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Informing Capital Juries About Parole: The Effect on Life or Death Decisions

BY C. LINDSEY MORRILL*

INTRODUCTION

A jury is deliberating the most serious of all decisions in the United States justice system: Should a defendant who has been found guilty of capital murder be put to death for his crime or receive a life sentence? In the minds of these twelve jurors, one emotion runs rampant. Rather than a feeling of responsibility and justice, the all-consuming emotion is fear. After hearing an account of how the defendant violently murdered his elderly neighbor,[1] the jury is afraid that the guilty defendant will be released. The prosecution urges the jurors to choose a death sentence as an "act of self defense"[2] and argues that the defendant's future dangerousness must be a factor in their decisionmaking.[3] Their choice is to recommend execution for the guilty party or to recommend a life sentence.

These jurors, like a majority of Americans, distrust the sentencing process.[4] They may have heard from news media and movies[5] that a "life sentence" is actually a misnomer, and that parole may dramatically reduce

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[1] *See* Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (plurality opinion).

[2] *Id.* at 157.

[3] *Id.*

[4] *See generally* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993); William W. Hood III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605 (1989); John Christopher Johnson, Note, *When Life Means Life: Juries, Parole, and Capital Sentencing*, 73 N.C. L. REV. 1211 (1995).

[5] *See* Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 212 n.1 (1987).

the sentence.[6] The jury decides to use the only resource at its disposal and sends a single question to the judge: "Does the imposition of a life sentence carry with it the possibility of parole?"[7] The judge, knowing that the defendant is ineligible for parole or early release, follows the common law precedent by informing the jury that the possibility of parole is of no concern to them, and that they must construe the terms "death sentence" and "life imprisonment" in their plain and ordinary language.[8] Within twenty-five minutes, the jury sentences the defendant to death.[9]

This scenario was a reality in *Simmons v. South Carolina*.[10] Although the defendant was ineligible for parole, the jury was unaware of that fact and was motivated by fear, rather than truth, in sentencing Simmons to die for his crimes.[11] The United States Supreme Court found that, by withholding this information from the jury, the trial court violated Simmons' Fourteenth Amendment[12] due process rights.[13] The Court held that due process required that Simmons be allowed to inform the jury of his parole ineligibility as a means of denial or explanation when the prosecution argues his future dangerousness to society.[14] The preclusion of such information was a violation of the Fourteenth Amendment.[15]

This decision has spurred a discussion of the wisdom of the common law approach that keeps parole information away from the jury.[16] The rationale given for this approach is based on cases where the defendant could have been released in the future.[17] Courts expressed concern that

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[6] *See generally* Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 812-13 (1975) (analyzing the "Private Slovik Syndrome," i.e., the expectation that a sentence will not be fully carried out).

[7] *Simmons*, 512 U.S. at 160 (plurality opinion).

[8] *Id.*

[9] *Id.*

[10] *Id.* at 154.

[11] *Id.* at 161.

[12] U.S. CONST. amend. XIV, § 1.

[13] *See Simmons*, 512 U.S. at 171 (plurality opinion).

[14] *Id.* at 169.

[15] *See id.*

[16] *See, e.g.*, Johnson, *supra* note 4, at 1211; Kimberly Metzger, Note, *Resolving the "False Dilemma":* Simmons v. South Carolina *and the Capital-Sentencing Jury's Access to Parole Ineligibility Information*, 27 U. TOL. L. REV. 149 (1995).

[17] *See, e.g.*, State v. Junkins, 126 N.W. 689 (Iowa 1910); Commonwealth v. Strong, 563 A.2d 479 (Pa. 1989); Commonwealth v. Johnson, 81 A.2d 569 (Pa. 1951); Jones v. Commonwealth, 72 S.E.2d 693 (Va. 1952); Coward v. Commonwealth, 178 S.E. 797 (Va. 1935), *overruled by* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000).

giving juries such information would be prejudicial to the defendant because the jury may be unduly harsh in order to compensate for the possible administrative decision of early release.[18] Many judges misapply the common law approach in cases where defendants are ineligible for parole.[19] This lack of information about parole forces the jury to be unduly harsh.

In 1993, data was gathered from jurors who sat in capital cases in South Carolina.[20] Although South Carolina statutes do not list future dangerousness as a statutory aggravating circumstance,[21] the state may offer aggravating evidence in addition to what is in the statute.[22] South Carolina prosecutors frequently argue that jurors should consider the defendant's future dangerousness when deciding between life and death sentences.[23] In assessing dangerousness, the probable true duration of a sentence is an important consideration. The data collected showed that the "jurors' deliberations emphasize dangerousness and that misguided fears of early

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[18] *See, e.g.*, Commonwealth v. Crittenton, 191 A. 358 (Pa. 1937).

[19] *See Coward*, 178 S.E. at 799 (holding that parole information should not be a consideration of the jury); *see also* Yarbrough v. Commonwealth, 519 S.E.2d 602, 615 (Va. 1999). In dealing with jurors' inquiry into parole possibilities when the defendant is parole ineligible, the court held that "[t]he *Coward* rule simply does not address th[is] unique situation." *Id.*

[20] *See* Eisenberg & Wells, *supra* note 4, at 2-3. Data gathered for the article was part of the Capital Jury Project, a National Science Foundation-funded, multi-state research effort exploring death penalty decisionmaking. *Id.* at 3 (citing to Justice Research Ctr., Northeastern Univ., Juror Interview Instrument, National Study of Juror Decision Making in Capital Cases (on file with Eisenberg & Wells)). Thirty-one South Carolina cases were included in the study. Through juror interviews, researchers collected data on the facts of the crime, the juror deliberation process, characteristics of the defendant and of the victim, and the conduct of the case by defense counsel, prosecutor, and judge. *Id.*

[21] *See* S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1992). The death penalty can only be imposed if at least one statutory aggravating circumstance has been proven beyond a reasonable doubt. Some of the aggravating circumstances include murder committed during the commission of certain serious crimes such as kidnaping and rape, murder of a police officer, and murder by a defendant previously convicted of murder. Once an aggravating circumstance has been proven, the jury may then consider statutory mitigating circumstances. Some of these include lack of prior convictions for violent crime, age or mental capacity of the defendant, duress, and provocation. *Id.*

[22] Eisenberg & Wells, *supra* note 4, at 4.

[23] *Id.*

release generate death sentences."[24] Those jurors who believe that the alternative to death will be a relatively short prison sentence are likely to vote for death.[25] Jurors who believe that the alternative prison sentence will be longer tend to sentence life.[26] The data showed that for twelve cases in which the jury gave a life sentence, the average time that the jurors expected the defendant to serve in prison was 23.8 years.[27] In nineteen cases in which the jury sentenced the defendant to death, the average expectation of time that the defendant would serve was 16.8 years.[28] A separate statewide survey in South Carolina showed that more than three-quarters of jury-eligible respondents believed the amount of time a convicted murderer would actually have to serve in prison to be an "extremely important" or "very important" factor in a capital sentencing decision.[29]

Expected life sentences certainly play a major role in sentencing deliberations, and, because of this, jurors should receive accurate information regarding the alternative true prison sentence. Before the Court's opinion in *Simmons*, judges often refused to inform juries about parole even when juries specifically asked.[30] Even after *Simmons*, the circumstances in which jurors have unlimited access to parole information remain limited. The only case in which a jury can obtain information on parole eligibility is when the prosecution is arguing future dangerousness as an aggravating factor.[31] If the prosecution does not argue the defendant's dangerousness, the negative implication of *Simmons* is that common law holdings such as the one in *Coward v. Commonwealth* still apply, prohibiting the trial judge from instructing jurors about the possibility of parole in the life alternative to a death sentence.[32]

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[24] *Id.*; *see also* William Bowers, Note, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 LAW & SOC'Y REV. 157 (1993) (reporting Capital Jury Project results for two other states with results consistent with South Carolina).

[25] Eisenberg & Wells, *supra* note 4, at 7.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *See* James M. Hughes, *Informing South Carolina Capital Juries About Parole*, 44 S.C. L. REV. 383 app. at tbl. 3 (1993).

[30] *See generally* W.E. Shipley, *Procedure to Be Followed Where Jury Requests Information as to Possibility of Pardon or Parole from Sentence Imposed*, 35 A.L.R.2d 769, 771 (1954).

[31] *See* Simmons v. South Carolina, 512 U.S. 154, 171 (1994) (plurality opinion).

[32] Coward v. Commonwealth, 178 S.E. 797, 799 (Va. 1935), *overruled by* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000).

This Note examines the trend of putting more information in the hands of the jury. While much of the debate has focused on whether judges should withhold information about parole ineligibility in death penalty cases, the policies behind the decisions are applicable in all jury sentencing trials.[33] Part I examines cases decided under the common law approach before the Supreme Court issued its *Simmons* ruling.[34] Part II focuses on the rationale and decision in *Simmons*.[35] Part III looks at how some states have begun to extend *Simmons*, using the rationale behind that decision to develop case law that allows full disclosure of parole options.[36] Part IV concludes by looking at Kentucky's approach mandating bifurcated penalty proceedings that consist of, first, a separate death penalty deliberation in which parole options are not disclosed and, second, a truth in sentencing proceeding which allows full disclosure of the possibility of parole to the jury.[37]

I. EXAMINING THE CASE LAW BEFORE *SIMMONS*: PROHIBITING CONSIDERATION OF PAROLE

Traditionally, prosecutors were prohibited from mentioning the possibility of early release or parole.[38] If the possibility of parole was brought up, it constituted prejudicial error.[39] The correct response to any parole questions by the jury was to remind the jurors that it was of "no concern" to them.[40]

According to case law, a court has two grounds for denying the capital sentencing jury access to parole information: separation of functions and prejudice to the defendant.[41] First, an argument has been made that the judge should not make the jury aware of the defendant's parole options

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[33] *See* discussion *infra* Parts III-IV.

[34] *See* discussion *infra* Part I.

[35] *See* discussion *infra* Part II.

[36] *See* discussion *infra* Part III.

[37] *See* discussion *infra* Part IV.

[38] *See* Shipley, *supra* note 30, at 771.

[39] *See, e.g.*, Gaines v. Commonwealth, 46 S.W.2d 75, 78 (Ky. 1932); Commonwealth v. Carey, 82 A.2d 240, 243 (Pa. 1951); Porter v. State, 151 S.W.2d 171, 174 (Tenn. 1941).

[40] *See, e.g.*, Hinton v. Commonwealth, 247 S.E.2d 704, 706 (Va. 1978) (directing the trial judge to instruct jurors that "what might afterwards happen is of no concern to them"); Coward v. Commonwealth, 178 S.E. 797, 799-800 (Va. 1935), *overruled by* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000).

[41] *See* Metzger, *supra* note 16, at 168.

since the function of the jury in sentencing is separate from the functions of either a parole board or a governor in granting probations or pardons.[42] In *Porter v. State*,[43] the Supreme Court of Tennessee commented on the necessity of keeping executive matters out of the hands of the jury.[44] During the trial phase in *Porter*, the jury's question concerning the possibility of a pardon went unanswered.[45] The court held that the judge responded properly in saying, "The power to grant pardons is vested exclusively in the Governor, and the jury should not engage in speculations as to what he may or may not do with respect to those incarcerated in the penitentiary."[46] Taking the view that matters of pardon or parole are exclusively for executive determination and should not receive any weight in the judicial function of assessing punishment, courts have repeatedly held that the matter is not proper for the jury's consideration.[47]

The second rationale that has been used to argue that jurors should not have access to parole information regarding the defendant is that such information may cause the jury to become prejudiced against the defendant.[48] Courts have anticipated that jurors might decide on harsher sentences if they know that the defendant could be eligible for parole too soon. In *Commonwealth v. Crittenton*,[49] the prosecution speculated to the jury that at some future time the defendant might be paroled.[50] After the jury reached a verdict of death, Crittenton appealed, claiming that "remarks made by the prosecuting attorney . . . were prejudicial and prevented the

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[42] *See infra* notes 43-47 and accompanying text.

[43] *Porter*, 151 S.W.2d at 171.

[44] *Id.* at 174.

[45] *Id.*

[46] *Id.*

[47] *Id.*; *see also* Commonwealth v. Mills, 39 A.2d 572 (Pa. 1944) (holding that in order for the duties of the sentencing jury and the duties of the board of pardons to remain separate and distinct, the trial judge must not respond to the capital sentencing jury's inquiry regarding parole by informing the jury that the defendant could apply to the board for a commutation).

[48] *See infra* notes 49-61 and accompanying text.

[49] Commonwealth v. Crittenton, 191 A. 358 (Pa. 1937).

[50] *Id.* at 360 n.1. The appeal was based on the following statements from the prosecutor:

> And there have been cases where that has meant only 12 or 14 years and we all know it. Life imprisonment? Is there any such a thing under our system of parole? Under our present system of parole, how do we know in the future but that this man will be paroled at some future date?

Id.

jury from reaching a fair verdict."[51] The Pennsylvania Supreme Court examined fairness to the defendant as a controlling factor in weighing the appropriateness of comments regarding parole ineligibility.[52] In reversing the death sentence, the court noted, "[T]he district attorney should be extremely careful not to become a persecutor, nor to introduce unfair arguments tending to unbalance the jurors' minds or unduly influence their action."[53]

Many states have held that this error is reversible.[54] The court in *Houston v. Commonwealth*[55] reversed a death sentence because the trial court told the jury that a life sentence would not prevent the accused from being pardoned.[56] A death sentence was also overturned in *Williams v. State*.[57] In that case, upon inquiry by the jury as to whether a sentence for a term of years would mean that the accused would have to stay in prison the whole time, the trial judge answered that it would depend upon the good behavior of the defendant and the attitude of the parole board but that the jury has nothing to do with the issue of parole.[58] Five minutes later the jury returned a death sentence.[59] The Tennessee Supreme Court overturned the death sentence, saying that evidently the jury would have sentenced the defendant to prison time if it had thought that he would have to serve the full term.[60] The judge's proper response to the jury's question should have been simply that the instructions already given were sufficient, and the jury must not consider parole possibilities.[61]

Although this rule is still prevalent when there is a possibility of parole, many states have recognized a need to give the jury notice of a defendant's

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[51] *Id.* at 360.

[52] *Id.* at 361 ("[A prosecutor] must remember, as district attorney he is a quasi judicial officer and should conduct himself as such with dignity and fairness.").

[53] *Id.*

[54] These states include Colorado (*see, e.g.*, Sukle v. People, 111 P.2d 233 (Colo. 1941)); Georgia (*see, e.g.*, Thompson v. State, 47 S.E.2d 54 (Ga. 1948)); Kentucky (*see, e.g.*, Houston v. Commonwealth, 109 S.W.2d 45 (Ky. 1937)); Pennsylvania (*see, e.g.*, Commonwealth v. Johnson, 81 A.2d 569 (Pa. 1951)); Tennessee (*see, e.g.*, Williams v. State, 234 S.W.2d 993 (Tenn. 1950)); and Virginia (*see, e.g.*, Jones v. Commonwealth, 72 S.E.2d 693 (Va. 1952)).

[55] *Houston*, 109 S.W.2d at 45.

[56] *Id.* at 46.

[57] *Williams*, 234 S.W.2d at 993.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 994.

[61] *Id.*

ineligibility. In 1994, when *Simmons* was decided, twenty-six states used juries for capital sentencing and provided a life imprisonment without parole option as an alternative to the death penalty.[62] In seventeen of these states, the jury expressly received notice of the defendant's ineligibility for parole in one of two ways: nine states simply identified the jury sentencing alternatives as death and life without parole,[63] while eight states allowed the jury itself to specify whether the defendant would or would not be eligible for parole.[64] In three states, statutory or decisional law required that the sentencing jury be instructed if the defendant were ineligible for parole.[65] Three states—South Dakota, Florida, and Wyoming—had not considered the question of whether jurors should be instructed that the defendant was ineligible for parole under state law.[66]

According to the *Simmons* plurality opinion, two states besides South Carolina—Pennsylvania and Virginia—had a life without parole sentencing alternative in 1994 but refused to inform the juries of this fact.[67] In 1994, however, the United States Supreme Court, in *Simmons*, changed that by

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[62] *See* Simmons v. South Carolina, 512 U.S. 154, 167 n.7 (1994) (plurality opinion).

[63] *Id.*; *see* ALA. CODE § 13A-5-46(e) (1994); ARK. CODE ANN. § 5-4-603(a)-(c) (Michie 1997); CAL. PENAL CODE § 190.3 (West 1999); CONN. GEN. STAT. ANN. § 53a-46a(f), (g) (West Supp. 2001); DEL. CODE ANN. tit. 11, § 4209(a) (1995); LA. CODE CRIM. PROC. ANN. art. 905.6 (West 1997); MO. ANN. STAT. § 565.030.4 (West 1999); N.H. REV. STAT. ANN. § 630:5(VIII) (1996); WASH. REV. CODE § 10.95.030(1), (2) (2000).

[64] *Simmons*, 512 U.S. at 167 n.7 (plurality opinion); *see* GA. CODE ANN. § 17-10-31.1(a) (1997); IND. CODE ANN. § 35-50-2-9 (Michie 1998); MD. ANN. CODE art. 27, § 413(c)(3) (1996); NEV. REV. STAT. § 175.554(2)(c) (2000); OKLA. STAT. ANN. tit. 21, § 701.10(A) (West Supp. 2001); OR. REV. STAT. § 163.105 (1999); TENN. CODE ANN. § 39-13-204(a)-(f) (Supp. 2001); UTAH CODE ANN. § 76-3-207(4) (Supp. 2001).

[65] *Simmons*, 512 U.S. at 167 n.7 (plurality opinion); *see* COLO. REV. STAT. § 16-11-103(1)(b), (4)(k) (2001); People v. Gacho, 522 N.E.2d 1146, 1166 (Ill. 1988); Turner v. State, 573 So. 2d 657, 675 (Miss. 1990).

[66] *Simmons*, 512 U.S. at 167 n.7 (plurality opinion); *see* S.D. CODIFIED LAWS § 24-15 (Michie 1998). Florida and Wyoming have since enacted statutes that expressly give juries notice of the defendant's ineligibility by identifying the sentencing alternatives as death and life without parole. FLA. STAT. ANN. § 775.0823(1) (West Supp. 2002); WYO. STAT. ANN. §§ 6-2-101(b), 7-13-402(a) (Michie 2001).

[67] *Simmons*, 512 U.S. at 168 n.8 (plurality opinion); *see* Commonwealth v. Henry, 569 A.2d 929, 941 (Pa. 1990); Eaton v. Commonwealth, 397 S.E.2d 385, 392-93 (Va. 1990).

declaring that these states' procedures of denying juries information on the defendant's parole eligibility is unconstitutional when the prosecution argues the defendant's future dangerousness as an aggravating factor.[68]

II. A CLOSER LOOK AT *SIMMONS V. SOUTH CAROLINA*

Jonathan Dale Simmons was charged with brutally murdering Josie Lamb, an elderly woman, during the course of a robbery.[69] The week prior to his capital murder trial, Simmons pleaded guilty to first-degree burglary and two counts of criminal sexual conduct in connection with prior assaults on two other elderly women.[70] These guilty pleas meant that Simmons would be ineligible for parole if convicted of any subsequent violent offense.[71] After a three-day trial, a jury convicted Simmons of the murder of Josie Lamb.[72]

During the sentencing phase of the trial, prosecutors argued for a death verdict based on all of the evidence brought forth, including Simmons' future dangerousness.[73] The prosecution urged the jury that the death penalty would be "a response of society to someone who is a threat"[74] and stated that "[y]our verdict will be an act of self-defense."[75] When the jury asked the judge about the possibility of parole, the judge refused to give the obvious answer—that the defendant would be ineligible for any form of early release.[76] Instead, the judge stated, "You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning."[77] The jury subsequently sentenced the defendant to death.[78]

On appeal, the defendant claimed that the trial court's refusal to provide the jury with accurate information about his ineligibility for parole violated both the Cruel and Unusual Punishment Clause of the U.S.

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[68] *Simmons*, 512 U.S. at 168-69 (plurality opinion).
[69] *Id.* at 156.
[70] *Id.*
[71] *Id.*; *see* S.C. CODE ANN. § 24-21-640 (Law. Co-op. Supp. 2000).
[72] *Simmons*, 512 U.S. at 157 (plurality opinion).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 160.
[77] *Id.*
[78] *Id.*

Constitution's Eighth Amendment[79] and the Due Process Clause under the Fourteenth Amendment.[80] The South Carolina Supreme Court upheld the death sentence, holding that the trial court's instruction in response to the jury's inquiry satisfied in substance the defendant's request for a charge on parole eligibility.[81] The court stated that "a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole."[82] On certiorari, the United States Supreme Court reversed and remanded.[83] Although unable to agree on a single opinion, seven justices did agree that the trial judge's instruction violated due process.[84] Justice Blackmun, writing the plurality opinion for the Court, expressed the view that in a capital trial, where the defendant's future dangerousness is at issue and where state law prohibits the defendant's release on parole, the Fourteenth Amendment's Due Process Clause requires that the sentencing jury be informed that the defendant is ineligible for parole under state law.[85]

In Blackmun's opinion, he focused on Simmons' lack of opportunity to rebut the prosecution's argument concerning future dangerousness, writing:

> In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed.[86]

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[79] U.S. CONST. amend. VIII. Although the Eighth Amendment is intertwined with most capital sentencing litigation, this Note consciously avoids Eighth Amendment arguments in order to focus on the Due Process claims of the Fourteenth Amendment. Additionally, the *Simmons* plurality opinion was based purely on the violation of the Due Process Clause. *Simmons*, 512 U.S. at 154.

[80] U.S. CONST. amend. XIV, § 1; *Simmons*, 512 U.S. at 160-61 (plurality opinion).

[81] State v. Simmons, 427 S.E.2d 175 (S.C. 1993), *rev'd*, 512 U.S. 154 (1994) (plurality opinion).

[82] *Id.* at 179.

[83] *Simmons*, 512 U.S. at 154 (plurality opinion).

[84] *Id.* at 155.

[85] *Id.* at 169.

[86] *Id.* at 161-62.

Blackmun acknowledged that future dangerousness is a factor that can be argued when deciding between life sentences and death sentences.[87] However, the Court was also quick to point out that "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant."[88] Even if the defendant is ineligible for parole, the future dangerousness of the defendant can be a factor, but only in respect to the safety of other inmates or the prison staff.[89] The Court reasoned, "The Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole under state law."[90]

The Court recognized that most jurors do not know the true meaning of "life imprisonment" as state statutes define the term.[91] Any term (a life term or a term of years) "in practice [is] understood to be shorter than the stated term."[92] As pointed out in the dissent to the South Carolina Supreme Court case of *State v. Smith*, "the reality, known to 'the reasonable juror,' [is] that, historically, life-term defendants have been eligible for parole."[93] The instruction that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to ameliorate jurors' confusion.[94] "[I]f the jury in this case understood that the 'plain meaning' of 'life imprisonment' was life without parole in South Carolina, there would have been no

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[87] *Id.* at 162; *see also* Jurek v. Texas, 428 U.S. 262, 275 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose").

[88] *Simmons*, 512 U.S. at 163 (plurality opinion).

[89] *Id.* at 165 n.5.

[90] *Id.*

[91] *Id.* at 169.

[92] *Id.*

[93] State v. Smith, 381 S.E.2d 724, 728 (S.C. 1989) (Chandler, J., concurring in part and dissenting in part). Historically, between 1977 and 1986, any capital defendant sentenced to life imprisonment in South Carolina was ineligible for parole before serving at least twenty years. *See* Act of June 8, 1977, No. 177, § 1(A), 1977 S.C. Acts 407, *amended by* The Omnibus Criminal Justice Improvements Act of 1986, No. 462, § 27, 1986 S.C. Acts 2983 (codified as amended at S.C. CODE ANN. § 16-3-20 (A) (Law. Co-op. 1986)). Between 1948 and 1977, a defendant serving a life sentence for a capital crime was eligible for parole after serving only ten years. *See* Act of May 26, 1949, No. 199, § 2, 1949 S.C. Acts 313, *amended by* Act of June 8, 1977, § 1(A), 1977 S.C. Acts 407.

[94] *Simmons*, 512 U.S. at 170 (plurality opinion).

reason for the jury to inquire about petitioner's parole eligibility."[95] The instruction of "plain and ordinary" meaning may have misled the jury by suggesting that parole was available, but that the court wanted the jury unaware of that fact.[96] Thus, the instruction was held to be "confusing and frustrating to the jury."[97]

Justice Souter, joined by Justice Stevens, concurred with Justice Blackmun.[98] Souter believed that the trial court's decision in *Simmons* should be reversed regardless of whether future dangerousness is an issue at sentencing.[99] Rather than looking only at the Fourteenth Amendment as the plurality opinion did,[100] Souter declared that the Eighth Amendment[101] was violated when the trial judge refused to allow submission of the defendant's parole ineligibility status to the jury.[102] The Eighth Amendment imposes a heightened standard to ensure that death is the appropriate punishment.[103] Thus, it requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die. . . ."[104] Souter proposed that "whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning. . . ."[105]

In dissent, Justice Scalia, joined by Justice Thomas, made the following primary arguments: first, the language of the prosecutor should not have been taken as a future dangerousness argument, and second, the state should be able to decide whether certain evidence ought to be admissible.[106] The plurality opinion used two main statements from the prosecutor to show that the prosecution acted to mislead the jury.[107] The dissent saw the

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[95] *Id.* at 170 n.10.

[96] *Id.* at 170.

[97] *Id.*

[98] *Id.* at 172-74 (Souter, J., concurring).

[99] *Id.*

[100] *See supra* note 79.

[101] U.S. CONST. amend. VIII.

[102] *Simmons*, 512 U.S. at 172-73 (Souter, J., concurring).

[103] Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (explaining that the Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case").

[104] Gregg v. Georgia, 428 U.S. 153, 190 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

[105] *Simmons*, 512 U.S. at 172 (Souter, J., concurring).

[106] *Id.* at 180-85 (Scalia, J., dissenting).

[107] *Id.* at 181.

first statement, telling the jury to decide "what to do with [petitioner] now that he is in our midst," merely as a response to the mitigating evidence of his troubled background.[108] The second statement, "Your verdict will be an act of self defense," according to the dissent, is a reference to the defense of society in general against this individual.[109]

A state's right to set the sentencing procedures is only unlimited if the prosecution does not raise the future dangerousness argument.[110] Future dangerousness as an aggravating circumstance would necessarily implicate due process rights.[111] The flexibility of states to set sentencing procedures may not violate the defendant's constitutional due process rights.[112] This will be discussed at length in the following section.[113]

III. AFTER *SIMMONS*: TAKING A BROADER APPROACH BY INCLUDING ALL CAPITAL CASES

According to *California v. Ramos*,[114] "the wisdom of the decision to permit juror consideration of [post-sentencing contingencies] is best left to the States."[115] Although *Simmons* declared that the judge should disclose parole ineligibility to the jury if future dangerousness is argued, that decision was based on due process rights.[116] Therefore, while this is the minimum requirement, in the years following *Simmons* many states have taken it further.

A prime example of the evolution of *Simmons*' application to jury sentencing comes from Virginia.[117] Virginia originally required a jury to decide

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[108] *Id.* at 181-82.

[109] *Id.* at 182.

[110] If the prosecution does raise future dangerousness as an aggravating factor, then under the Due Process Clause of the Fourteenth Amendment, all states must allow the defendant to counter the prosecutor's argument with the defendant's ineligibility for parole. *Id.* at 171 (plurality opinion).

[111] *See id.* ("Because petitioner's future dangerousness was at issue, he was entitled to inform the jury of his parole ineligibility.").

[112] *See generally* California v. Ramos, 463 U.S. 992 (1983).

[113] *See* discussion *infra* Part III.

[114] *Ramos*, 463 U.S. at 992.

[115] *Id.* at 1014. The Court found that it is within the state's discretion to keep the Briggs Instruction, which requires courts to tell juries that the governor could commute life sentences but does allow the jury to know that there is a possibility that the governor will grant clemency for death sentences. *Id.* at 1013.

[116] *Simmons*, 512 U.S. at 171 (plurality opinion).

[117] *See* Hood, *supra* note 4.

between life sentences and death sentences without the benefit of information about the defendant's parole ineligibility.[118] This ended after *Simmons*, but only in cases where future dangerousness was argued.[119] In capital cases where the prosecution did not mention future dangerousness as an aggravating factor, the defendant was still denied full disclosure of his parole ineligibility status to the jury.[120] For instance, in *Cardwell v. Commonwealth*, the Supreme Court of Virginia held that *Simmons* did not apply.[121] It stated that "the jury fixed Cardwell's punishment at death based upon the 'vileness' predicate rather than upon the 'future dangerousness' predicate. Therefore, the issue of the applicability of *Simmons* may be moot."[122]

Virginia is also an interesting forum to study the admissibility of parole ineligibility in jury trials because of its abolition of parole for all felony offenders. The Virginia legislature enacted a statute saying that "[a]ny person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense."[123] With this statute in place, all felony offenders must serve the entirety of the term given to them.[124] It is likely that many jurors in Virginia are not aware of this statutory requirement, causing continued speculation about offenders receiving early release.[125] The progression of case law in Virginia shows how judges have used the reasoning stated in *Simmons* to expand parole information admissibility to all felony penalty proceedings.[126]

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[118] *See, e.g.*, Hinton v. Commonwealth, 247 S.E.2d 704 (Va. 1978); Jones v. Commonwealth, 72 S.E.2d 693 (Va. 1952); Coward v. Commonwealth, 178 S.E. 797 (Va. 1935), *overruled by* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000).

[119] *See* State v. Young, 459 S.E.2d 84, 87 (1995) (holding that *Simmons* is inapplicable where there is no issue regarding the defendant's future dangerousness).

[120] *See, e.g.*, Cardwell v. Commonwealth, 450 S.E.2d 146, 155 (Va. 1994).

[121] *Id.*

[122] *Id.*

[123] VA. CODE ANN. § 53.1-165.1 (Michie 1998).

[124] *See generally* Robert P. Crouch, Jr., *Uncertain Guideposts on the Road to Criminal Justice Reform: Parole Abolition and Truth-In-Sentencing*, 2 VA. J. SOC. POL'Y & L. 419 (1995).

[125] *See, e.g.*, Hartigan v. Commonwealth, 522 S.E.2d 406, 412 (Va. Ct. App. 1999), *adhered to en banc*, 531 S.E.2d 63 (Va. Ct. App. 2000) ("We believe it is highly likely that Hartigan's jury erroneously speculated on the continuing availability of parole.").

[126] *See, e.g.*, Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000); *Hartigan*, 522 S.E.2d at 406; Yarbrough v. Commonwealth, 519 S.E.2d 602 (Va. 1999).

A. Yarbrough v. Commonwealth

Five years after *Simmons*, in *Yarbrough v. Commonwealth*,[127] the Supreme Court of Virginia faced a similar issue to the one in *Cardwell*.[128] While robbing a small store, Yarbrough killed the owner of the store by cutting around his neck in a manner consistent with a beheading.[129] The prosecution argued "solely on the issue of whether the death penalty was warranted because Yarbrough's crime was 'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim,' commonly referred to as the 'vileness' aggravating factor."[130] The trial court refused to give an instruction to the jury on the defendant's ineligibility for parole[131] since the prosecution's argument did not implicate future dangerousness.[132] During its deliberation, the jury sent a question to the court asking for a definition of the term "life in prison," and specifically asking if parole would be offered after a specified number of years had been served.[133] The judge answered the jury, "[Y]ou must do what you feel is appropriate under the circumstances of this case and not concern yourselves with what might happen afterwards."[134] Subsequently, the jury sentenced Yarbrough to death.[135]

On appeal, the Supreme Court of Virginia looked at the underlying policy for the decisions made in *Coward*[136] and *Hinton*.[137] In sum, the underlying policy "is that the jury should not be permitted to speculate on the potential effect of parole, pardon, or an act of clemency on its sentence

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[127] *Yarbrough*, 519 S.E.2d at 602.

[128] Cardwell v. Commonwealth, 450 S.E.2d 146 (Va. 1994); *see also supra* notes 120-22 and accompanying text.

[129] *Yarbrough*, 519 S.E.2d at 604.

[130] *Id.* at 606.

[131] *Id.* at 612 n.7. Yarbrough was ineligible for parole based on VA. CODE ANN. § 53.1-165.1, which abolished parole for all felony offenses. *Id.*

[132] *Id.* at 606 ("The trial court refused Yarbrough's 'life means life' instruction, stating that it was not appropriate under the current state of the law in Virginia where the Commonwealth relies only on the vileness aggravating factor.").

[133] *Id.* at 607.

[134] *Id.*

[135] *Id.*

[136] Coward v. Commonwealth, 178 S.E. 797 (Va. 1935), *overruled by* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000) (holding that it is reversible error to tell the jury that the sentence it imposes can be reduced by another state entity).

[137] Hinton v. Commonwealth, 247 S.E.2d 704 (Va. 1978) (holding that the judge's emphasis on post-verdict procedures prejudiced the defendant).

because doing so would inevitably prejudice the jury in favor of a harsher sentence than the facts of the case might otherwise warrant."[138] This policy had been continually utilized in cases where the defendant would have been eligible for parole,[139] but the court recognized that *Yarbrough* was the converse situation.[140] If the jury is only deciding between the death penalty or a life sentence without the possibility of parole, the knowledge that a life sentence will not be reduced will have no prejudicial effect to the defendant.[141] If anything, such knowledge would achieve the opposite effect, benefitting the defendant.[142] The court reasoned that keeping the information from the jury is more harmful in this situation because of the possibility that the jury may speculate on the availability of parole.[143]

The court in *Yarbrough* ultimately concluded that jurors do speculate.[144] As support, the court looked at empirical research[145] and at the multitude of cases where juries asked questions concerning the possibility of parole when no information on that had been given to them.[146] The court also looked to evidence from the specific jury used in *Yarbrough*, stating that "[t]he real danger of this possibility [of the jury erroneously speculating on the availability of parole] is amply demonstrated by the jury's question in this case in which the jurors posited the hypothetical situation that Yarbrough might serve as few as twelve years of a life sentence."[147]

In response, the Supreme Court of Virginia carved out an exception to the *Coward* rule of not allowing the jury any parole eligibility informa-

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[138] *Yarbrough*, 519 S.E.2d at 615; *see also supra* notes 48-61 and accompanying text.

[139] *See, e.g.*, Stamper v. Commonwealth, 257 S.E.2d 808, 821 (Va. 1979); *Hinton*, 247 S.E.2d at 706; *Coward*, 178 S.E. at 797-99.

[140] *Yarbrough*, 519 S.E.2d at 615.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* at 616.

[145] *See* Simmons v. South Carolina, 512 U.S. 154, 170 n.9 (1994) (plurality opinion) ("Public opinion and juror surveys support the commonsense understanding that there is a reasonable likelihood of juror confusion about the meaning of the term 'life imprisonment.'").

[146] *Yarbrough*, 519 S.E.2d at 615-16 n.10 ("[T]he likelihood that the issue [of expanding the application of *Simmons*] will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court.'" (quoting Brown v. Texas, 522 U.S. 940, 943 (1997))).

[147] *Id.* at 616.

tion[148] and held that when a jury is deciding between a sentence of life without parole or death, the jury must be made aware of the defendant's ineligibility for parole.[149] The court stated, "[I]n the context of a capital murder trial a jury's knowledge of the lack of availability of parole is necessary to achieve the same policy goals articulated in *Coward* and *Hinton*."[150]

B. Hartigan v. Commonwealth

In *Hartigan v. Commonwealth*, the Court of Appeals of Virginia applied the rationale of *Yarbrough* to non-capital cases.[151] In that case, David Hartigan was convicted of grand larceny.[152] In the penalty phase of the trial, the defense counsel's request that the jury instruction include a statement that parole had been abolished was denied.[153] The appellate court held that the denial of this instruction was error warranting a reversal of the conviction.[154]

Also during the penalty phase of Hartigan's trial, the Commonwealth introduced evidence that Hartigan had previously been convicted of six felonies for which he had been eligible for parole.[155] The Commonwealth presented the jury with a list of convictions, the sentences imposed, and the actual terms served.[156] On three occasions, Hartigan was convicted of

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[148] Coward v. Commonwealth, 178 S.E. 797, 799 (Va. 1935), *overruled by* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000).

[149] *Yarbrough*, 519 S.E.2d at 616.

[150] *Id.*

[151] Hartigan v. Commonwealth, 522 S.E.2d 406, 411-12 (Va. Ct. App. 1999), *adhered to en banc*, 531 S.E.2d 63 (Va. Ct. App. 2000).

[152] *Id.* at 408.

[153] *Id.* at 411.

[154] *Id.* at 413.

[155] *Id.* at 412.

[156] *Id.*

> [T]he jury was presented with the following information: distributing a controlled drug, October 27, 1978, eight years in prison, all suspended; distribution of a controlled drug as an accommodation, December 7, 1979, two years in prison; distributing a controlled drug, January 25, 1980, eight years in prison with six years suspended; two counts of distributing a controlled drug, October 7, 1983, five years in prison with two years suspended on count I and five years in prison with three years suspended in count II; possession of a controlled drug, February 19, 1988, five years in prison; possession of a controlled drug, November 18, 1992, twelve months in jail.

another offense before he would have completed the sentence imposed on a previous conviction had he not been paroled.[157] The appellate court stated:

> The presentation of this information may have led the jury to believe that Hartigan would be eligible for parole and, as was the case with his previous convictions, would not serve the full sentence imposed. We believe it is highly likely that Hartigan's jury erroneously speculated on the continuing availability of parole.[158]

The court reasoned that even without direct language of parole eligibility, "[t]he obvious message to the jury was—over and over again, this man has served only a fraction of his actual sentence and you have the opportunity to ensure that this will not happen again by imposing a long sentence."[159]

The *Hartigan* court rejected *Coward*'s application to the current circumstances under the parole abolishment statutes.[160] Relying on *Yarbrough*,[161] the appellate court held that "when evidence of prior sentences may lead the jury to speculate that parole is still available to the defendant, a trial judge is required to instruct the jury that the defendant, if convicted, will be ineligible for parole."[162]

C. Fishback v. Commonwealth

In *Fishback v. Commonwealth*, Virginia's Supreme Court took the last step in allowing the jury to make decisions with full disclosure regarding parole possibilities.[163] Richard David Fishback was convicted of eight non-

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Id.

[157] *Id.*

[158] *Id.*

[159] *Id.* at 413.

[160] *Id.* at 411.

[161] *Id.* at 411-12 ("Although the Court limited its decision in *Yarbrough* to the effect of Code § 53.1-165.1 on sentencing in capital murder cases, it acknowledged that 'the limitations placed upon the availability of parole by Code § 53.1-40.01 and § 53.1-165.1 may call into question the continued viability of the *Coward* rule in a non-capital felony case, as where, for example, a defendant subject to a maximum term of years for a specific crime would serve that entire sentence before being eligible for geriatric parole.'" (quoting Yarbrough v. Commonwealth, 519 S.E.2d 602, 615 (1999))).

[162] *Id.* at 413.

[163] Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000).

capital felonies including one count of robbery, three counts of abduction, and four related firearm charges.[164] Although not eligible for parole, Fishback could eventually be eligible for geriatric release and could qualify for a reduction in sentence through good behavior credits.[165] The trial court applied the *Coward* rule.[166] On appeal to the Supreme Court of Virginia, the court held that Fishback was entitled to have the jury properly instructed as to the extent of the abolition of parole.[167] The court found that this was a logical extension of *Yarbrough*, even though it was not a capital case and the defendant was eligible for some type of sentence reduction.[168]

The court in *Fishback* recognized that "juries frequently have no comprehension of the current state of parole eligibility . . . but remain concerned that their sentencing decisions will be subjected to extensive reductions by executive action."[169] The problem in informing the jury of projected release dates is that they are difficult to predict. After a jury sentences the defendant, the length of jail time is highly dependent on the defendant's behavior. However, under Virginia's parole abolishment statute, the time given for a felony must be the time served.[170] It is under this specific statute that the Virginia Supreme Court in *Fishback* ruled that the defendant should be allowed to inform the jury of the statutory limitations and the abolition of parole.[171] With the statutory provisions in place, the jury must not be left to speculate about what might occur after the sentence is imposed.[172] The court reasoned that "because those statutory provisions represent a clear departure from the broad discretion given to the executive branch under the prior law with regard to early release and sentence reduction, we believe that strict adherence to the *Coward* rule is no longer appropriate."[173]

In keeping with national trends, the Virginia Supreme Court now recognizes a "truth in sentencing" goal.[174] Generally, "truth in sentencing"

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[164] *Id.* at 630.

[165] *Id.* at 632; *see also* VA. CODE ANN. § 53.1-40.01 (Michie Supp. 2001); VA. CODE ANN. § 53.1-165.1 (Michie 1998); VA. CODE ANN. § 53.1-202.2 (Michie 1998).

[166] *See Fishback*, 532 S.E.2d at 630.

[167] *Id.* at 635.

[168] *Id.* at 636.

[169] *Id.* at 632.

[170] *See* VA. CODE ANN. § 53.1-165.1.

[171] *Fishback*, 532 S.E.2d at 634.

[172] *Id.* at 633.

[173] *Id.*

[174] *Id.*; *see also* Symposium, *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN.

refers to the objective of requiring offenders to serve a substantial portion of their imposed prison sentences.[175] The impact of truth in sentencing on jury decisions is that juries have more control. They are able to look at the crime and know that the penalty imposed will be carried out. "[I]n the context of achieving the goal of 'truth in sentencing,' it simply defies reason that this information [of the defendant's parole ineligibility] ought not to be provided to the jury by an instruction of the trial court."[176]

IV. KENTUCKY AND THE "TRUTH IN SENTENCING" MOVEMENT

To date, the *Simmons* decision only directly affects the states where future dangerousness is an aggravating circumstance and where the decision between life imprisonment or the death penalty must be made absent any information about the defendant's possible parole ineligibility.[177] As stated earlier, the presence of these two factors only exists in Pennsylvania, Virginia, and South Carolina.[178] Even with such a limited scope of direct impact, the *Simmons* decision, and the subsequent extension of that reasoning seen in Virginia courts,[179] is part of a larger movement to put more information in the hands of the jury.[180] This movement is not limited to capital punishment cases but uses the same underlying philosophy that determines how much information juries should be given about the possibility of parole for all crimes.[181] Juries understandably desire a feeling of security and confidence that the punishment they choose is appropriate for the crime and will be substantially carried out. The Kentucky legislature joined this trend in 1986 when it enacted Kentucky Revised Statute ("K.R.S.") § 532.055, the "truth in sentencing" statute.[182]

L. & POL'Y REV. 75 (1999). "Truth in sentencing" is often associated with legislation that inhibits or abolishes the option of parole for certain convictions. For the purposes of this Note, the term "truth in sentencing" refers more to legislation which allows jurors to know decisively the term of years that the defendant will actually serve.

[175] Symposium, *supra* note 174, at 75.

[176] *Fishback*, 532 S.E.2d at 633.

[177] *See* discussion *supra* Part II.

[178] *See supra* notes 62-67 and accompanying text.

[179] *See* discussion *supra* Part III.

[180] *See, e.g.*, Crouch, *supra* note 124; Symposium, *supra* note 174.

[181] *See generally* Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury about Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232 (1995).

[182] KY. REV. STAT. ANN. [hereinafter K.R.S.] § 532.055 (Michie 1999).

K.R.S. § 532.055 is a procedural statute to be followed in the trial and sentencing of criminal felony defendants.[183] Under this statute, the jury is permitted to hear some evidence in the sentencing phase that would not be admissible in the guilt or innocence phase of the trial.[184] K.R.S. § 532.055(2)(a) authorizes the jury to have information regarding parole eligibility.[185] This includes information regarding minimum parole eligibility, as well as maximum expiration of a sentence for all current or prior offenses as determined by the division of probation and parole.[186]

Through K.R.S. § 532.055, the legislature mandated a radical change, abandoning a long line of cases holding that it is prejudicial error to inform the jury about the possibility of parole.[187] Traditionally, "the subject of parole is not to be given any consideration by [the jury] in determining innocence, guilt, or punishment."[188] Based on the same rationale as *Coward*,[189] Kentucky courts had reasoned that providing information about the possibility of parole might result in prejudice "by urging the jury to impose an excessive punishment in order to compensate for or protect against the action of the pardoning or paroling authority."[190]

The Kentucky truth in sentencing statute quickly fell under criticism from members of the Kentucky Supreme Court.[191] Although juries feel

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[183] *See id.*

[184] *See id.* For example, § 532.055(2)(a)(2) allows information regarding the nature of any prior offenses for which the defendant has been convicted in the sentencing proceeding even if such information would be disallowed in the trial phase.

[185] *See id.* § 532.055(2)(a).

[186] *See id.* § 532.055(2)(a)(1), (4).

[187] *E.g.*, Payne v. Commonwealth, 623 S.W.2d 867, 870 (Ky. 1981) ("The consideration of future consequences such as . . . parole have no place in the jury's finding of fact and may serve to distort it. For that reason we now hold that neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict at any time during a criminal trial."); Broyles v. Commonwealth, 267 S.W.2d 73 (Ky. 1954); Boyle v. Commonwealth, 694 S.W.2d 711 (Ky. Ct. App. 1985).

[188] *Boyle*, 694 S.W.2d at 712.

[189] Coward v. Commonwealth, 178 S.E. 797 (Va. 1935), *overruled by* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000).

[190] Commonwealth v. Reneer, 734 S.W.2d 794, 802 (Ky. 1987) (Leibson, J., dissenting) (quoting 16 A.L.R.3d 1137, 1141 (1967)).

[191] *Id.* at 796. The court stated:

> Because K.R.S. 532.055 is a legislative attempt to invade the rule making prerogative of the Supreme Court by legislatively prescribing rules of practice and procedure, it violates the separation of powers doctrine

entitled to know what will occur after they recommend a sentence, the reality that their decisions may be swayed by speculative parole possibilities when they do know that the defendant will be parole eligible is a deep concern for the courts.[192] In the present sentencing system, when a convicted offender is turned over to the department of corrections, the power to determine the period of incarceration passes completely to the parole board.[193] Therefore, conceivably, an offender could be released immediately after his sentence begins.[194] Thus, Kentucky courts are not only dealing with prejudicial effect towards the defendant but also with the jurors' conflicting and erroneous ideas of how and when parole is likely to occur. "The legal reasoning underlying our previous decisions holding such evidence [of parole eligibility] irrelevant, inflammatory, and prejudicially erroneous, is overturned without suitable explanation .... In its place we substitute a new approach based on half-truths and speculations."[195]

In *Huff v. Commonwealth*, the truth in sentencing statute was attacked on the basis of its constitutionality.[196] Besides arguing that it was a violation of the separation of powers, an argument that the court rejected in *Commonwealth v. Reneer*,[197] the defendant, Terry Lee Huff, argued specifically that allowing evidence of minimum parole eligibility into the penalty phase of the trial is unconstitutional based on due process, equal protection, and vagueness.[198] The court in *Huff* discussed the fact that a life sentence has a minimum eligibility for parole of twelve years, while an offender who has received a term of years has a minimum eligibility of fifty

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> enunciated in Section 28 of the Kentucky Constitution. Nevertheless, it has not been the policy of this court to nullify as a matter of course all legislation which infringes to some extent upon a proper function of the judiciary.

Id.

[192] *See id.* at 802 (Leibson, J., dissenting). *See generally* Amy Jo Harwood, Note, *"Comity" Revisited: The Continuing Struggle over Rulemaking Authority Between the Kentucky Supreme Court and General Assembly*, 86 KY. L.J. 437, 442-47 (1997) (discussing Justice Leibson's assertions in his dissent in *Reneer* that the truth in sentencing statute blatantly infringed on the judiciary's rulemaking authority and his other criticisms of the statute).

[193] *See* K.R.S. § 439.340 (Michie 1999).

[194] *See id.* § 532.060, cmt.

[195] *Reneer*, 734 S.W.2d at 802 (Leibson, J., dissenting).

[196] Huff v. Commonwealth, 763 S.W.2d 106 (Ky. 1988).

[197] *Reneer*, 734 S.W.2d at 796.

[198] *See Huff*, 763 S.W.2d at 107.

percent of the sentence imposed.[199] Therefore, the defendant who receives a life sentence could be parole eligible before the defendant who receives a sentence of twenty-five years or more.[200] This may give a jury a false impression about the actual length that most offenders serve.

In *Huff*, Kentucky again affirmed the constitutionality of K.R.S. § 532.055.[201] Regarding the benefits of the truth in sentencing statute, the court quoted *Gregg v. Georgia*:[202] "We think it [desirable] for the jury to have as much information before it as possible when it makes the sentencing decision."[203] The court also looked to *California v. Ramos*:[204] "[T]he court at the sentencing [stage] shall inform the jury of the nature of the sentence of imprisonment that may be imposed, *including its implication with respect to possible release upon parole. . . .*"[205]

Kentucky has recognized that the effect that parole eligibility may have on a jury could substantially alter the decision between life imprisonment and the death sentence.[206] To overcome this severe prejudice to the defendant, the capital penalty sentencing phase under K.R.S. § 532.025[207] is conducted before the truth in sentencing hearing.[208] In the capital penalty sentencing phase, the jury hears evidence of aggravating and mitigating circumstances, including the prior record of the defendant.[209] The jury also hears arguments from both the prosecutor and the defendant regarding the punishment each urges the jury to impose.[210] At this point in the proceedings, no evidence concerning the defendant's parole eligibility or ineligibil-

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[199] *Id.* at 107-08.

[200] *Id.* at 108.

[201] *Id.*

[202] Gregg v. Georgia, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

[203] *Huff*, 763 S.W.2d at 107 (quoting *Gregg*, 428 U.S. at 204).

[204] California v. Ramos, 463 U.S. 992 (1983).

[205] *Huff*, 763 S.W.2d at 107 (quoting *Ramos*, 463 U.S. at 1009 n.23) (alteration in original).

[206] *See, e.g.*, Francis v. Commonwealth, 752 S.W.2d 309, 311 (Ky. 1988) (stating that even in a death penalty case, it is not improper to give the jury accurate information of which both the defendant and counsel are aware).

[207] *See* K.R.S. § 532.025 (Michie Supp. 2001) (instructing capital penalty sentencing).

[208] *See Francis*, 752 S.W.2d at 311 (holding that "in any case in which the death penalty phase is sought, the capital penalty sentencing phase pursuant to KRS 532.025 should be conducted before the truth-in-sentencing hearing under KRS 532.055(2) . . . .").

[209] *See* K.R.S. § 532.025(1)(b).

[210] *See id.*

ity[211] can be admitted.[212] If evidence is introduced, then it is grounds for reversal and re-sentencing.[213]

This situation occurred in *Perdue v. Commonwealth*. A jury convicted Tommy Perdue of complicity to commit arson, for which he was given a life sentence, and complicity to commit murder, for which he was sentenced to death.[214] The murder conviction was based on the fact that he had arranged for the victim's murder in exchange for money.[215] The Commonwealth, during the closing statement of the penalty phase, stated:

> [A]ny penalty that you impose on this man, whether it be 20 years, 50 years, 100 years, or life, he is going to be eligible for parole in 12 years.... The time has come for this man to get the death penalty. If you give him anything less, he is going to be out on the street. . . .; 20 years, he is eligible for parole in four years.... 39 years, he is eligible for parole in seven years and 10 months.[216]

The Supreme Court of Kentucky responded strongly to the error in the penalty phase, stating:

> [U]nder KRS 532.025, when the death penalty is sought, evidence of minimum parole eligibility guidelines may not be introduced at all .... this error is too great to overlook. It may well be that the jury considered sentencing appellant to a term of years, but felt that only a death sentence would keep him off the street.[217]

The court held that combining the death penalty sentencing phase and the truth in sentencing hearing is prejudicial to the offender and constitutes

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[211] *See id.* § 532.025(2)(a) (since Kentucky does not use "future dangerousness" as an aggravating circumstance, *Simmons* is inapplicable).

[212] *See* Perdue v. Commonwealth, 916 S.W.2d 148, 163 (Ky. 1995) (when death penalty is sought, evidence of minimum parole eligibility guidelines may not be introduced at all); *see also* Matthews v. Commonwealth, 709 S.W.2d 414, 422 (Ky. 1985) (when the jury sent a note to the judge asking questions about parole in a life sentence, the court correctly instructed the jury that these were "questions which the court cannot instruct you upon").

[213] *Perdue*, 916 S.W.2d at 163.

[214] *Id.* at 153.

[215] *Id.*

[216] *Id.* at 163.

[217] *Id.*

reversible error.[218] The court stated that "[u]nder no circumstances should parole eligibility enter into death penalty deliberations."[219]

After death penalty deliberations, the jury must recommend either a life or death sentence.[220] In Kentucky, the jury's decision is only a recommendation to the trial judge.[221] Although prosecutors cannot in any way diminish the responsibility of the jury or the importance of its decision,[222] the conclusive determination is left up to the trial judge.[223] After the recommendation, the truth in sentencing statute comes into play and the minimum and maximum actual sentences are fully disclosed to the trial judge.[224] By mandating that K.R.S. § 532.055 come into play after the jury's recommendation, the court has attempted to find middle ground between complete disclosure and separation of parole information from sentencing decisions.[225] The judge is able to see the parole options of the defendant and then determine if the jury's recommendation was made fairly.

V. PROPOSED SOLUTIONS

Jurors in death penalty cases are compelled to make a decision of unequaled magnitude: whether a defendant will live or die. The goal for all states should be to find an approach for determining which information should be admitted so that capital jurors can be confident in their decisions and not prejudice the defendant. Although *Simmons* allows defendants to

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[218] *Id.* at 170.

[219] *Id.* at 164.

[220] *See* K.R.S. § 532.025(1)(b) (Michie Supp. 2001).

[221] *See id.*

[222] *See* Ward v. Commonwealth, 695 S.W.2d 404, 407 (Ky. 1985) (where the prosecutor clearly sought to divert from the minds of the jurors their true responsibility by implying that the ultimate responsibility of fixing the death penalty would fall on the trial judge, it was clearly reversible error).

[223] *See* Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980), *overruled by* Payne v. Commonwealth, 623 S.W.2d 867 (Ky. 1981) (the jury's function with regard to the ultimate sentence is limited, and its recommendation carries great weight but is not binding on the trial judge).

[224] *See* K.R.S. § 532.055; Francis v. Commonwealth, 752 S.W.2d 309, 311 (Ky. 1988).

[225] *Compare* Coward v. Commonwealth, 178 S.E. 797, 799-800 (Va. 1935), *overruled by* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000) (keeping parole out of consideration of the jury), *and supra* Part I, *with Fishback*, 532 S.E.2d at 635 (allowing the jury to consider parole when deciding sentencing), *and supra* Part III.C.

counter the state's argument in the limited context where future dangerousness is argued as an aggravating factor, the decision is silent as to all other death penalty decisions.[226] This leaves the states to determine the best method of reducing jurors' misconceptions while preventing prejudice.

A. Separating Sentencing Proceedings

Separating proceedings in capital penalty sentencing, as Kentucky has done in K.R.S. § 532.055 and § 532.025, is one attempt to find a balance between allowing information of the defendant's parole options in, while keeping the jury from being unduly harsh as a result of hearing about the possibilities of parole.[227] Jurors are first able to decide innocence and guilt based purely on the factual situation.[228] After the initial decision of guilt of a capital offense, the jury proceeds to the capital penalty sentencing phase under K.R.S. §532.025, in which aggravating and mitigating circumstances may be weighed.[229] The jury then makes a sentencing recommendation to the judge.[230] The judge can either follow the recommendation or make her own decision regarding whether the defendant should be sentenced to death.[231] At this point during the capital penalty sentencing proceeding, no information regarding the defendant's eligibility or ineligibility for parole is presented to either the jury or the judge.[232]

Once the capital penalty sentencing phase is completed, the truth in sentencing phase, pursuant to K.R.S. § 532.055, begins.[233] Any evidence relating to minimum parole eligibility and the maximum expiration of the sentence may come before the judge.[234] The judge is then able to modify the penalty if she believes that the sentence is unfair.[235]

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[226] Simmons v. South Carolina, 512 U.S. 154 (1994) (plurality opinion).

[227] *See* discussion *supra* Part IV.

[228] *See* K.R.S. § 532.055(1). *See also* discussion *supra* Part IV.

[229] K.R.S. § 532.025(1)(b).

[230] *Id.*

[231] *See id.*

[232] *See id.* § 532.025(2).

[233] *See* Francis v. Commonwealth, 752 S.W.2d 309, 311 (Ky. 1988) (holding that in any case in which the death penalty is sought, the capital penalty sentencing phase pursuant to K.R.S. § 532.025 should be conducted before the truth in sentencing hearing under K.R.S. § 532.055(2)).

[234] K.R.S. § 532.055(2)(a).

[235] Although the judge's responsibilities after going through the truth in sentencing procedure in a capital case are unclear, the implication is that the decision made in the capital penalty sentencing phase may be changed if the judge believes

This is not a flawless solution. Juries still do not get parole information and may not feel confident about the parole system. This may lead to excessively harsh results. The hope is that judges will realize the attitude that the jury holds and, upon seeing accurate parole information, mitigate to a more reasonable decision. On the other hand, judges may be harsh when hearing of early parole dates and thus reject any lighter sentences that the jury may recommend. Though not perfect, allowing for separate proceedings in sentencing at least attempts to provide some check on fallible decisions.

B. *Instructions to the Jury*

States may also find a solution in allowing instructive and meaningful responses by the judge when the jury asks questions concerning the defendant's possibility of parole.[236] The United States Supreme Court made it clear in *Simmons* that giving the instruction that the terms "life imprisonment" and "death penalty" should be understood "in their plain and ordinary meaning" is "confusing and frustrating to the jury."[237] However, the Court did not instruct states as to what would constitute a proper instruction.[238]

States may fall back on the *Coward* rule by stating to the jury that under no circumstances should parole be a consideration in sentencing.[239] Although appropriate if taken literally by perfect, mechanical juries, in practice, this instruction has been faulty.[240] The lack of a substantive answer to questions regarding parole has been shown to lead jurors to believe that the defendant will likely be released and not serve his full term.[241] The instruction to ignore a belief that the defendant may be paroled, a belief that is integrated in the jurors' decisionmaking process,[242]

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that such a change is warranted by the new evidence disclosed pursuant to K.R.S. § 532.055(2).

[236] *See* Paduano & Smith, *supra* note 5, at 249-52.

[237] Simmons v. South Carolina, 512 U.S. 154, 170 (1994) (plurality opinion); *see* discussion *supra* Part II.

[238] *Simmons,* 512 U.S. at 154 (plurality opinion).

[239] Coward v. Commonwealth, 178 S.E. 797 (Va. 1935), *overruled by* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000).

[240] *See generally* discussion *supra* Part III.

[241] *See* discussion *supra* Part I.

[242] *See* Hughes, *supra* note 29, app. at tbl. 3.

is arguably legal fiction.[243] The probability that a jury will be able to truly disregard this in its determination is low.[244]

Another possible instruction is to tell the jury that life means "until the death of the defendant." This instruction was used by some South Carolina courts after *Simmons* was decided.[245] Despite being the literal meaning, the United States Supreme Court held that even this instruction is not explicit enough and thus violates due process.[246] In *Shafer v. South Carolina*, the Supreme Court reiterated *Simmons*' holding that the court was required to clarify the parole ineligibility of the defendant even after the jury heard that "life imprisonment means until the death of the defendant" and that the defendant will " 'die in prison' after 'spend[ing] his natural life there.' "[247] Because of human nature, even this instruction poses some risk that the jury will speculate wrongly and without guidance as to parole.[248]

Lastly, the state may allow the judge to fully disclose the possibility of parole to the jury, insofar as the facts of this can be ascertained.[249] This instruction has the advantage of presenting the jury with full disclosure of the possibilities for parole which will allow the jury to make an educated decision. However, there is still a disadvantage in cases in which the defendant is parole eligible because the instructions could be prejudicial.[250] Jurors may assume that the defendant will be paroled at the first date of his eligibility, an assumption that is untrue for virtually ninety-nine percent of life-sentenced inmates.[251]

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[243] *See* Paduano & Smith, *supra* note 5, at 250.

[244] *E.g.*, Bruton v. United States, 391 U.S. 123, 135-36 (1968). The Court held that an instruction given to the jury to consider a confession only against the co-defendant who made it was inadequate. "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.*

[245] *See* Shafer v. South Carolina, 532 U.S. 36, 44 (2001).

[246] *Id.* at 54.

[247] *Id.* at 52.

[248] *See id.* at 53-54. Even with such instruction, the jury sought clarification, asking, "Is there any remote chance for someone convicted of murder to become el[i]gible for parole?" The trial court may have been misleading in responding that "[p]arole eligibility or ineligibility is not for your consideration." *Id.* at 53.

[249] *See id.* at 54.

[250] *See* discussion *supra* Part I.

[251] *See* Paduano & Smith, *supra* note 5, at 228-29 n.53 (citing Georgia State Board of Pardons and Paroles Annual Report: Fiscal Year 1985 (only one percent—twelve out of 949—of all life-sentenced inmates released upon their first

C. Evidence

Presenting relevant evidence about parole is a critical means of allowing information to reach the jury.[252] Evidence on parole can reach the jury through the court taking judicial notice of statutes restricting parole eligibility.[253] Any statute that is judicially noticed may be argued and included in instructions to the jury.[254] Another method is to permit the defendant to present parole restrictions and predictions as mitigating evidence during the case.[255] This would also include evidence showing the likelihood of the parole board granting release.[256]

Once evidence of parole is admitted at the sentencing phase, both the prosecution and the defendant can use the evidence to their best advantage. In trials where the defendant is parole ineligible, this arguably will prevent the jury from acting in fear and pushing the death penalty.[257] In trials where the defendant is eligible for parole, the defendant can present evidence of the most probable release date, which often is later than the first date of parole eligibility.[258] The benefit of admitting parole eligibility evidence is that the jury gets all of the information without preventing the prosecutor or defendant from putting on experts or bringing in other information that enables them both to put on the best case possible.

CONCLUSION

Juries are influenced and susceptible to fears and distrust of the sentencing process. Therefore, the search for an approach where jurors can be confident of their decisions without prejudice to the defendant must continue. States continue to make progress by recognizing that this is an important issue and by attempting to implement procedures that act to decrease the speculation of the jury.[259] At the same time, state legislatures

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application for parole)).

[252] *Id.* at 254-55.

[253] *Id.* at 255.

[254] FED. R. EVID. 201.

[255] Paduano & Smith, *supra* note 5, at 255.

[256] *See id.* at 255 n.155. The actions taken at a parole hearing, although not absolute, are predictable since it is subject to objective criteria. *Id.*

[257] *See generally* discussion *supra* Part III.A.

[258] *See supra* note 251 and accompanying text.

[259] *See, e.g.*, discussion *supra* Part III (explaining how Virginia's law has evolved as an attempt to allow the jurors to make decisions fully informed of the parole consequences to the defendant); discussion *supra* Part IV (examining Kentucky's bifurcated penalty proceedings).

have continued to implement statutes that give the defendant a sentence that he is more likely to serve.[260] This is progress because it will work to change the stereotypes jurors may have of the parole system. With both the attitudes of the jurors and the policy of the courts changing, we continue to get closer to a solution that allows jurors to be informed in capital sentencing proceedings without subjecting the defendant to injustice.

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[260] *See* Symposium, *supra* note 174, at 80 tbl. 1 (showing which states have received grant money for implementation of truth in sentencing legislation that will focus on imposing longer and more determinate sentences).