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I. Facts

On July 10, 1990, Joseph Keel ("Keel") murdered his father-in-law, John Simmons ("Simmons"). Keel shot Simmons as Simmons sat in his pickup truck parked at the family farm. In August of 1990, Keel was found guilty of first degree murder and sentenced to death.[1] On appeal, the Supreme Court of North Carolina concluded that the trial court had committed prejudicial error on the basis of an erroneous jury instruction.[2] Accordingly, the court ordered a new trial.[3]

At the guilt phase of the new trial, Keel was again found guilty of first-degree murder. At the penalty trial, the jury recommended that Keel be sentenced to death. Keel had previously been convicted of involuntary manslaughter, which satisfied the statutory aggravating factor of commission of a prior felony involving the use of violence to a person.[4] Keel's subsequent state direct and collateral appeals were denied. Keel petitioned for writ of habeas corpus on January 29, 1996.[5]

II. Holding

The United States Court of Appeals for the Fourth Circuit held the following: (1) Keel's claim that the state violated his due process and Eighth Amendment rights when it allowed evidence of his involuntary manslaughter conviction to be submitted as an aggravating factor was barred under *Teague v. Lane*[6]; (2) the trial court's refusal to instruct the jury as to his parole status, pursuant to *Simmons v. South Carolina*,[7] was proper because Keel would have been eligible for parole; (3) North Carolina's list of statu-

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1. Keel v. French, 162 F.3d 263, 266 (4th Cir. 1998).
2. State v. Keel, 423 S.E.2d 458 (N.C. 1992).
3. *See Keel*, 162 F.3d at 266.
4. *See* N.C. GEN. STAT. § 15A-2000(e)(3) (1998).
5. *Keel*, 162 F.3d at 267.
6. 489 U.S. 288 (1989) (holding that new constitutional rules are not applicable to defendants whose convictions have become final before announcement of the rule).
7. 512 U.S. 154 (1994) (plurality opinion) (holding that the due process clause of the Fourteenth Amendment requires that a defendant who is not eligible for parole if sentenced to life in prison is entitled to apprize the jury of that fact when the State argues future dangerousness as an aggravating factor).

tory aggravating factors[8] was not unconstitutionally vague and over broad as interpreted in *Tuilaepa v. California*[9]; and (4) Keel's trial counsel was not constitutionally ineffective for failing to make a *Batson v. Kentucky*[10] claim and for failing to introduce evidence of diminished capacity due to cocaine and alcohol use. Accordingly, the court dismissed the petition.[11]

III. Analysis / Application in Virginia

Before ruling on the merits of Keel's claims, the court first addressed several issues that arose as a result of a 60-day time limit imposed on Keel by the Supreme Court of North Carolina, during which Keel was required to file a Motion for Appropriate Relief.[12] Keel missed the 60-day deadline and the federal district court barred those claims which were not filed within the time limit. The Fourth Circuit overturned. The court held that the 60-day deadline, which acted as a procedural default, was not regularly imposed on criminal defendants in North Carolina. Since the deadline was not regularly imposed, the ground for the procedural bar was not an "adequate" ground as required by *Wainwright v. Sykes*[13] and its progeny.[14] After overturning the procedural default of several of Keel's claims, the court addressed Keel's claims on the merits.

A. Keel's Request for a Simmons *Instruction*

Keel argued that his Eighth Amendment right to be free of cruel and unusual punishment was violated when the trial court refused to instruct the jury as to his parole status. The court did not respond to Keel's Eighth Amendment claim and instead focused on the Fourteenth Amendment holding of the *Simmons* Court. In *Simmons*, a plurality of the Supreme Court ruled that due process requires that when the state argues future

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8. *See* N.C. GEN. STAT. § 15A-2000(e)(3) (1998).

9. 512 U.S. 967 (1994).

10. 476 U.S. 79 (1986) (holding that in making use of peremptory challenges, a prosecutor may not exercise them on the basis of a prospective juror's race, and if a prima facie case is established that the prosecutor did use the peremptory strike on the basis of race, the prosecutor must give an alternative race neutral reason for the exercise of the peremptory strike).

11. *Keel*, 162 F.3d at 269-73. Keel's claims of ineffective assistance of counsel and of a due process violation when evidence of his involuntary manslaughter was entered as evidence to prove an aggravating factor will not be discussed further in this article. The court's disposition of these two claims were proper statements of the law and provide no new guidance for capital defense lawyers in Virginia.

12. In North Carolina, a Motion for Appropriate Relief is equivalent to a petition for a writ of habeas corpus with the Supreme Court of Virginia (a state habeas petition).

13. 433 U.S. 72, 81 (1977) (holding that grounds for procedural default on a state law issue in a state court must be independent and adequate grounds).

14. *Keel*, 162 F.3d at 268-69.

dangerousness as an aggravating factor, a defendant who is not eligible for parole is entitled to apprize the jury of that fact or have a court instruction explaining parole ineligibility.[15] In the present case, the court ruled that since Keel would have been eligible for parole, the Fourteenth Amendment due process right to the jury instruction announced in *Simmons* did not apply to Keel.[16] However, the court's ruling did not address the issue raised by Keel, which was a claim under the Eighth Amendment that a life sentence without the possibility of parole has mitigating significance as a severe and sufficient punishment in some cases.

An Eighth Amendment claim is also based on the concurring opinion in *Simmons* written by Justice Souter and joined by Justice Stevens, which arguably stands for the proposition that all parole information is admissible, whether the defendant is parole ineligible or not.[17] When the state argues future dangerousness as an aggravating factor, Virginia capital defendants are entitled to parole ineligibility instructions based on the Fourteenth Amendment rationale of *Simmons*.[18] The Eighth Amendment basis, however, should also be advanced and presented to the jury. The penalty trial jury has but two sentencing options. It is entitled to know and understand the nature and severity of the life in prison punishment alternative.[19]

B. Tuilaepa *and the Virginia Vileness Eligibility Factor*

Keel argued that the North Carolina statutory aggravating factors[20] were unconstitutionally vague and over broad. In disposing of Keel's claim, the Fourth Circuit cited the Supreme Court case of *Tuilaepa v. California*[21] for the proposition that "vagueness review of the 'eligibility and selection factors' attendant to sentencing plans is 'quite deferential.'"[22]

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15. *See* Simmons v. South Carolina, 512 U.S. 154 (1994) (plurality opinion).

16. *Keel*, 162 F.3d at 270.

17. *See Simmons*, 512 U.S. at 173-174 (Souter, J., concurring); *see also* Timothy B. Heavner, Case Note, CAP. DEF. J., Fall 1994, at 30 (analyzing Simmons v. South Carolina, 114 S. Ct. 2187 (1994)).

18. *See* Mickens v. Commonwealth, 457 S.E.2d 9 (1995), *cert. denied sub nom*, Mickens v. Virginia, 520 U.S. 1269 (1997), *reh'g denied sub nom* Mickens v. Virginia, 118 S. Ct. 331 (1997).

19. To make the case for death, the Commonwealth must prove beyond a reasonable doubt that the defendant will be a danger to society in the future (the "future dangerousness" aggravating factor) or that the murder committed by the defendant was sufficiently vile (the "vileness" aggravating factor). *See* VA. CODE ANN. § 19.2-264.4 (Michie 1998). Ordinarily, the fact that a defendant is ineligible for parole can help to show a jury that because the defendant will never be part of society again, the Commonwealth has failed to prove beyond a reasonable doubt that the defendant will be a danger to society in the future.

20. Aggravating factors are also herein referred to as eligibility factors.

21. 512 U.S. 967 (1994).

22. *Keel*, 162 F.3d at 270 (quoting Tuilaepa v. California, 512 U.S. 967, 973 (1994)). In

While the Fourth Circuit correctly quotes from *Tuilaepa*, it does so in a somewhat misleading manner. *Tuilaepa* held that court review of a vagueness challenge is to be more deferential when the factor is a "selection" factor rather than an "eligibility" factor—that is, a court is to be more deferential when looking at the factors (selection factors) the jury is considering in deciding the sentence for one who has already been determined to be eligible for the death penalty by examination of other factors (eligibility factors). *Tuilaepa* did not require deference where the challenge was to the vagueness of eligibility factors requiring a yes or no response from the jury. Under Virginia law, the aggravating factors of future dangerousness or vileness are to be proven beyond a reasonable doubt before the jury can consider the death penalty.[23] These factors are eligibility factors and *Tuilaepa* does not undermine the validity of challenges to them based on *Godfrey v. Georgia*[24] and its progeny.[25]

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Tuilaepa, the Court upheld a California aggravating factor that allowed the jury to consider whether the defendant had committed a crime "which involved the use or threat of violence." *Tuilaepa*, 512 U.S. at 973. The challenged North Carolina aggravating factor permitted the jury to consider "the use or threat of violence," and thus the court upheld the factor because it was "legally indistinguishable" to the factor upheld in *Tuilaepa*.

23. *See* VA. CODE ANN. § 19.2-264.4 (Michie 1998).

24. 446 U.S. 420 (1980) (concluding that death sentence invalid because of the failure of the state court to provide a constitutional limiting construction to the aggravating circumstance providing for the death penalty for a murder which is "outrageous or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim" meaning "there is no way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not").

25. For a discussion of the continuing strength of challenges to these eligibility factors, see Matthew K. Mahoney, Case Note, 11 CAP. DEF. J. 457 (1999) (analyzing Reid v. Commonwealth, 506 S.E.2d 787 (Va. 1998)).