, or pardon is not probable.").

[19] A representative of the Department of Corrections is also qualified to make a parole eligibility determination, but the Parole Board may supersede such a determination, so use of a Parole Board member is advised. Va. Code Ann. § 53.1-151(B)(1) (Supp. 1994).

[20] 489 U.S. 288 (1989).

[21] The state is not required to raise the *Teague* issue; the state may waive *Teague* or simply elect not to assert it. *See, e.g., Caspari v. Bohlen*, 114 S. Ct. 948, 957 (1994) (Stevens, J., dissenting) (*Teague*'s nonretroactivity principle "is a judge-made defense that can be waived."); *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (*Teague*'s nonretroactivity rule is not jurisdictional, so a court must not "raise and decide the issue *sua sponte*.").

[22] For a discussion of how the Rehnquist Court created and developed the *Teague* nonretroactivity doctrine as a means of effectively keeping the federal courts from considering every arguably "new law" claim, see Robert Weisberg, *A Great Writ While It Lasted*, 81 J. Crim. L. & Criminology 9 (1990). *See also* James S. Liebman, *More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. Rev. L. & Soc. Change 537 (1990-91).

saving later decisions were to be "new" rules that state courts should not have anticipated so they would not be given retroactive effect. The Court held that habeas petitioners could not, during their collateral appeals, derive any benefit from doctrines which had not been articulated by the Supreme Court **before** the petitioner's conviction became final.[23] The Court did not define what constituted a "new" rule.[24] The Court did state, however, that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . [or] if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[25]

The Court offered two narrowly tailored exceptions to its *Teague* nonretroactivity principle.[26] First, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[27] Second,[28] "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty,"'"[29] or stated differently, retroactive application is allowed[30] for "watershed rules of criminal procedure"[31] that are "central to an accurate determination of innocence or guilt."[32] Thus, the issue in Virginia cases at state or federal habeas on June 17, 1994, is whether the *Simmons* requirement that capital juries be informed of parole ineligibility is a "new rule," and if so, whether any of the exceptions are applicable. *Simmons* may not have established a new rule.

If it did, however, the first of these two exceptions will clearly be of no use in an attempt to have the *Simmons* doctrine applied retroactively; the second exception, however, may prove very useful. Some of the Court's prior *Teague* doctrine opinions provide insight into how the *Simmons* question may be resolved and how defense counsel may persuade courts that *Simmons* applies retroactively to all cases.

1. Extending *Teague* to Capital Cases

Teague was a non-capital case,[33] but its reach was extended through *Penry v. Lynaugh*[34] so that its nonretroactivity doctrine now applies equally in the capital sentencing context.[35] A case which decided the fate of a moderately retarded death row inmate, *Penry* turned on two issues: first, whether the mentally retarded could constitutionally be put to death; and second, whether such a death sentence would be unconstitutional because it resulted without the jury's having been instructed that it could consider and give effect to evidence of mental retardation in mitigation of the death sentence.[36] *Teague* required the Court, when faced with each of these two issues, to decide as a threshold matter—before deciding the merits of the issue—whether any ruling favorable to the defendant would constitute a new rule, and if so, whether an exception would apply. Therefore, if a ruling in defendant's favor would

---

[23] *Teague*, 489 U.S. at 295-96. The Court defined "final" to mean that a judgment had been rendered, all available appeals had been exhausted, and the time for a petition of certiorari had elapsed. *See Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986). *Accord Caspari v. Bohlen*, 114 S. Ct. 948, 953 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.").

[24] *Teague*, 489 U.S. at 301 ("It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes.").

[25] *Id.* at 301 (emphasis in original).

[26] Justice O'Connor, writing for a plurality, claimed to have derived the two exceptions directly from former Justice Harlan's ideas. *Teague*, 489 U.S. at 305-07 ("Justice Harlan believed that new rules generally should not be applied retroactively to cases on collateral review. . . . [He] identified only two exceptions to his general rule. . . .").

[27] *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (separate opinion of Harlan, J., concurring in part and dissenting in part)). This first exception appears to follow Harlan's idea exactly.

[28] *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. at 693). This second exception does not appear to follow Harlan's ideas. *See* Friedman, *Habeas and Hubris*, 4 Vand. L. Rev. 797, 811 (1992) ("the *Teague* decision resembles Justice Harlan's views much like a kidnapping note pasted together from stray pieces of newsprint resembles the newspaper from which it came").

[29] *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. at 693 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.))).

[30] According to *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), the Constitution neither prohibits nor requires retroactive application of laws.

[31] *Teague*, 489 U.S. at 311.

[32] *Id.* at 313.

[33] *Id.* at 288, 314 n.2 ("Because petitioner is not under sentence of death, we need not, and do not, express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context.").

[34] 492 U.S. 302 (1989). *Penry* also extended the relevant issue from whether conduct could be proscribed to whether conduct was sufficient to constitutionally warrant imposition of the death penalty.

[35] *Penry*, 492 U.S. at 313-14 (holding that the "finality concerns" necessitating *Teague*'s retroactivity approach, as well as the two exceptions, apply equally to death row petitioners).

[36] *Id.* at 307. During the penalty phase jurors were instructed to answer three "special issues" questions relating to deliberateness, future dangerousness, and unreasonableness. If the jury answered all three questions affirmatively—which it did—Texas law required imposition of a death sentence; even a single "no" response mandated a life sentence. *Id.* at 310-311. Although this system allowed the consideration of evidence in mitigation, it did not permit mental retardation evidence to be given any practical effect. Therefore the jury was able to give no independent weight to the fact of Penry's mental retardation. This is apparent when it is noted that the existence of mental retardation could indicate future dangerousness: "The mitigating evidence concerning Penry's mental retardation indicated that one effect of his retardation is his inability to learn from his mistakes." *Id.* at 323. Since the jury would as a practical matter have already answered affirmatively on two of the special issue questions, the answer to the future dangerousness inquiry was decisive.

be an unexcepted new rule, the Court would not decide its merits, which is the practical equivalent of a denial on the merits.[37] With regard to the first issue, the *Penry* court held that declaring the mentally retarded to be exempt from the death penalty would be a new rule. If mandated, however, such a rule would fall within the narrow confines of the first *Teague* exception since it would "prohibit[] a certain category of punishment for a class of defendants because of their status or offense."[38] With regard to the second issue—whether requiring that juries be permitted to give independent weight to mental retardation would be a new rule—the Court held that it was not a new rule because under precedent existing at the time Penry's conviction became final,[39] the prosecution could not prevent the presentation, consideration or use of mitigating evidence at the penalty phase of a capital trial.[40]

2. Examples of *Teague* "New Rules"

An examination of three post-*Penry* cases reveals that quite often the United States Supreme Court has held that cases have announced new rules. According to the Court, *Butler v. McKellar*,[41] *Saffle v. Parks*,[42] and *Sawyer v. Smith*[43] all announced new rules which did not fall within either of *Teague*'s two exceptions.

Butler held that *Arizona v. Roberson*[44] was a new rule because the old rule, *Edwards v. Arizona*[45]—holding that police interrogation of an accused held in continuous custody must cease when he invokes his right to counsel—could not be extended to Roberson's application of *Edwards* to a case of continuous custody under a second, different charge. The Court held that the *Teague* new rule doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[46]

Parks held that a requirement that jurors be instructed that they could base their decision on sympathy for the defendant would constitute a new rule. The old rule, holding that states could not prevent the presentation, consideration or use of mitigating evidence at the penalty phase of capital trials, was established by *Lockett v. Ohio*[47] and *Eddings v. Oklahoma*.[48] Parks argued that a third case (also decided after his conviction became final), which approved an antisympathy instruction that prevented jurors from considering emotional responses **not** based upon evidence,[49] would require the Court to find that therefore "the Constitution requires that the jury be allowed to consider and give effect to emotions that are based upon mitigating evidence."[50] The *Parks* court rejected this argument and held that the existing law could not be extended, as Parks requested, without making a "negative inference"[51] and without "contraven[ing] well-considered precedents."[52]

Sawyer held that *Caldwell v. Mississippi*[53] established a new rule because none of the Court's prior reasoning requiring heightened reliability in capital cases had involved improper argument. *Caldwell* held that prosecutorial argument which is designed to lessen the jury's sense of responsibility—for example, by telling jurors that their decision could be overridden—was unconstitutional. The *Sawyer* court rejected the argument that "the second *Teague* exception should be read to include new rules of capital sentencing that 'preserve the accuracy and fairness of capital sentencing judgments'"[54] because acceptance of such an argument would amount to overruling the Court's "decision in *Penry* that *Teague* applies to new rules of capital sentencing."[55] The dissent disagreed with the characterization of *Caldwell* as a new rule: "To reach this result, the majority misrepresents the source and function of *Caldwell*'s prohibitions, thereby applying its newly crafted retroactivity bar to a case in which the State has no legitimate interest in the finality of the death sentence it obtained through intentional misconduct."[56]

---

[37] In order to "eliminate any problems of rendering advisory opinions" and to "avoid[] the inequity resulting from the uneven application of new rules to similarly situated defendants," the Court held that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions." *Teague*, 489 U.S. at 316 (emphasis in original).

[38] *Penry*, 492 U.S. at 330. The Court proceeded to decide the merits of Penry's case and held that death was a permissible form of punishment even for the mentally retarded. *Id.* at 330-40.

[39] *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original) ("[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982) (emphasis in original) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."). In *Eddings* the Court stated that "it was as if the trial judge had instructed a jury to disregard the mitigating evidence [the defendant] proffered on his behalf." *Eddings*, 455 U.S. at 114.

[40] *Penry*, 492 U.S. at 315 ("Penry thus seeks a rule that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death." The Court held that the rule sought by Penry was not a new rule under *Teague*.).

[41] 494 U.S. 407 (1990). *See* case summary of *Butler*, Capital Defense Digest, Vol. 3, No. 1, p. 2 (1990).

[42] 494 U.S. 484 (1990). *See* case summary of *Parks*, Capital Defense Digest, Vol. 3, No. 1, p. 3 (1990).

[43] 497 U.S. 227 (1990). *See* case summary of *Sawyer*, Capital Defense Digest, Vol. 3, No. 1, p. 4 (1990).

[44] 486 U.S. 675 (1988).

[45] 451 U.S. 477 (1981).

[46] *Butler*, 494 U.S. at 414.

[47] 438 U.S. 586 (1978).

[48] 455 U.S. 104 (1982).

[49] *California v. Brown*, 479 U.S. 538, 542 (1987).

[50] *Parks*, 494 U.S. at 494 (emphasis added).

[51] *Id.*

[52] *Id.* at 486. To get relief "Parks must establish that the decision in *Brown* did not create a new rule. To do so, Parks must contend that *Lockett* and *Eddings* dictated our reasoning, albeit perhaps not the result, in *Brown*. Our discussion above makes it evident that they do not." *Id.* at 494.

[53] 472 U.S. 320 (1985).

[54] *Sawyer*, 497 U.S. at 242 (quoting Brief for Petitioner 30).

[55] *Id.* at 243 (Because Sawyer could "not suggest[] any Eighth Amendment rule that would not be sufficiently 'fundamental' to qualify for the proposed definition of the exception," the Court stated: "It is difficult to see any limit to the definition of the second exception if cast as proposed by petitioner. All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense.").

[56] *Id.* at 245-46 (Marshall, J., dissenting).

3. A Pleasant Surprise: *Stringer v. Black*[57]

After holding three times in 1990 that new rules had been announced, the Court two years later decided *Stringer v. Black*, which involved a determination that a doctrine did not constitute a new rule. In *Stringer* at issue was the constitutionality of a jury instruction allowing imposition of a death sentence in cases where the murder is found to be "especially heinous, atrocious or cruel."[58] An earlier case had held a similar vileness predicate to be unconstitutionally vague,[59] but this rule had not yet been applied to the precise *Stringer* language (and it was not applied until after Stringer's conviction became final). The case so applying the language held that the "especially heinous, atrocious, or cruel" instruction was invalid,[60] and this decision was held in *Stringer* not to be a new rule because it was "controlled" by precedent.[61]

In *Teague* the plurality opinion "expressed no views regarding how the retroactivity approach" would be applied, but it did note—as the *Penry* court was quick to point out—that "a criminal judgment necessarily includes the sentence imposed, and that collateral challenges to sentences 'delay the enforcement of the judgment at issue and decrease the possibility that "there will at some point be the certainty that comes with an end to litigation."'"[62]

B. Is *Simmons* a "New" Rule?

In assessing *Teague*'s impact on *Simmons*, one must first determine whether or not *Simmons* has expounded a new rule. A solid argument can be made that *Simmons* does not establish a new rule at all, that *Simmons* merely reinforces the established due process principle that a defendant at risk of forfeiting his life has a right to rebut the state's case against him. Supreme Court jurisprudence finally decided prior to *Simmons* had already firmly established a right-of-rebuttal principle; in fact, *Simmons* may very well have been decided on the basis of two opinions in particular.[63] *Gardner v. Florida*[64] stands for the proposition that a defendant is denied due process and may not be sentenced to death when the sentence is based, even partially, on information which the defendant did not have occasion to explain or deny.[65] In *Skipper v. South Carolina*[66] the Court held that a state trial court's refusal to admit good behavior (in prison) evidence during the penalty phase of trial constituted a denial of due process. The Court explained that "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty... elemental due process require[s] that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'"[67]

Perhaps the best argument for *Simmons* not being a new rule comes directly from the Court's opinion: "The principle announced in *Gardner* was reaffirmed in *Skipper*, and it compels our decision today."[68] The state would argue, of course, that this language is not strong enough in light of a particular example of the Court's post-*Penry* language:

> [T]he fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*. Courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts.[69]

The position of defendants attempting to have *Simmons* deemed not to be a new rule, on the other hand, is improved by the following language:

> *Teague* does bear on applications of law to fact which result in the announcement of a new rule. Whether the prisoner seeks the application of an old rule in a novel setting... depends in large part on the nature of the rule. If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. The rule of *Jackson v. Virginia*, 443 U.S. 307 (1979), is an example. By its very terms it provides a general standard which calls for some examination of the facts... so of course there will be variations from case to case. Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.[70]

It is possible that habeas petitioners are entitled to benefit from *Simmons* even if it is determined to have established a new rule. In an argument recently presented to the Supreme Court for consideration, the following reasoning—which assumed *arguendo* that *Teague* was applicable and that *Simmons* constituted a "new rule"—was introduced to show that such a new *Simmons* rule should fall within the second of *Teague*'s exceptions.[71] The reasoning was in the form of a comparison.

---

[57] 112 S. Ct. 1130 (1992).

[58] *Stringer*, 112 S. Ct. at 1134.

[59] *Godfrey v. Georgia*, 446 U.S. 420 (1980).

[60] *Maynard v. Cartwright*, 486 U.S. 356, 360 (1988).

[61] *Stringer*, 112 S. Ct. at 1135-36 ("*Maynard* was... for purposes of *Teague*, controlled by *Godfrey*, and it did not announce a new rule.").

[62] *Penry*, 492 U.S. at 313 (quoting *Teague*, 489 U.S. at 314 n.2 (quoting *Sanders v. United States*, 373 U.S. 1, 25 (1963 (Harlan, J., dissenting))).

[63] *Simmons*, 114 S. Ct. 2187, 2194 (1994) (plurality opinion) (stating that the two cases "reached a similar conclusion" and that like Simmons, the defendants in the other two cases were "prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death").

[64] 430 U.S. 349 (1977).

[65] *Id.* at 355-62 (plurality opinion). Here the judge relied, during the sentencing phase, upon a presentence investigation report which was never made available to the defendant, and which he could therefore never rebut.

[66] 476 U.S. 1 (1986).

[67] *Skipper*, 476 U.S. at 5 n.1 (quoting *Gardner*, 430 U.S. at 362).

[68] *Simmons*, 114 S. Ct. at 2194 (plurality opinion of Blackmun, J., joined by Stevens, Souter, and Ginsburg, JJ.). The concurring opinion of O'Connor, J., joined by Rehnquist and Kennedy, JJ., also rested on fundamental due process grounds and cited *Gardner* and *Skipper*. *Id.* at 2200-01.

[69] *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

[70] *Wright v. West*, 112 S. Ct. 2482, 2499 (1992) (Kennedy, J., concurring) (citation omitted).

[71] *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 1994 WL 388345 (U.S.Va. (Oct. 31, 1994)).

Gideon v. Wainwright[72] falls under exception two[73] because it is a "watershed rule of criminal procedure," a "bedrock procedural element";[74] therefore *Simmons* should also fall under exception two since it "established even more of a 'bedrock' principle than the right to counsel in that the right to be heard at all on rebuttal is more fundamental than the right to a lawyer to assist being heard."[75] The reasoning continued with a comparison of *Simmons* (without which "the likelihood of a sentencing decision based on wrong facts is so great"[76]) to *McKoy v. North Carolina*[77] (which was applied retroactively under exception two[78] because it "ensures the ability of the jury to reach an individualized verdict based on mitigating evidence"[79]).

McKoy was decided the way it was in order to remain consistent with *Mills v. Maryland*.[80] In *Mills* the Court reaffirmed that in a capital case the sentencer must be allowed to consider—in mitigation—"any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[81] *Mills* arose out of a statute which required all twelve jurors to agree on the existence of a particular mitigating circumstance before the jury was allowed to consider any evidence in mitigation.

When *McKoy* was decided less than two years later, a surprisingly similar problem was exposed. Although North Carolina allowed the jury to vote for life solely on the basis that the aggravating factors did not support a death sentence (even if no mitigating factors were found), reasonable jurors might also have concluded that the state imposed a unanimity requirement: unless the jury unanimously found a certain mitigating factor to exist, all evidence supporting such a mitigating factor would be deemed legally "irrelevant" and would not be considered.[82]

Because both *Mills* and *McKoy* were held to be governed by *Teague* as new rules but excepted by its "implicit in the concept of ordered liberty" exception, precedent may dictate that *Simmons* should also not fall victim to *Teague*'s nonretroactivity rule.[83]

Simmons may be found to be nonretroactive under reasoning similar to that employed in *Saffle* and *Sawyer* (and perhaps also *Butler*). Or it may apply to habeas petitioners under the reasoning of *Penry* and *Stringer*. Whatever the result, *Simmons* demonstrates how essential it is that attorneys representing prisoners in collateral proceedings coordinate their efforts, seek assistance, and craft arguments for retroactive application with all the skill at their command.

V. NO *TEAGUE* ON STATE HABEAS

The fact that *Teague* involved a federal habeas corpus appeal might be crucial in determining the effect of *Teague* on the *Simmons* rule for cases which were on state habeas at the time *Simmons* was decided. Arguably no state habeas appellant should be barred by *Teague* from benefitting from *Simmons*.[84] Only if a state had adopted its own doctrine analogous to *Teague*—one applicable in cases on state habeas appeal as opposed to appeals at federal habeas—should the nonretroactivity doctrine come into play.[85] Virginia does not seem to have such a doctrine,[86] although the Attorney General claims that *Hawks v. Cox*[87] is such a *Teague* analogue.[88]

Hawks was decided 19 years before *Teague* and involved a prisoner's petition for certiorari to the Supreme Court of Virginia. The petition was denied on the basis that the arguments presented had been previously litigated by the same court on direct appeal.[89]

---

[72] 372 U.S. 335 (1963) (Sixth Amendment guarantees that an indigent accused is entitled to counsel).

[73] In an attempt to outline the "precise contours" of the second *Teague* exception, the Court stated in *Saffle v. Parks*, 494 U.S. 484 (1990), that "we have usually cited *Gideon v. Wainwright*, holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception." *Parks*, 494 U.S. at 495 (citation omitted).

[74] *See Teague*, 489 U.S. at 311-12 (quoting *Mackey*, 401 U.S. 667, 693-694 (1971).

[75] Petitioner's Reply to Brief in Opposition at 6 n.1, *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 1994 WL 388345 (U.S.Va. (Oct. 31, 1994)).

[76] Id.

[77] 494 U.S. 433 (1990).

[78] *McKoy* was retroactively applied in *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 510 (1992).

[79] Petitioner's Reply to Brief in Opposition at 6 n.1, *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 1994 WL 388345 (U.S.Va. (Oct. 31, 1994)).

[80] 486 U.S. 367 (1988).

[81] *Mills*, 486 U.S. at 374 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion))). The Court noted, too, that the corollary that the sentencer cannot refuse to consider this type of evidence in mitigation had been long established. *Id.*

[82] *McKoy*, 494 U.S. at 435-39.

[83] It should be noted that even if the *Simmons* decision is held by the Court to have not announced a new rule, it may still be deemed a new rule later in another case if the granting of relief there would require application of the old rule "in a novel setting, thereby extending the precedent." *Stringer v. Black*, 112 S. Ct. 1130, 1135 (1992) (citing *Butler v. McKellar*, 494 U.S. 407, 414-41 (1990)).

[84] *See, e.g.*, Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 Ala. L. Rev. 421, 423-24 (1993) ("its restrictions apply only to federal habeas cases"); John Blume & William Pratt, *Understanding Teague v. Lane*, 18 N.Y.U. Rev. L. & Soc. Change 325, 353 n.228 (1990-91) ("Teague says nothing about the availability of retroactive benefit of new rules of constitutional criminal procedure in state post-conviction proceedings.").

[85] Hutton, *supra*, at 424 ("states [have] the opportunity to follow *Teague* or to develop an approach to retroactivity which enables them to fulfill the requirements of their state constitutions, statutes, and case law") (citations omitted). *See* Va. Code Ann. §§ 8.01-654-668 (1992). *See also* Va. Const. art. I, § 9.

[86] Hutton, *supra*, at 473 ("Virginia habeas corpus statutes are silent on the issue of retroactivity.").

[87] 211 Va. 91, 175 S.E.2d 271 (1970).

[88] Hutton, *supra*, at 458. According to Hutton's analysis, like "the majority of states [Virginia] has not had to address the retroactivity issue since *Teague* was decided" and therefore has "the opportunity to depart from *Teague*'s inflexibility and to adopt a rule of partial or total retroactivity." Since *Teague*'s rule was handed down by the highest court in the land, and not by a legislative body, presumably states' highest courts could also chisel away at the effectiveness of habeas proceedings by deciding to judicially enact *Teague*. Arguably, however, a state must be explicit about such a decision.

[89] *Hawks*, 211 Va. at 95, 175 S.E.2d at 274.

VI. DOES *HAWKS V. COX* HELP THE ATTORNEY GENERAL ON STATE HABEAS?

Although decided years before *Teague*, on the surface *Hawks* seems to have the same holding. But upon closer examination it becomes clear that Virginia does in fact not yet have a *Teague* analogue, at least not one established by *Hawks*. Crucial to the decision in *Hawks* is language holding that "[a]bsent a change of circumstances, previous determination of the issues by either state or federal courts will be conclusive."[90] In future *Simmons* litigation at state habeas, an important question will be whether the *Simmons* rule is sufficient to constitute a "change of circumstances" of the type anticipated by *Hawks*.[91]

Whether or not the Supreme Court of Virginia decides this issue, it is well settled that the court may reconsider a conviction on the basis of a decision of the United States Supreme Court which is held to be retroactively applicable.[92] In fact the Supreme Court of Virginia has applied one of its own intervening decisions retroactively. On the basis of the law of *Peyton v. French*,[93] the court granted relief in *Gogley v. Peyton*[94] to a state habeas prisoner whose conviction had become final before *French* was decided. This meant that *French*, an intervening Supreme Court of Virginia case, was applied retroactively to a case at Virginia state habeas. Since it was done in *Gogley*, perhaps it will also be done in a case applying *Simmons*.

Since the Supreme Court of Virginia applied an intervening decision retroactively in *Gogley*, it would seem inconsistent for the court—when faced with *Simmons*—to hold that it does not constitute a change in circumstances of the type contemplated by *Hawks*.

In any event, a contrary interpretation would only mean that a *Simmons* claim was not **cognizable** at Virginia state habeas. This would not bar the claim from consideration in federal court.[95] Thus, provided the issue was not defaulted, *Simmons* claims are eligible for presentation in federal habeas proceedings whether *Hawks* bars their consideration at state habeas or not.

VII. *SIMMONS* FOR THE "PAROLE ELIGIBLE" IN VIRGINIA

A hypothetical capital juror, confronted with only two possible verdicts, death or life imprisonment, faces a stressful experience in any event. Deprived of information about the meaning of a life sentence, the typical juror suffers more stress, he may also make the wrong decision, one he would not have made had he been fully informed. It would be tremendously upsetting for that juror to agonize over the decision to sentence a man to death when he truly had sympathy for the pathetic and tortured life the defendant had lived. On the other hand, the juror would know that an innocent person has died and that he, the juror, must be concerned about the other innocent people in the community who could be at risk if the defendant were released. Fearing the worst, with little other information about the defendant's future to guide him, the juror would cast his vote for death.

At the heart of *Simmons* is a concern that jury members may sentence a man to death for whom they would not choose death if they had more accurate sentencing information. The case itself and the problem it seeks to solve raise grave questions in Virginia jurisprudence about the reliability of the death sentence itself, the constitutionality of the future dangerousness aggravating factor as it has been applied in the Commonwealth, and the state of mitigation evidence.

As will be shown, the case for construing *Simmons* to require that juries be entitled to accurate parole law information in all capital cases is even more compelling in Virginia than in South Carolina. The issues should be litigated until definitively resolved by the United States Supreme Court.

VIII. WHEN IS PAROLE "AVAILABLE" IN VIRGINIA

The United States Supreme Court in *Simmons* specifically mandated parole eligibility instructions for defendants who are ineligible for parole in the event of a sentence of life imprisonment. The Court did not make any findings that directly apply to a defendant who may be eligible for parole. The issue then becomes a question of when parole is truly "available" to the extent that due process no longer requires juries to consider it in rebuttal of the state's case for death. Is the point automatically reached if the possibility of parole is specifically provided for in the state's statute? Is it reached even if the defendant's only chance for release is so far in the future that his opportunity to be dangerous then is severely decreased, if not eliminated?

In Virginia trials involving offenses committed before January 1, 1995,[96] some capital defendants sentenced to life in prison will not be eligible for parole,[97] some will be eligible for parole in 25 years and some will be eligible in 30 years. For those who are parole eligible, "good time" credits can only reduce these penalties by a maximum of 5 days per month.[98] Thus, the minimum amount of time that a defendant convicted of capital murder and sentenced to life will spend in prison is 20 years and 10 months.

---

[90] *Id.*

[91] The argument has been made that "[i]f an intervening United States Supreme Court decision does not represent the change in circumstances exception contemplated by *Hawks*, then the exception is meaningless." Petitioner's Reply to Brief in Opposition at 2, *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 1994 WL 388345 (U.S.Va. (Oct. 31, 1994)).

[92] *Smith v. Superintendent*, 214 Va. 359, 200 S.E.2d 523 (1973).

[93] 207 Va. 73, 147 S.E.2d 739 (1966) (holding that a guardian *ad litem* must be appointed in juvenile proceedings).

[94] 208 Va. 679, 160 S.E.2d 746 (1968) (decided more than two years before *Hawks*).

[95] *See Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993) (*Spencer I*), and case summary of *Spencer I*, Capital Defense Digest, Vol. 6, No. 2, p. 14, 16 (citations omitted) (emphasis in original) (1993):

> The *Spencer I* court, however, made it clear that claims presented to the Supreme Court of Virginia and rejected on direct appeal were still procedurally eligible to be considered on the merits by federal habeas courts. Quoting *Grundler v. North Carolina*, [283 F.2d 798 (4th Cir. 1960),] the court stated: "If a question is presented and adjudicated by the state's highest court once, it is not necessary to urge it upon them a second time under an alternative procedure." [*Id.* at 800.] Thus, the *Spencer I* court indicates that the *Hawks* argument taken by the Attorney General (i.e., that no **state** habeas relief is available on claims previously rejected on direct appeal to the Supreme Court of Virginia) is still valid.

[96] Frank Green, Parole act puts risk in play, critics say, Richmond Times-Dispatch, Oct. 2, 1994, et al.

[97] See Va. Code Ann. § 53.1-151(B) (Supp. 1994).

[98] *See* Va. Code Ann. § 53.1-199 (1988); § 53.1-201 (1991).

In the wake of *Simmons* and the clear implications that it has for capital sentencing beyond its narrow holding, courts have begun to struggle with the threshold question of whether and when parole is "available." The Court stated in *Simmons* that "[b]ecause truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court."[99] The question then becomes at what point the defendant is "ineligible" such that the factors compelling the *Simmons* decision require that parole information be given. In terms of those factors, the line between eligibility for parole at age 86 and ineligibility is a fairly arbitrary one to draw.

At least one state has already decided that *Simmons* requires the lower court to instruct the jury that a sentence of life imprisonment would mean that the defendant would not be eligible for parole until he was an old man.[100] In that case, the Supreme Court of New Mexico said:

> Although *Simmons* did not decide whether the Eighth Amendment requires a jury to be informed of the meaning of a life sentence, it reveals that notions of fundamental fairness embodied in the Due Process Clause require that the defendant be allowed to rebut, with all relevant mitigating evidence, the prosecutor's argument that the defendant's future dangerousness is cause for the death penalty, and relevant mitigating evidence includes the length of incarceration facing the defendant if he is not sentenced to death.[101]

In this case, the defendant would not have been eligible for parole until he reached the age of 86.

A study has shown that Virginia jurors believe that a defendant sentenced to life imprisonment will be in prison for a much shorter period of time than is actually the case.[102] The study also indicated that parole eligibility and the likely period of incarceration were key factors for Virginia jurors in their sentencing determination.

IX. *SIMMONS* SHOULD APPLY TO VIRGINIA CAPITAL CASES, EVEN WHERE PAROLE IS AVAILABLE.

Even assuming parole to be "available" in certain cases in Virginia, *Simmons* did not foreclose its extension to such cases.[103] The United States Supreme Court focused on the South Carolina death penalty scheme in its holding in *Simmons*, a plan very different from that found in Virginia. Differences in the administration of the capital murder statutes in the two states point to an even greater need for Virginia jurors to have accurate parole information in all cases. The argument that *Simmons* applies, even when parole is "available," is strong in Virginia.[104]

Denial of parole information to Virginia jurors is a more significant factor undermining due process because of the relative centrality of future dangerousness in Virginia's capital scheme, and, in addition, because the error is but one of many deficiencies in the administration the future dangerousness aggravating factor. Others include the absence of meaningful adversarial testing, absence of a standard of proof for unadjudicated misconduct, and the admission of irrelevant evidence.

Denial of the right to present accurate parole information, even for the "parole eligible" under Virginia's particular statutory scheme, is an open issue. It is ripe for litigation on the grounds used to decide *Simmons* and on two other grounds expressly left open by the *Simmons* court.

A. *Gardner*/Due Process Rationale

All seven of the members of the United States Supreme Court constituting the majority in *Simmons* decided the case on the Fourteenth Amendment Due Process Clause requirement that defendants have the right to rebut the state's case for death.[105] In the decision, the Court focused on the South Carolina death penalty scheme and its use of future dangerousness as an aggravating factor. South Carolina statutes, however, do not provide that the jury must find future dangerousness as a specific aggravating factor.[106] Prosecutors frequently offer evidence of future dangerousness because the state's evidence in the sentencing phase can extend beyond the listed aggravating factors.[107] The Virginia scheme, in contrast to that of South Carolina, makes proof of future dangerousness or "vileness" a prerequisite to eligibility for a sentence of death. The due process right to rebut the state's case for death in Virginia is not, as it is in South Carolina, the right to rebut evidence of a factor that the sentencing jury is permitted to consider. Rather, it is the right to rebut evidence of a factor the jury is required to find as a precondition to the imposition of a death sentence.[108]

---

[99] See *Simmons*, 114 S.Ct. at 2196.

[100] *Clark v. Tansy*, 882 P.2d 527 (N.M. 1994).

[101] *Id.* at 533.

[102] *The Meaning of 'Life' for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605, 1623 (1989) (quoting National Legal Research Group, Inc., Jury Research and Trial Simulation Services, Report on Jurors' Attitudes Concerning the Death Penalty (Dec. 6, 1988) (unpublished report).

[103] See generally case summary of *Simmons*, Capital Defense Digest, this issue. (Justice Blackmun's statements in *Simmons* even support the idea that such evidence ought to be admissible. "[S]uch 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." *Simmons*, 114 S.Ct. at 2195.

[104] However, *see Ramdass v. Commonwealth*, No. 930693, (1994) In *Ramdass*, the defendant argued that he was not eligible for parole because he had previous convictions for murder and two armed robberies. Section 53.1-151(B) of the Virginia Code establishes a defendant's ineligibility for parole when that defendant has three prior convictions for serious felonies such as these. The Supreme Court of Virginia found that Ramdass was parole eligible, however, because the trial court did not enter judgment on the verdict of conviction for one of the armed robberies. The court upheld the trial court's decision to withhold accurate parole information from the jury because of this conceivable parole eligibility.

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

[106] S.C. Code Ann. § 16-3-20(C) (Supp. 1993).

[107] *See* T. Eisenberg and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

[108] "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 of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused 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, in that it involved torture, depravity of mind or aggravated battery to the victim." Va. Code § 19.2-264.4(C). *See also* case summary of *Tuilaepa v. California*, Capital Defense Digest, this issue (discussing the importance of the eligibility factors in capital statutes).

The Virginia Code makes proof of future dangerousness equivalent to that required to prove an element of the offense. The statute requires that the Commonwealth prove either future dangerousness or vileness beyond a reasonable doubt. This statutory requirement that the Commonwealth prove future dangerousness beyond a reasonable doubt alone creates a strong argument that Virginia jurors are entitled to accurate parole information in every case.

B. Eighth Amendment Reliability Grounds

The *Simmons* Court expressly did not decide if the trial courts must disclose parole information because of the Eighth Amendment "heightened reliability" requirement.[109] All of the grounds for urging the communication of parole information, including the grounds relied on by the United States Supreme Court in *Simmons* and those expressly left undecided, relate in some way to the reliability of capital sentencing. Two members of the Court, however, saw this as a discrete issue and wrote separately in *Simmons* in support.[110] Consequently, it is worth understanding the "heightened reliability"[111] requirement and urging *Simmons*' application to all cases on these grounds.

Arguably, the future dangerousness aggravating factor leads to unreliable results whenever states choose to utilize it. After all, this factor calls for almost complete speculation in the best of circumstances. Although the Court upheld the use of future dangerousness as an aggravating factor in *Barefoot v. Estelle*,[112] it scrutinized the manner in which a state may use this aggravator in *Simmons*. Here again, the case for applying *Simmons* is even more compelling in Virginia than in South Carolina, given the centrality of future dangerousness to the capital sentencing scheme in Virginia and the lack of reliability of much of Virginia's procedures for applying the factor.

The United States Supreme Court has mandated various safeguards in its death penalty cases and based these holdings on the Eighth Amendment reliability in sentencing requirement.[113] In these instances, the Court has emphasized the importance of the procedure by which the state seeks to impose the death penalty. In *California v. Ramos*,[114] the Court stated:

> In ensuring that the death penalty is not meted out arbitrarily or capriciously, 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 basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty.[115]

The Court explained in *Woodson v. North Carolina*[116] that "the penalty of death is qualitatively different from a sentence of imprisonment, however long."[117] Moreover, the Court, in *Lockett v. Ohio*,[118] clarified that "[w]e are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[119]

In an effort to ensure reliability, the Supreme Court should require the lower courts to provide the jury with the greatest amount of relevant data that defense counsel can make available, including accurate incarceration information. In the past, the Eighth Amendment reliability requisite has influenced the Court to decide that the lower courts should err on the side of giving the jury more information instead of less. In *California v. Ramos*, the Court upheld the state's right to tell the jury that the defendant's sentence could be commuted by the governor if he were sentenced to life in prison without the opportunity for parole.[120] In that case, the Court emphasized that the instruction was constitutional because the Briggs Instruction [governor's right to commute] does not limit the jury to two sentencing choices, neither of which may be appropriate. Instead it places before the jury an additional element to be considered, along with many other factors, in determining which sentence is appropriate under the circumstances of the defendant's case.[121]

If the sentencing body chooses death as the appropriate punishment for the defendant when it would not have chosen death had it realized the defendant would be in prison until he was 73, then the state has not reliably proven that death is the appropriate sentence. In *Caldwell v. Mississippi*,[122] the United States Supreme Court held that a court cannot allow a jury to believe that the final determination of the defendant's guilt will rest with an appellate court and not the jury itself.[123] Key to this determination was the Court's finding that such a sentence was not truly reliable.[124] In fact, the Court stated that "[t]he death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death."[125] In addition, the Court found that the "[b]ias could similarly stem from the fact that some jurors may correctly assume that a sentence of life in prison could not be increased to a death sentence on appeal."[126] The harshest result seems safest but is unconstitutionally unreliable, much like the determination that Virginia jurors have made in the past.[127]

Moreover, it makes no sense not to tell the jury the relevant facts about the future incarceration opportunities for the defendant. The United States Supreme Court stated in *Gardner v. Florida*[128]

---

109 *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding that "the penalty of death is qualitatively different from a sentence of imprisonment, however long.") and *Caldwell v. Mississippi*, 472 U.S. 320 (1985)(holding that the prosecutor's argument undermined the reliability of the death sentence).

110 In fact, two justices concurred in a separate opinion which emphasized that the need for heightened reliability mandated this disclosure of parole information. *See* 114 S.Ct. at 2198 (Souter, J. concurring).

111 *Lockett v. Ohio*, 438 U.S. 586 (1978).

112 463 U.S. 880, 896-97 (1983) (The Court had earlier approved the entire Texas statutory scheme, including the future dangerousness factor, in *Jurek v. Texas*, 428 U.S. 262 (1976)).

113 *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

114 463 U.S. 992 (1983).

115 *Id.* at 999.

116 428 U.S. 280 (1976).

117 *Id.* at 305.

118 438 U.S. 586 (1978).

119 *Id.* at 604.

120 463 U.S. at 1001-02.

121 *Id.* at 1007.

122 472 U.S. 320 (1985).

123 *Id.* at 323.

124 *Id.* at 332.

125 *Id.*

126 *Id.*

127 *See Amici Curiae Brief of Donna L. Markle and Patricia Ann Knipfer in Support of Petitioner in Simmons v. South Carolina* in which two jurors in the trial of Dennis Eaton, a Virginia prisoner sentenced to death under circumstances virtually identical to those of Simmons, explained that it would have been very important for them to know whether the defendant was parole eligible to aid in the sentencing determination.

128 430 U.S. 349 (1977).

> If it [the information the State does not want to disclose] tends to tip the scales in favor of life, presumably the information would be favorable and there would be no reason why it should not be disclosed. On the other hand, if it is the basis for a death sentence, the interest in reliability plainly outweighs the State's interest in preserving the availability of comparable information in other cases.[129]

This reliability is important not only to the defendant whose life hangs in the balance but also to the rest of society whose members are responsible for his life and death. For this reason, reliability and humanity must remain the supreme goals of the procedure the state employs in the sentencing phase of the capital trial. The Supreme Court has supported this proposition in the past, and stated in *Gardner v. Florida* that

> [f]rom the point of view of the defendant, it [the death penalty] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.[130]

Knowledge of all of the relevant facts enables the jury to properly represent society and make a careful decision on behalf of the community. Without that knowledge, jurors may regret the decision they made and feel that justice was not served.[131]

C. Reliability In Virginia/South Carolina

The relevant case law indicates that the courts of South Carolina are more concerned with ensuring evidentiary reliability during the penalty phase of the capital trial than are the courts of Virginia. In addition, reliability in Virginia has already been undermined in several respects aside from the parole law question.

1. Absence of Meaningful Adversarial Testing

Denial of parole eligibility is not the only factor that has undermined the reliability of future dangerousness determination in the typical Virginia case. The fact that the trial court has considered evidence that is improper or untested has not prevented the Supreme Court of Virginia from upholding a death sentence in the past. In *Johnson v. Mississippi*,[132] the United States Supreme Court found that the state could not use a conviction that had been reversed as the basis for a death sentence because the defendant still had the presumption of innocence. Yet in *Dubois v. Commonwealth*,[133] the judge noted charges against the defendant that had been nolle prossed and presumed him guilty although he was never convicted of the crime.[134] Moreover, the court included a statement by the defendant that he made his living selling drugs in its reasons for finding future dangerousness. The defendant had never been convicted of selling drugs so any evidence that might show that he did in fact sell drugs was completely untested, even assuming some relevance to future dangerousness.

2. Absence of Standard of Proof for Unadjudicated Acts

The Commonwealth allows the use of unadjudicated acts to prove future dangerousness.[135] In *LeVasseur v. Commonwealth*,[136] the Supreme Court of Virginia upheld the right of the Commonwealth to introduce unadjudicated acts at the sentencing phase of the capital penalty trial to prove future dangerousness.[137] The court looked to the holding of *Jurek v. Texas*[138] to determine that the jury is entitled to "all possible relevant information"[139] and decided that unadjudicated acts could fit within this realm of relevant information. The Virginia courts have not, however, articulated a standard of proof by which the jury must find the defendant committed the act in order to utilize it in their sentencing determination. A Virginia prosecutor can offer any evidence of any degree of reliability about an act of the defendant and jurors can use it in their sentencing determination even if the juror thinks that only a slight probability exists that the defendant actually committed the act.

In a recent Virginia case, *Breard v. Commonwealth*,[140] the Commonwealth introduced evidence about assaults on two other women, allegedly committed by the defendant, to show "future dangerousness." Breard requested a jury instruction that the jury must find these assaults occurred beyond a reasonable doubt before the jury could consider this information against him. The trial court refused and the Supreme Court of Virginia upheld its decision.[141] The court has yet to require any standard of proof. The South Carolina Courts also allow the state to present evidence of unadjudicated acts in the sentencing phase of a capital murder trial. The South Carolina courts, however, require that the jury find that the defendant committed the acts by clear and convincing evidence. In *State v. Middleton*,[142] the South Carolina Supreme Court found that a judge must charge the jury with specific instructions as to the manner in which they process and weigh the evidence. The Supreme Court allowed admission of a confession in which the defendant confessed to other crimes even though the lower court had not required the jury to find that the commission of the act met a certain standard of proof. The court did note, however, that the judge charged the jury that they

---

129 *Id.* at 359.

130 *Id.* at 357-58.

131 *See Amici Curiae Brief of Donna L. Markle and Patricia Ann Knipfer in Support of Petitioner in Simmons v. South Carolina.*

132 486 U.S. 578, 586 (1988).

133 246 Va. 260, 425 S.E.2d 636 (1993).

134 *Id.* at 264, 435 S.E.2d at 638.

135 For a good overall analysis of unadjudicated acts in Virginia, see *Anything Someone Else Says Can and Will be Used Against You in a Court of Law: The Use of Unadjudicated Acts in Capital Sentencing*, Capital Defense Digest, Vol. 5, No. 2, p. 31, (1993).

136 225 Va. 564, 304 S.E.2d 644 (1983).

137 *Id.* at 593-94, 304 S.E.2d at 660.

138 428 U.S. 262 (1976).

139 *LeVasseur*, 225 Va. at 594, 304 S.E.2d at 660.

140 248 Va. 68, 445 S.E.2d 670 (1994). See also case summary of *Breard*, Capital Defense Digest, this issue.

141 *See* case summary of *Breard v. Commonwealth*, Capital Defense Digest, this issue (discussing the suggestion in analogous Virginia law that the Commonwealth should be required to prove unadjudicated acts by the preponderance of the evidence standard of proof).

142 368 S.E.2d 457 (S.C. 1988).

could not consider the unadjudicated acts as evidence of an aggravating circumstance relevant to capital sentencing. If the state offers unadjudicated acts as proof of an aggravating factor, the state must present the evidence in conformity with the requirements of with *State v. Conyers*,[143] where the South Carolina Supreme Court said that "[b]ecause of the potential for prejudice from the admission of testimony of other crimes, it is generally held that proof of the other crime must be clear and convincing."[144] This rule obviously reflects a concern, absent in Virginia, that such evidence be reliably established before being used to support a death sentence.

3. Admission of Irrelevant Evidence

Aside from reliability problems, a great deal of the evidence presented to prove future dangerousness in Virginia is irrelevant in all aspects save prejudicing the sentencing body. In *Dubois v. Commonwealth*, the trial court considered and mentioned the fact that the defendant had fathered nine children but had not supported any of them.[145] The Supreme Court of Virginia also upheld all of the evidence utilized to prove future dangerousness in *Strickler v. Commonwealth*,[146] even though this evidence included the defendant's attempt to use the victim's bank card at a later point in time and his conviction for tampering with a vending machine. In *King v. Commonwealth*,[147] the prosecution presented evidence of a bigamy conviction,[148] unauthorized possession of United States currency,[149] possession of drug paraphernalia[150] and use of intoxicants[151] in their efforts to show that the defendant might be dangerous in the future. Although few people would consider these actions to be those of an upstanding member of the community, it is difficult to see how any of them show a probability that defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society."[152] The potential prejudice from the use of such evidence, however, further undermines the reliability of future dangerousness determinations in Virginia and strengthens the argument for parole evidence disclosure based on this ground left open in *Simmons*. Although the court gave a cautionary instruction in *King*, it is nearly impossible to stop a juror from considering that which he has heard.

In contrast, the South Carolina Supreme Court has expressed interest in ensuring that the evidence presented is relevant. In *State v. Green*,[153] the court allowed evidence of other crimes but noted that "[t]hese crimes [similar crimes that the defendant may have attempted] may not be used to prove statutory aggravating circumstances. Instead, the judge must properly limit the jury's consideration of these offenses to evidence of appellant's characteristics as they may bear logical relevance to the crime."[154]

South Carolina's attempts to ensure that the evidence in aggravation that the jury hears is both relevant and reliable shows a much more determined effort than that of Virginia to treat the defendant with a "degree of respect due the uniqueness of the individual."[155] For this reason, the *Simmons* holding and the importance it places on fair consideration of future dangerousness evidence is even more applicable in Virginia than it is in South Carolina.

D. Eighth Amendment Right to Present Mitigation

In *Simmons*, the defense attorneys also argued that the Eighth Amendment right to present mitigation evidence required a parole eligibility instruction. The Court expressly did not decide that issue. This evidence is also "a basis for a sentence less than death"[156] in the sense that a defendant will not be dangerous to the population as a whole if he will be behind bars. Further, life in prison is a severe punishment and may be of sufficient severity in a particular case to be a basis for a sentence less than death. Consequently, this ground for requiring such evidence of parole eligibility in all capital cases remains open. Once again, the claim is strengthened when considered in the context of Virginia's treatment of mitigation evidence.

When the members of the jury, as representatives of society, seek to fix a punishment, knowledge of the defendant's incarceration is an affirmative reason to give the defendant a prison sentence because the members of the jury can decide that this sentence is sufficient to vindicate the interests of the community. Refusal to provide such evidence is an impermissible denial of the right to present evidence in mitigation. The Supreme Court has repeatedly indicated that all defendants have the right to present evidence in mitigation.[157] Once again, the relative importance of accurate parole information as mitigation is enhanced by the cursory treatment given mitigation in Virginia.

The courts of Virginia have not taken mitigation seriously in the past. In *Stewart v. Commonwealth*,[158] the Supreme Court of Virginia examined whether the bare mention of mitigation in Virginia's verdict form[159] and the lower court's refusal to instruct the jury on the subject per the defendant's request violated the defendant's constitutional

---

143 233 S.E.2d 95 (S.C. 1977).

144 *Id.* at 96.

145 *Dubois v. Commonwealth*, 246 Va. at 266, 435 S.E.2d at 638-39.

146 241 Va. 482, 496-97 404 S.E.2d 227, 236 (1991).

147 243 Va. 353, 416 S.E.2d 669 (Va. 1992).

148 *Id.* at 370, 416 S.E.2d at 678.

149 *Id.* at 370, 416 S.E.2d at 679.

150 *Id.*

151 *Id.*

152 Va. Code Ann. § 19.2-264.4(c).

153 392 S.E.2d 157 (S.C. 1990).

154 *Id.* at 163 (citation omitted).

155 *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.")

156 *Id.* at 604.

157 *See Lockett*, 438 U.S. at 605 (1978) ("a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.") and *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) ("The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender.")

158 245 Va. 222, 427 S.E.2d 394 (1993).

159 "The verdict of the jury shall be in writing, and in one of the following forms:

> (1) 'We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that the there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the

rights.[160] The Court found that this was not a violation of the defendant's constitutional rights and that the jury's ability to vote for life as opposed to death was not compromised. In *Mackall v. Commonwealth*,[161] the defendant attempted to introduce into evidence that he had previously informed his parole officer (prior to his incarceration for another crime) that he wanted to change the prison that he had been sentenced to because he had friends there that would make it more difficult for him to rehabilitate himself. The Supreme Court of Virginia upheld the decision of the trial court to withhold this evidence.

The Virginia courts are not the only state courts that have approached the defendant's right to present mitigation evidence to the jury so lightly. The South Carolina courts have not been any more liberal in their recognition of the defendant's constitutional right to present such evidence.

Prior to *Simmons*, the South Carolina Supreme Court "rejected the retroactive application of the stricter parole eligibility provision as mitigating evidence."[162] Even though a newly enacted statute had retroactive application and would cause the defendant to be in prison for a longer amount of time the South Carolina courts would not allow the defendant to present this evidence as mitigation. In *State v. Sims*,[163] the South Carolina Supreme Court upheld the trial court's mistaken instruction that mitigating evidence must reduce the degree of guilt. Even though the defendant argued forcefully that this precluded the jury's ability to consider other mitigating factors such as the defendant's background, the court held that the instruction was not reversible error.

In addition, the principal point of the mitigation argument is that a prison sentence is a severe and adequate punishment for the defendant's crime. The defense may use a traditional mitigation argument which rebuts the state's case in aggravation to show why the defendant behaved the way he did and that he will no longer be a threat in the structured confines of the prison setting. The overall point, however, is impossible to make without informing the jury what that prison sentence will be. If the jury only has two sentencing alternatives, the knowledge that the lesser of them is also a formidable punishment is essential to the defense case.

Given that the United States Supreme Court did not decide the mitigation issue, it is still open for consideration at a later time. The Eighth Amendment argument that the right to present mitigation should apply to those who are "parole eligible" is strong in Virginia. Indeed, if Virginia's attempts to comply with constitutional mandates concerning mitigation can be considered to be sufficient, the state does so barely and grudgingly.

X. SUMMATION

Although the United States Supreme Court in *Simmons* dealt directly with defendants who are ineligible for parole, it did not preclude requiring states courts to provide parole eligibility information to all defendants facing the penalty phase of a capital murder trial. The argument that Virginia courts should be required to provide this information is even more compelling given the importance of future dangerousness in the Virginia death penalty scheme, the lack of relevance and reliability assigned to the evidence presented to prove future dangerousness in the penalty phases of Virginia capital murder trials, and the importance of accurate parole information as a mitigating factor.

XI. CONCLUSION

Recent cases summarized in this issue of the Capital Defense Digest demonstrate that the Supreme Court of Virginia is not the court of last resort for all capital litigation issues. In *Breard v. Commonwealth*,[164] the defense defaulted the potentially lifesaving *Simmons* issue. By contrast, in *Mickens v. Commonwealth*,[165] the defense preserved the issue although the Supreme Court of Virginia had previously ruled that parole eligibility was irrelevant for purposes of sentencing. The perseverance of these Virginia defense attorneys resulted in a decision by the United States Supreme Court to remand *Mickens* in light of *Simmons*. Thus, the jury will likely be able to consider parole evidence in *Mickens* but will not in *Breard*, and the difference can only be attributed to the persistence of Mickens' defense team. Properly presented and litigated, and preserved, *Simmons* may well turn out to be applicable even when parole is technically available. Present, litigate and preserve until the United States Supreme Court gives a definitive answer.

---

offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture)(depravity of mind)(aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.
Signed . . . . . foreman'
or
(2) 'we, the jury, on the issue joined, having found the defendant guilty (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.
Signed . . . . . foreman'"
Va. Code Ann. § 19.2-264.4(D).

160 245 va. at 244-45. 427 S.E.2d at 408-09.
161 Mackall v. Commonwealth, (1988).
162 *State v. Jones*, 378 S.E.2d 594, 596 (S.C. 1989).
163 405 S.E.2d 377, 384-85 (S.C. 1991).
164 248 Va. 68, 445 S.E.2d 670 (1994).
165 247 Va. 395, 442 S.E.2d 678 (1994).