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Future Dangerousness in Capital Cases: Always "At Issue"

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FUTURE DANGEROUSNESS IN CAPITAL CASES: ALWAYS "AT ISSUE"

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Under Simmons v. South Carolina, *a capital defendant who, if not sentenced to death, will remain in prison with no chance of parole is constitutionally entitled to an instruction informing the jury of that fact, but only if the prosecution engages in conduct that places the defendant's future dangerousness "at issue." Based on data collected from interviews with South Carolina capital jurors, Professors Blume, Garvey, and Johnson argue that future dangerousness is on the minds of most capital jurors, and is thus "at issue" in virtually all capital trials, regardless of the prosecution's conduct. Accordingly, the authors argue that the "at issue" requirement of* Simmons *serves no real purpose and should be eliminated.*

INTRODUCTION

Capital jurors face a hard choice. They must impose a sentence of death, or a sentence of life imprisonment. One or the other. But for many jurors the choice is even harder.

The problem is this: Even where the alternative to death is life imprisonment, and where life imprisonment means life imprisonment without any possibility of parole, jurors may nonetheless believe that the defendant, if not sentenced to death, will one day find his way to freedom. In the minds of these jurors, the choice is really between death and something *less* than life imprisonment, and this imagined but false choice will prompt them to cast their vote for death. Forced to choose, jurors would prefer to see the defendant executed rather than run the risk that he will someday be released.

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The empirical results we describe below, *see infra* Part III.B, were presented to the United States Supreme Court in a brief *amicus curiae* submitted by the Cornell Death Penalty Project in support of the petitioner in *Shafer v. South Carolina*. *See* Brief *Amicus Curiae* of the Cornell Death Penalty Project in Support of Petitioner, Shafer v. South Carolina, No. 00-5250 (U.S. filed Nov. 13, 2000).

In *Simmons v. South Carolina*,[1] the Supreme Court tried to craft a solution to this problem. A plurality of the *Simmons* Court held that when state law authorizes the jury to impose a life sentence without the possibility of parole, due process entitles a capital defendant to inform the jury about his parole ineligibility.[2] But *Simmons* came with a catch: A capital defendant was entitled to this remedy only if the state placed his future dangerousness "at issue."[3] Otherwise, the jury was to be left to its own devices, forced to rely on its own understanding, however far off the mark, of what life imprisonment really meant.

But why the "at issue" requirement? The most likely explanation is ultimately empirical. On this account, the rule in *Simmons* is designed to obviate juror misapprehension about parole ineligibility and thereby promote reliability in capital sentencing.[4] The "at issue" requirement, in turn, reflects the empirical assumption that capital jurors worry about the defendant's future dangerousness, and thus about what a sentence of life imprisonment really means, only if the state injects the issue of future dangerous into the proceedings. If not, jurors will think little, if at all, about future dangerousness, and no remedial instruction is needed.[5]

We disagree. Based on the results of interviews with over a hundred jurors who served on capital cases in South Carolina, all conducted in connection with the nationwide Capital Jury Project (CJP),[6] we argue that the "at issue" requirement is misguided because the empirical assumption on which it rests is false: We find that future dangerousness is on the minds of most capital jurors, and is thus "at issue"

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1 512 U.S. 154 (1994). *Simmons* has two progeny, *O'Dell v. Netherland*, 521 U.S. 151 (1997), and *Ramdass v. Angelone*, 120 S. Ct. 2113 (2000). In *O'Dell* the Court held that *Simmons* was a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and thus was unavailable to a petitioner claiming its benefit in federal habeas corpus. 521 U.S. at 153. In *Ramdass*, the Court held that *Simmons* only applied if the defendant was ineligible for parole under state law at the time of his sentencing trial. 120 S. Ct. at 2116 (plurality opinion).

2 *Simmons*, 512 U.S. at 156 (plurality opinion) (holding that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible").

3 *Id.* (plurality opinion).

4 We address and reject another possible justification for the "at issue" requirement at *infra* Part III.C.

5 *Cf. Simmons*, 512 U.S. at 161–62 (plurality opinion) (emphasizing that juror misunderstanding of defendant's parole ineligibility was "*encouraged* . . . by the State's repeated suggestion that petitioner would pose future danger to society if he were not executed" (emphasis added)); *id.* at 164 (plurality opinion) (stating that "[t]he trial court's refusal to apprise the jury of information so crucial to its sentencing determination, *particularly* when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with . . . the Due Process Clause" (emphasis added)).

6 *See infra* Part II.

in virtually all capital trials, no matter what the prosecution says or does not say.

We make this point now for a reason. The United States Supreme Court currently has pending before it *Shafer v. South Carolina.*[7] *Shafer* is important because it presents the Court with an opportunity to eliminate the *Simmons* "at issue" requirement altogether. Although the Court can, as we explain, decide *Shafer* without taking this step, we nonetheless hope that the analysis and evidence we present here, and which we presented to the Court in an *amicus* brief,[8] will persuade its members that the costs of the "at issue" requirement outweigh its benefits.

Part I explains the issues facing the Court in *Shafer.* Part II briefly describes the organization, objectives, and methodology of the CJP. Part III first reviews findings from prior CJP research that underscore the central role future dangerousness plays in the decision making of capital jurors; it then presents additional results which, we believe, show that even when the prosecution is silent about the defendant's future dangerousness, future dangerousness is nonetheless "at issue" in virtually all capital cases.

I

SHAFER V. SOUTH CAROLINA

Nineteen-year-old Wesley Shafer was convicted in South Carolina for the murder of Ray Broome.[9] During the penalty phase of Shafer's trial, the court instructed the jury that South Carolina law gave its members one of two choices: death or life imprisonment. Relying on *Simmons,* defense counsel argued that Shafer was also entitled to an instruction informing the jury that life imprisonment under existing South Carolina law meant life imprisonment without the possibility of parole.[10] Counsel requested this "*Simmons* instruction" because he wanted the jurors to know that Shafer, if not sentenced to death, would spend the rest of his days behind prison walls.

However, *Simmons* imposes two conditions on a capital defendant's right to obtain an instruction on his parole ineligibility. First, the defendant must in fact never be eligible for parole under applicable state law;[11] second, the prosecutor must place the defendant's future dangerousness "at issue."[12] Shafer's lawyer argued that both

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7 121 S. Ct. 30 (2000), *granting cert. to* 531 S.E.2d 524 (S.C. 2000).

8 Brief *Amicus Curiae* of the Cornell Death Penalty Project in Support of Petitioner, Shafer v. South Carolina, No. 00-5250 (U.S. filed Nov. 13, 2000).

9 *Shafer,* 531 S.E.2d at 526.

10 *Id.* at 527.

11 Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (plurality opinion).

12 *Id.* (plurality opinion).

conditions were satisfied in his client's case: Shafer would be ineligible for parole for life under South Carolina law if the jury voted to impose a sentence of life imprisonment, and the solicitor had introduced evidence and made a number of comments the result of which was to put Shafer's future dangerousness "at issue."[13]

The trial court disagreed. According to the trial court, the prosecutor had ultimately said or done nothing that made Shafer's future dangerousness an issue in the case.[14] Consequently, the court refused to tell the jury that, if its members sentenced him to life imprisonment, Shafer would never be eligible for release on parole. The court did, however, agree to tell the jury that "life imprisonment means until the death of the offender."[15]

But that apparently was not enough. After three and one-half hours of deliberations, the jury returned with two questions:

1. Is there any remote chance for someone convicted of murder to become eligible for parole?
2. Under what conditions would someone convicted of murder be eligible?[16]

The trial court responded with the following:

> Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge. Section 16-3-20 of our Code of Laws as applies to this case in the process we're in states that, "for purposes of this section life imprisonment means until the death of the offender." Parole eligibility or ineligibility is not for your consideration.[17]

An hour and twenty minutes later the jury returned a sentence of death, which the trial court duly imposed.[18]

On appeal, Shafer argued that the trial court erred when it denied his request for a *Simmons* instruction.[19] The South Carolina Supreme Court rejected his claim. Like the trial court, the state high court held that *Simmons* did not apply, but for a reason different than that the trial court gave.

The trial court had held that *Simmons* did not apply because the *second* condition of *Simmons* was not satisfied: the prosecution had not placed Shafer's future dangerousness at issue. In contrast, the South Carolina Supreme Court held that *Simmons* did not apply because its *first* condition was not satisfied. According to the state high court,

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13 *See* Joint Appendix at 161-63, 188, Shafer v. South Carolina, No. 00-5250 (U.S. filed Oct. 18, 2000) [hereinafter Joint Appendix].

14 *See id.* at 164, 191-92.

15 *Shafer*, 531 S.E.2d at 527.

16 *Id.*

17 *Id.*

18 *See* Joint Appendix, *supra* note 13, at 239-43.

19 *Shafer*, 531 S.E.2d at 527.

Simmons applied if and only if "life without the possibility of parole [was] . . . the only legally available sentence alternative to death";[20] moreover, said the court, under the capital sentencing scheme in place when Shafer was tried—a scheme slightly different from the one in place when the United States Supreme Court decided *Simmons*—life without the possibility of parole was *not* the only legally available alternative to death.[21] Consequently, the court held, *Simmons* no longer applied *at all* in South Carolina.[22]

Although we seriously doubt that the South Carolina Supreme Court correctly applied the holding in *Simmons* to South Carolina's post-*Simmons* sentencing scheme,[23] that question is one on which the CJP data offer no special insight. But even if the Unites State Supreme Court were to agree that *Simmons* continues to apply to South Carolina's new scheme, Shafer would still need to show that the trial court was wrong when it found that the prosecutor had never placed future dangerousness "at issue." On *this* question the CJP data does provide insight.

Based on data collected from CJP interviews with jurors who sat on over one hundred capital cases tried in South Carolina, we argue that *Simmons*' second condition—that the prosecution by word or deed place the defendant's future dangerousness "at issue"—should be eliminated. We make this suggestion not because we believe the "at issue" requirement is unimportant, but rather because we find that future dangerousness is "at issue" in virtually all capital cases, even when the prosecution says or does nothing to put it there. A case-by-case resolution of the "at issue" requirement is therefore a waste of judicial time and energy, not to mention the unfairness it produces when jurors, uninformed about a defendant's ineligibility for parole

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20 *Id.* at 528 (citing State v. Starnes, 531 S.E.2d 907 (S.C. 2000)).

21 *Id.*

22 *Id.*

23 South Carolina law in effect at the time of Shafer's trial (and still in effect today) provided that, if the jury failed to find a statutory aggravating circumstance beyond a reasonable doubt, the jury "shall not make a sentencing recommendation" at all. S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1999). Under these circumstances the court—not the jury—would sentence the defendant, with the court's only options being life imprisonment without parole or a mandatory minimum term of thirty years. Consequently, the *jury*'s sentencing deliberations do not even begin unless the jury first determines that a statutory aggravating circumstance exists, and once the jury *does* make that finding, the *only* two choices available to it are death and life imprisonment without parole.

Moreover, even if the jury's options did include a sentence of imprisonment less than life, the false dilemma a *Simmons* instruction is intended to obviate would still exist because that dilemma exists whenever even *one* of the options available to the jury includes life imprisonment without the possibility of parole (and the jury is uninformed of that fact). In other words, even if the choice facing the jurors in *Shafer did* include the possibility of a sentence of imprisonment less than life, *Simmons* would continue to apply because the sentencing menu facing them *also* included the option of life imprisonment without the possibility of parole.

because the prosecutor chose to remain silent, vote for death out of fear that the defendant will otherwise someday be released.

II
THE CAPITAL JURY PROJECT

The Capital Jury Project is a National Science Foundation-funded, multistate research effort designed to better understand the dynamics of juror decision making in capital cases. Toward that end, the CJP began in 1990 to interview in a number of different states jurors who had actually served on capital cases. Analyses of the data collected during the interviews began appearing in 1993.[24]

Prior to the work of the CJP, our understanding of juror decision making in capital cases—and in particular of the sentencing phase of the trial—was based primarily on mock jury studies, and on inferences drawn from the conduct of individual cases. Each of these methodologies, though valuable, has limitations. Mock studies are open to a variety of criticisms, not the least of which is that the experience of mock jurors is substantially removed from that of actual jurors, perhaps especially so in capital cases. Likewise, inferences based on an individual case or series of cases may not lend themselves to general-

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24 Quantitative analyses of CJP data to date can be found in William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (multistate data); William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999) (multistate data); Theodore Eisenberg et al., Forecasting Life and Death (Sept. 28, 2000) (unpublished manuscript, on file with author) (South Carolina data); Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. (forthcoming Jan. 2001) (South Carolina data); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) (South Carolina data); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996) (South Carolina data); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (South Carolina data); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) (South Carolina data); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000) (South Carolina data); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995) (North Carolina data); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183 (1995) (Kentucky data); Benjamin D. Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461 (1999) (multistate data); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) (California data); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (California data).

Qualitative analyses of CPJ data to date can be found in Joseph L. Hoffmann, *Where's The Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995) (Indiana data), and Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103 (1995) (Georgia data).

ization; worse, they may reflect little more than the preconceptions of the person drawing them.

The CJP and its individual researchers have to date conducted interviews with 916 jurors who sat on 257 capital trials in eleven different states (Alabama, California, Florida, Georgia, Kentucky, Missouri, North Carolina, Pennsylvania, South Carolina, Texas, and Virginia).[25] The CJP's aim was to conduct interviews with at least four jurors from a randomly selected sample of cases, half of which resulted in a final verdict of death, and half in a final verdict of life imprisonment.[26]

Each juror responded to a series of questions asked during interviews generally lasting between three and four hours. The questions covered the guilt and penalty phases of the trial, the evidence presented, the demeanor of the defendant, the actions of the victim's family, the performance of the lawyers and the judge, the legal instructions given, the process of the jury's deliberations, and the verdict reached. Demographic information—for example, race, sex, age, religion—was also collected, as was information about each juror's attitudes toward the death penalty and the criminal justice system more generally. All told, each survey yielded data on over 750 variables.

The results we present below are based on the CJP's efforts in South Carolina. The data from South Carolina are the most extensive of all the states included in the CJP, encompassing interviews with 187 jurors in 53 cases tried in South Carolina between 1988 and 1997.[27] Of the 187 jurors interviewed thus far, 100 sat on one of 28 cases that resulted in a death sentence, and 87 sat on one of 25 cases that resulted in a sentence of life imprisonment.

III
ALWAYS "AT ISSUE"

Our focus here is limited to the *Simmons* "at issue" requirement. But in order to set the context, we begin with a brief review of existing CJP findings that highlight the important role future dangerousness plays in capital sentencing. We then present the results of the simple

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25 *See* Bowers & Steiner, *supra* note 24, at 608 n.6, 647 tbl.1.

26 *See id.* at 643–44.

27 Data collection began in South Carolina following the enactment of the South Carolina Omnibus Criminal Justice Improvements Act of 1986. *See* The Omnibus Criminal Justice Improvements Act of 1986, 1986 S.C. Acts 2955. The 1986 Act changed the standards of parole in capital cases and provided a natural starting point for the collection of data. *See id.*, 1986 S.C. Acts at 2983 (changing parole eligibility for defendants convicted of capital murder with an aggravating circumstance but not sentenced to death, from ineligibility for twenty years to ineligibility for thirty years). A later amendment to the South Carolina death penalty statute—the one at issue in *Shafer*—provided that capital defendants not sentenced to death would be ineligible for parole for life. Act of June 7, 1995, 1995 S.C. Acts 545, 557.

analysis that lead us to urge the Court to abandon the "at issue" requirement.

A. Future Dangerousness

The results that have so far emerged from the research efforts of the CJP support the following three propositions related to the role of future dangerousness in capital sentencing:

First, "[j]urors grossly underestimate how long capital murderers not sentenced to death usually stay in prison."[28] In South Carolina, for example, the median juror estimate of years usually served by capital murderers not sentenced to death was only seventeen years.[29] Based on these results, the typical South Carolina juror, told only that the alternative to a death sentence was a sentence of "life imprisonment," would have thought that nineteen-year-old Wesley Shafer would be released at the still-threatening age of thirty-six. Less than one percent would have thought he would never be released.[30]

Second, future dangerousness plays a highly prominent role in the jury's discussions during the penalty phase. One of the earliest CJP studies, which relied on South Carolina data, found that topics related to the defendant's dangerousness should he ever return to society (including the possibility and timing of such a return) are second only to the crime itself in the attention they receive during the jury's penalty phase deliberations.[31] Future dangerousness overshadows evidence presented in mitigation (such as the defendant's intelligence, remorse, alcoholism, mental illness), as well as any concern about the defendant's dangerousness in prison.[32]

Third, these misconceptions about parole eligibility have predictable and deadly consequences. The shorter the period of time a juror thinks the defendant will be imprisoned, the more likely he or she is to vote for death on the final ballot.[33] Moreover, aggregate data from all eleven states of the CJP show that even in cases in which the prosecution's evidence and argument at the penalty phase did "not at all" emphasize the defendant's future dangerousness, jurors who believed the defendant would be released in under twenty years if not sentenced to death were still more likely to cast their final vote for death than were jurors who thought the alternative to death was twenty years or more.[34]

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28 Bowers & Steiner, *supra* note 24, at 648.

29 *Id.* at 647.

30 *Id.* at 649.

31 Eisenberg & Wells, *supra* note 24, at 6.

32 *See id.*

33 Bowers & Steiner, *supra* note 24, at 664; Eisenberg & Wells, *supra* note 24, at 6-8.

34 Bowers & Steiner, *supra* note 24, at 665 tbl.6. Among jurors who believed the prosecutor did not emphasize at all that the death penalty would prevent the defendant from

We believe these findings provide strong support for a rule broader than *Simmons*. Those findings suggest that a capital defendant should have a right to tell the jury how long he will remain in prison if not sentenced to death, even if the term of his imprisonment under state law is less than death, and even if the prosecution does nothing to place his future dangerousness "at issue."[35] In other words, we believe these findings cast serious doubt on *both* of the requirements set forth in *Simmons*.

For now, however, we concentrate on the second requirement: Does it makes sense, in light of how capital jurors decide capital cases, to require the right *Simmons* recognizes—the right of a capital defendant to honestly tell the jury that, if its members do not sentence him to death, he will in accordance with state law never be released from prison—to turn on the prosecution's decision to put future dangerousness "at issue?"

B. Testing the Empirical Assumption Behind the "At Issue" Requirement

The "at issue" requirement, as we construe it here, is based on the Court's empirical assumption that jurors only worry about future dangerousness if and when the prosecution broaches the subject. However, we would have assumed just the opposite: that capital jurors worry about future dangerousness no matter what the prosecution says. Here we put these competing assumptions to two empirical tests.

First, if the Court's assumption is correct, then we would expect the jury's discussions during the penalty phase to reflect worries about future dangerousness only when the prosecution makes a point of it; in contrast, if our assumption is correct, then we would expect the jury's discussions to reflect worries about future dangerousness even when the prosecution says nothing about it at all. Second, if the Court's assumption is correct, we would expect jurors to say that future dangerousness influenced their sentencing decisions only when the prosecution raised questions about it; in contrast, if our assumption is correct, then we would expect jurors to say that future danger-

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killing again and who estimated that the alternative to a death sentence was zero to nine years in prison, 73.1% cast their final vote for death; similarly, among those who estimated that the alternative was ten to nineteen years, 69.4% cast their final vote for death. In contrast, among those who estimated that the alternative was twenty years or more, only 43.8% cast their final vote for death. *Id.*

Among jurors who believed the prosecutor did not emphasize at all the danger of escape or release and who estimated that the alternative to a death sentence was zero to nine years in prison, 58.1% cast their final vote for death; similarly, among those who estimated that the alternative was ten to nineteen years, 63.3% cast their final vote for death. In contrast, among those who estimated that the alternative was twenty years or more, only 39.0% cast their final vote for death. *Id.*

35 This argument is advanced in Bowers & Steiner, *supra* note 24, at 712-13.

ousness was a significant factor in their sentencing decisions regardless of the prosecution's focus.

One question the CJP asked jurors was the following: "How much did the prosecutor's evidence and arguments at the punishment stage of the trial emphasize the danger to the public if the defendant ever escaped or was released from prison?" The possible responses were: a "great deal," a "fair amount," "not much," and "not at all." Of the 187 South Carolina jurors we interviewed, fifty-three said that the prosecutor's evidence and argument at the penalty phase emphasized the defendant's danger to the public if he was ever released or escaped from prison "not at all." It is on this group of fifty-three that we focus the remainder of our analysis.[36] If future dangerousness matters to this group, then it matters even when the prosecution has not placed the defendant's dangerousness "at issue."

We next look at the responses this group of jurors gave when asked a series of questions about the topics the jury discussed during the course of its penalty phase deliberations. We focus in particular on how much the jury discussed various topics related to the defendant's future dangerousness. Table 1 gives the results.

TABLE 1
RESPONSES OF JURORS WHO SAID THE PROSECUTOR'S EVIDENCE AND ARGUMENT AT THE PUNISHMENT STAGE OF THE TRIAL EMPHASIZED "NOT AT ALL" THE DANGER TO THE PUBLIC IF THE DEFENDANT EVER ESCAPED OR WAS RELEASED FROM PRISON
(% RESPONDING)

How much did the discussion among the jurors focus on the following topics?	A Great Deal	Fair Amount	Not Much	Not At All	*n*
Defendant's dangerousness if ever back in society	23	30	21	26	53
How likely he would be to get a parole or pardon	21	40	19	21	53
How long before he got a parole or pardon	22	35	20	24	51
Need to prevent him from killing again	32	34	15	19	53

Even among jurors who said the prosecution made no effort whatsoever to emphasize the defendant's future dangerousness, anywhere between twenty-one and thirty-two percent reported that the jury's discussions during the penalty phase focused "a great deal" on a

36 In some instances the number of respondents is less than fifty-three due to one or two missing observations.

variety of topics related to worries about the defendant's future dangerousness. Moreover, anywhere between fifty-three and sixty-six percent of these same jurors reported that the jury's discussions focused at least a "fair amount" on topics related to the defendant's future dangerousness.

Table 2 explores the matter from slightly different angle and suggests that the jury's focus on the defendant's future dangerousness during the penalty phase is not *just* talk. Concentrating once again on those jurors who said the prosecutor emphasized "not at all" the defendant's danger to the public if he was ever released or escaped from prison, we asked how important it was to them in deciding the defendant's punishment to "keep[ ] the defendant from ever killing again." Forty-three percent said it was "very" important; twenty-six percent said it was "fairly" important. In other words, nearly *seventy percent* of the jurors who served on cases in which the prosecution did not put the defendant's future dangerousness "at issue" nonetheless reported that keeping the defendant from ever killing again was at least fairly important to them in deciding how to vote.

TABLE 2
RESPONSES OF JURORS WHO SAID THE PROSECUTOR'S EVIDENCE AND ARGUMENT AT THE PUNISHMENT STAGE OF THE TRIAL EMPHASIZED "NOT AT ALL" THE DANGER TO THE PUBLIC IF THE DEFENDANT EVER ESCAPED OR WAS RELEASED FROM PRISON
(% RESPONDING)

How important was the following consideration for you in deciding what the defendant's punishment should be?

	Very	Fairly	Not Much	Not at All	*n*
Keeping the defendant from ever killing again	43	26	11	19	53

When you were considering the defendant's punishment, were you concerned that the defendant might get back into society someday, if not given the death penalty?

Yes, Greatly Concerned	Yes, Somewhat Concerned	Yes, But Only Slightly Concerned	No, Not At All Concerned	*n*
31	29	10	31	52

Of course, the jury's concern about "keeping the defendant from ever killing again" might include concerns about keeping him from killing again *in* prison, as well as outside of it. Accordingly, we also analyzed responses to a narrower question: How concerned was the juror that the defendant might get back into society if not given the death penalty. Thirty-one percent said they were "greatly concerned," and another twenty-nine percent said they were "somewhat con-

cerned." That makes a total of *sixty percent*.[37] Put differently, on an average jury in which the prosecutor emphasized the defendant's future dangerousness "not at all," seven members would be at least somewhat concerned that, unless sentenced to death, the defendant might get back into society.

C. Have We Tested the Wrong Justification?

We noted at the outset that the most likely justification of the "at issue" requirement rests on the empirical assumption we have tested and found wanting. As an empirical matter, we can say with some confidence that even in cases in which prosecutors have not affirmatively "raised the specter of . . . future dangerousness,"[38] that specter is present all the same. Indeed, the specter of future dangerousness explains why jurors—if not told—commonly ask questions about a defendant's parole eligibility,[39] as did the jurors in Shafer's case.

But perhaps the "at issue" requirement of *Simmons* rests on a different justification altogether. According to this alternative theory, due process is offended only when the state affirmatively presents a false or misleading reason to impose the death penalty. Seen from this perspective, the rule in *Simmons* is intended to monitor and prevent state misconduct, not to ensure the reliability of the jury's sentencing decision. If so, the results presented above are beside the point, because the "at issue" requirement is not based on an empirical assumption at all; it instead constitutes the misconduct without which no due process violation would exist.

The Court has treated both these justifications—preventing prosecutorial misconduct and ensuring reliability—as touchstones of due process. The Court has, for example, held that police misconduct is a necessary prerequisite to finding a confession involuntary;[40] likewise, suggestive identifications violate due process only when they are unnecessarily suggestive,[41] a qualification that is related, though not identical, to a misconduct requirement.

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37 Bowers and Steiner report results based on interviews with capital jurors from all eleven CJP states that are consistent with our findings. According to Bowers and Steiner, the tendency among jurors to cast their final vote for death the shorter the period of time they believe a defendant not sentenced to death will remain in prison does not vary with how much or how little they believe the prosecution's evidence and arguments at the penalty phase emphasize the defendant's future dangerousness. Bowers & Steiner, *supra* note 24, at 665 tbl.6.A.

38 Simmons v. South Carolina, 512 U.S. 154, 165 (1994) (plurality opinion).

39 *See, e.g.*, J. Mark Lane, *"Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L. REV. 327, 335–36 (1993) (reporting that sentencing juries asked questions about parole eligibility in one quarter of the cases in which a death sentence was returned).

40 Colorado v. Connelly, 479 U.S. 157, 167 (1986)

41 Manson v. Brathwaite, 432 U.S. 98, 114 (1997).

On the other hand, inflexible hearsay rules that preclude capital defendants from presenting persuasive mitigating evidence violate due process regardless of the prosecutor's conduct.[42] Numerous other due process rights do not depend upon prosecutorial misconduct, such as the right to voir dire on racial prejudice in a capital case involving an interracial crime,[43] the right to a change of venue due to widespread pretrial publicity,[44] the right to be informed of every element of a crime before pleading guilty,[45] the right to be free of apprehension of retaliatory sentencing after the exercise of the right to appeal,[46] and the right to voir dire potential jurors regarding whether they would automatically impose the death penalty upon conviction of the defendant.[47]

Unfortunately, *Simmons* did not clearly identify one ground or the other—preventing prosecutorial misconduct or ensuring reliability—as the basis for its rule. Nonetheless, we think *Simmons* is best understood as a rule of reliability. The closest analogy is *Brady v. Maryland*.[48] *Brady* requires the state to provide the defense with any exculpatory evidence within its possession; moreover, *Brady* holds that a new trial is required whenever such evidence is not disclosed, regardless of the good or bad faith of the prosecutor.[49] Good faith is irrelevant because preventing nondisclosure by a prosecutor "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."[50] *Simmons* likewise contemplates a state of affairs in which the state has in its hands information—namely, that the defendant, if not sentenced to death, will never be eligible for parole—the effect of which is exculpatory. If good faith will not excuse the state's failure to provide exculpatory evidence to the defense under *Brady*, neither should it excuse the corresponding failure to provide exculpatory information to a capital sentencing jury under *Simmons*.[51]

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42 Green v. Georgia, 442 U.S. 95, 97 (1979).

43 Turner v. Murray, 476 U.S. 28, 36-37 (1986).

44 Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

45 Henderson v. Morgan, 426 U.S. 637, 644-45 (1976).

46 North Carolina v. Pearce, 395 U.S. 711, 725 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

47 Morgan v. Illinois, 504 U.S. 719, 729 (1992).

48 373 U.S. 83 (1963).

49 *Id.* at 87.

50 *Id.*

51 Our proposed approach to the "at issue" requirement also has the practical advantage of being clear and "workable." *Cf.* Ramdass v. Angelone, 120 S. Ct. 2113, 2120 (2000) (emphasizing that applying *Simmons* only to cases in which the defendant is ineligible for parole under state law is a "workable rule"). Prosecutors would have no incentive under our proposal to see how far they could hint at future dangerousness without actually crossing some invisible line. Nor would trial judges or reviewing courts have to deal one case at a time with the often elusive question of whether the state, either through evidence or the argument, affirmatively "raised the specter of . . . future dangerousness generally." Simmons v. South Carolina, 512 U.S. 154, 165 (1994) (plurality opinion).

CONCLUSION

Under existing doctrine, due process entitles a capital defendant to inform the jurors who will decide his fate that, if not sentenced to death, he will never be eligible for parole—but only if his future dangerousness is "at issue." Yet the fact of the matter is that future dangerousness is on the minds of most capital jurors and thus "at issue" in virtually all capital trials, even if the prosecution says nothing about it. Ironically, a capital defendant is therefore better off, all else being equal, if the prosecutor argues that he will pose a danger to society—in which case the defendant would be entitled to a *Simmons* instruction—than if the prosecutor remains silent. Indeed, the prosecutor in *Shafer* was well aware of this irony; otherwise, he would not have gone to such lengths to avoid a *Simmons* instruction.[52]

The better approach—one not only more closely attuned to the empirical realities of capital sentencing but also more in keeping with the spirit of *Simmons* itself—would be to eliminate the "at issue" requirement altogether.

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52 For example, the prosecution introduced testimony relating the fact that Shafer had assaulted a guard while in jail after his arrest; nonetheless, this evidence, the prosecutor claimed, was introduced "to show his character and to show his adaptability to prison, not future dangerousness." Joint Appendix, *supra* note 13, at 162–63.