UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 81 | Number 3 Article 11

3-1-2003

Kelly v. South Carolina: When Parole Eligibility is a Matter of Life and Death

Kristie Ellison Shufelt

Kelly v. South Carolina: When Parole Eligibility Is a Matter of Life and Death

Imagine you are sitting on a jury in a death penalty case. You have found the defendant guilty and are now trying to determine an appropriate punishment. The prosecutor indicated that the defendant is a very dangerous person. He even told you that he hopes you never end up only a few feet away from this person again. You are not entirely sure that you want to see the defendant die, but you could not live with yourself knowing this person could walk the streets again. It is important to you to be assured that, if you choose life imprisonment, this person will not be released on parole—ever. Unfortunately, as a juror in South Carolina, you have been told that parole is not an issue with which you should be concerned.[1] But you are concerned. The good news for you (and the defendant) is that the United States Supreme Court has heard South Carolina's argument against informing jurors of a defendant's parole ineligibility, and it disagreed with this argument, not once, but three times.[2] For the third time in eight years, the U.S. Supreme Court has struck down the South Carolina Supreme Court.[3] The Court's message is loud and clear: If there has been any indication that a defendant presents a future danger to the public and a jury's only sentencing alternative to the death penalty is life imprisonment without the possibility of parole, a defendant's constitutional due process rights require that the jury be given an instruction regarding the defendant's ineligibility for parole.[4]

Kelly v. South Carolina is the Supreme Court's most recent decision holding that when a defendant's future dangerousness is at

---

1. *See* Shafer v. South Carolina, 121 S. Ct. 1263, 1270 (2001) (stating that the judge instructed the jury that "[p]arole eligibility or ineligibility is not for your consideration"); Simmons v. South Carolina, 512 U.S. 154, 160 (1994) (plurality opinion) (stating that the judge told the jury, "[y]ou are instructed not to consider parole or parole eligibility in reaching your verdict").

2. *See* Kelly v. South Carolina, 122 S. Ct. 726, 728–29 (2002); *Shafer*, 121 S. Ct. at 1267; *Simmons*, 512 U.S. at 156.

3. *See Kelly*, 122 S. Ct. at 734; *Shafer*, 121 S. Ct. at 1275; *Simmons*, 512 U.S. at 171.

4. *See Kelly*, 122 S. Ct. at 728–29. The Fourteenth Amendment states that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Supreme Court has held that a State denies a defendant due process by securing a death sentence based in part on the defendant's future dangerousness, while failing to inform the jury that its only alternative to a death sentence is life without the possibility of parole. *Simmons*, 512 U.S. at 162.

issue, he is entitled to a jury instruction on parole ineligibility.[5] This Recent Development will examine *Kelly* and its two predecessors[6] to analyze why the South Carolina Supreme Court thought *Kelly* was distinguishable from the U.S. Supreme Court's two earlier decisions and why the U.S. Supreme Court determined that it is not. Further, and perhaps more importantly, this examination of *Kelly* considers the concerns of the dissenters, including two new dissenters who were part of the majority's two earlier decisions against South Carolina.[7] Based on this examination, this Recent Development concludes that the extremely broad interpretation of future dangerousness has created a "back door" out of the requirement that the prosecution specifically state that the defendant will be dangerous in the future.[8] Finally, this Recent Development demonstrates why, as a practical matter, the requested instruction regarding parole ineligibility actually makes a difference.[9] The *Kelly* decision took an important step in ensuring fairness to capital defendants by guaranteeing that nearly every capital defendant will get a jury instruction on parole ineligibility. This Recent Development argues that the next step will be to do away with the future dangerousness requirement altogether.

An analysis of the *Kelly* decision begins with a look at the cases that set the stage for the Court's decision. *Gardner v. Florida*[10] establishes the foundation for the Supreme Court's decisions regarding jury instructions and disclosure of parole ineligibility. In *Gardner*, the judge sentenced the defendant to death and based his

5. The idea underlying the future dangerousness requirement is that parole eligibility only matters if the jury believes the defendant will continue to pose a threat to society when he is released from prison. *See Simmons*, 512 U.S. at 163–64. If the prosecution tries to encourage the jury to vote for death by making it believe that the defendant will be dangerous in the future, the defendant has the right to demonstrate that he will not be a danger to the public because he will never be released from prison. *See id.* at 161–62.

6. *Shafer*, 121 S. Ct. 1263; *Simmons*, 512 U.S. 154.

7. In *Kelly*, Chief Justice Rehnquist filed a dissenting opinion in which Justice Kennedy joined. 122 S. Ct. at 734 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist and Justice Kennedy had joined Justice Ginsburg's majority opinion in *Shafer*, 121 S. Ct. at 1266, and Justice O'Connor's opinion concurring in the judgment in *Simmons*. *Simmons*, 512 U.S. at 175 (O'Connor, J., concurring in the judgment).

8. *See infra* notes 90–92 and accompanying text (discussing how defendants can use the broad holding as a way around the requirement that the prosecution present evidence of a defendant's future dangerousness); *see also infra* note 77 and accompanying text (discussing how under *Kelly* only the implication of future dangerousness is required to get the jury instruction on parole ineligibility).

9. For instance, if it makes no difference to a jury whether or not the defendant will ever be eligible for parole, the logical conclusion would be that the instruction makes no difference as well. This Recent Development will show that parole ineligibility does matter to the jury. *See infra* notes 93–98 and accompanying text.

10. 430 U.S. 349 (1977) (plurality opinion).

decision in part on an investigation report that was not made available to the defense.[11] The U.S. Supreme Court found that this omission violated the defendant's constitutional right to due process.[12] Although *Gardner* involved a specific act of withholding confidential information from the defense by the prosecution, the Court does not indicate that an intentional act was necessary for the finding of a due process violation.[13] The *Gardner* plurality first noted two important ideas previously established by the U.S. Supreme Court. First, "death is a different kind of punishment from any other which may be imposed in this country . . . both [in] its severity and its finality."[14] Second, the sentencing process must satisfy the requirements of the Due Process Clause.[15] Based on these two principles, the Court concluded that because the defendant received a death sentence based in part on information that he had no opportunity to explain or deny, he was denied due process of law.[16] The Court later relies on this conclusion when deciding the cases on jury instructions regarding parole ineligibility.

The U.S. Supreme Court first overturned a South Carolina decision not to inform the jury of a defendant's ineligibility for parole in the capital case of *Simmons v. South Carolina*.[17] Four justices[18] held that when the prosecution puts a defendant's future dangerousness at issue and the defendant is ineligible for parole, the defendant has a constitutional right to have the jury informed that he will never be released on parole.[19] The plurality decided that because the jury was not instructed on the issue of parole and the defendant's

11. *Id.* at 351.

12. *Id.*

13. *See id.* at 353. The Court did not base its decision on any suggestion of prosecutorial misconduct caused by the intentional act of withholding information, but rather on the idea that the death sentence was imposed based on information that the defendant had no opportunity to explain or deny. *See id.* at 362. The Court did not state that the intentional act was essential or even relevant to the decision.

14. *Id.* at 357 (citations omitted).

15. *Id.* at 358.

16. *Id.* at 362.

17. 512 U.S. 154 (1994) (plurality opinion).

18. Justice Blackmun announced the judgment of the Court and delivered an opinion, which was joined by Justices Stevens, Souter, and Ginsburg. *Id.* at 156. Justice O'Connor filed an opinion concurring in the judgment in which Chief Justice Rehnquist and Justice Kennedy joined. *Id.* at 175 (O'Connor, J., concurring in the judgment).

19. *Id.* at 156. "At issue" means that the prosecution has made the idea of future dangerousness an issue in the case by suggesting to the jury that the defendant will be dangerous in the future. Kelly v. South Carolina, 122 S. Ct. 726, 731 (2002). The Court held in *Kelly* that future dangerousness could be at issue even if it is only implied. *See infra* notes 66–69 and accompanying text.

future dangerousness was at issue, the defendant had been denied due process as guaranteed by the Fourteenth Amendment.[20]

The defendant in *Simmons* was convicted of the gruesome murder of an elderly woman.[21] During the sentencing phase, the prosecution argued the defendant's future dangerousness to the jury by referring to the defendant as being "in our midst" and telling the jury that their verdict in favor of a death sentence would be "an act of self-defense."[22] The defendant requested that the trial judge give specific instructions to the jury about the meaning of "life imprisonment" and the defendant's ineligibility for parole.[23] The judge refused and instead instructed the jury that the terms "life imprisonment" and "death sentence" should be given their ordinary meaning.[24] The situation was further complicated when the jury sent the judge a note during deliberations inquiring about the possibility of parole, and the judge responded that parole was not for their consideration.[25] On appeal, the South Carolina Supreme Court held that even if an instruction about a defendant's parole ineligibility was required, the instruction in this case was sufficient.[26]

---

20. *Simmons*, 512 U.S. at 162; *see also* U.S. CONST. amend. XIV, § 1 (requiring states to provide due process of law when depriving individuals of life, liberty, or property); *supra* note 4 and accompanying text (discussing the Fourteenth Amendment further).

21. *Simmons*, 512 U.S. at 156. The defendant had also pled guilty to assaulting two other elderly women, and, under South Carolina law, these convictions made him conclusively ineligible for parole if he were sentenced to life imprisonment for the murder. *Id.*; *see also* S.C. CODE ANN. § 24-21-640 (Law. Co-op. 2002) (stating that parole is not authorized for any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes).

22. *Simmons*, 512 U.S. at 157. The dissent argued that these comments were taken out of context and were not actually referring to the defendant's future dangerousness. *Id.* at 182 (Scalia, J., dissenting). Other evidence, however, exists to support the idea that future dangerousness was at issue, including prosecution witnesses who testified that the defendant "posed a continuing danger to elderly women." *Id.* at 157. For a discussion of decisions in which the Court seemed unconcerned by the fact that a defendant's future dangerousness was not specifically mentioned, see *infra* notes 66–69, 90–92 and accompanying text.

23. *Simmons*, 512 U.S. at 158–60.

24. *Id.* at 160.

25. *Id.* The plurality opinion was concerned that the judge's answer may have actually misled the jury into believing "parole *was* available but that the jury, for some unstated reason, should be blind to this fact." *Id.* at 170.

26. State v. Simmons, 427 S.E.2d 175, 179 (S.C. 1993). The judge told the jury that if it sentenced the defendant to life imprisonment, "he actually will be *sentenced* to imprisonment in the state penitentiary for the balance of his natural life." *Simmons*, 512 U.S. at 160 (emphasis added). Notably, by stating that the defendant will be *sentenced* for life, the judge gave no indication as to how long the defendant would actually *remain* in prison. Juries are made up of average people, and most people simply do not believe that a sentence of life imprisonment actually means that the defendant will never be released from prison. *See infra* note 36. In fact, one commentator notes that recent research

Quoting *Gardner*, a plurality of the U.S. Supreme Court noted that the "Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' "[27] The Court decided that the trial judge's refusal to instruct the jury on the parole issue after the prosecution had put the defendant's future dangerousness at issue, in essence, denied the defendant the ability to refute or explain his future dangerousness.[28] South Carolina argued that an instruction regarding the ineligibility of parole is misleading because it fails to take into account possibilities, such as legislative reform or clemency, that could also result in the release of the defendant.[29] The plurality found this argument unpersuasive, however, noting that an instruction informing the jury of the defendant's ineligibility for parole is legally accurate and that a majority of states that provide life imprisonment without the possibility of parole allow for this instruction.[30] The Court thus held that the defendant's right to due process was violated and remanded the case.[31]

---

indicates that "most Americans believe convicted murderers spend only about 7 years in prison—unless they are sentenced to death." H. A. Bedau, *Prison Homicides, Recidivist Murder, and Life Imprisonment, in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 176, 181 (Hugo Adam Bedau ed., 1997); *see also infra* note 36 (discussing studies indicating that people do not believe life imprisonment means the defendant will never get out of prison).

27. *Simmons*, 512 U.S. at 161 (quoting Gardner v. Florida, 430 U.S. 349, 362 (1977)).

28. *Id.* at 162 ("The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, that life imprisonment meant life without parole."). Due process requires that a defendant be given the opportunity to explain or deny any accusations made by the State. *See* Gardner v. Florida, 430 U.S. 349, 362 (1977). Therefore, the defendant must be given the chance to explain or deny his future dangerousness by informing the jury that he will not be released into society. *Simmons*, 512 U.S. at 165, 169.

29. *Simmons*, 512 U.S. at 166.

30. *Id.* at 166–67. The plurality noted, "At present there are 26 States that both employ juries in capital sentencing and provide for life imprisonment without parole as an alternative to capital punishment. In 17 of these, the jury expressly is informed of the defendant's ineligibility for parole." *Id.* at 167 n.7. The plurality also noted that the State is still allowed to argue that the defendant will continue to pose a danger to others in prison as a reason to execute him. *Id.* at 165 n.5.

31. *Id.* at 171. Justice O'Connor's concurrence in the judgment, joined by Chief Justice Rehnquist and Justice Kennedy, allowed for the reversal by a vote of seven to two. *Id.* at 175 (O'Connor, J., concurring in the judgment). The separate opinion indicated that either the trial judge or the defense counsel could inform the jury of the defendant's ineligibility for parole. *Id.* at 177 (O'Connor, J., concurring in the judgment). Justice O'Connor also stated that the instruction was not constitutionally required if the defendant's future dangerousness was not at issue. *Id.* at 176 (O'Connor, J., concurring in the judgment).

The *Simmons* dissenters accepted that the parole instruction was reasonable, but did not find it to be constitutionally required.[32] They argued that decisions about jury instructions should be left to the states, pointing to the various state sentencing structures.[33] Many of these sentencing structures do not require an instruction on parole, and some allow the jury to decide whether the defendant should ever be eligible for parole.[34] The dissent attempted to illustrate that a national consensus on the issue did not exist.[35] The term "life imprisonment," however, is ambiguous in the parole context because people have different ideas about whether the term includes parole, and a jury should be fully informed about the consequences of its decision.[36] The dissent admitted that many of the states that do not

32. *Id.* at 185 (Scalia, J., dissenting). Justice Scalia expressed concern that there is no need to interfere with the states' sentencing schemes. *Id.* (Scalia, J., dissenting) ("I fear we have read today the first page of a whole new chapter in the 'death-is-different' jurisprudence which this Court is in the apparently continuous process of composing.").

33. *Id.* at 183 (Scalia, J., dissenting) (citing California v. Ramos, 463 U.S. 992 (1983)).

34. *Id.* at 179–80 (Scalia, J., dissenting).

35. *Id.* at 180 (Scalia, J., dissenting).

36. Numerous studies indicate that Americans do not believe that life imprisonment actually means that a defendant will be in prison for the rest of his natural life. As noted earlier, one commentator points out recent research indicating that most people believe convicted murderers spend only about seven years in prison. Bedau, *supra* note 26, at 181. One study found that in South Carolina, the median-juror estimate of years actually served by capital murderers who were not sentenced to death was seventeen. John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 404 (2001). Based on those results, a typical juror in South Carolina would have expected the nineteen-year-old defendant in the *Shafer* parole ineligibility case to be released at the dangerously young age of thirty-six. *Id.* Another study found that only four percent of Americans believed that life imprisonment meant imprisonment for life, and the average time people thought a defendant sentenced to life imprisonment would spend in prison was fifteen years. Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, *in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, *supra* note 26, at 90, 99. The same study, however, revealed the desire of people to ensure that a convicted murderer never gets out of prison so that he will never victimize anyone else and never have a chance to live a normal life. *Id.* It follows that if the primary goal of a jury is to ensure that a convicted capital murderer never gets out of prison, and the jury thinks the only way to accomplish this goal is to sentence the defendant to death, then that is what it will do. Indeed, at least one study has found that the shorter the period of time a juror thinks a defendant will serve in prison, the more likely he is to vote for death. Blume et al., *supra*, at 404; *see also* Laurie B. Berberich, *Jury Instructions Regarding Deadlock in Capital Sentencing*, 29 HOFSTRA L. REV. 1301, 1318–20 (2001) (noting that capital sentencing is unreliable when the jury is not fully informed). Victims' family members would certainly hope a capital murderer is never released from prison. One father whose twelve-year-old daughter was raped and murdered expressed his doubt that a convicted murderer would really spend the rest of his life in prison: "The reality of incarceration in America is that everything is based on a lie. We sentence individuals to life without parole and then parole them. We sentence people to life and put them on the streets in 20 years." Marc Klaas, *I'll Be There*

require the instruction do include "life without parole" as one of the sentencing choices.[37] If a jury is given a choice between death, life imprisonment *without parole*, and life imprisonment, it logically would understand the difference between the two life sentences—one allows for parole and the other does not. Further, if the jury can choose whether the defendant will ever be eligible for parole, it recognizes the difference between its choices.

Almost seven years after the *Simmons* decision, South Carolina again found itself admonished by the Supreme Court in *Shafer v. South Carolina*.[38] South Carolina decided *Simmons* no longer applied because of a statutory change in its sentencing process.[39] Under the new scheme, jurors in capital cases are required to answer two questions.[40] First, they must decide whether the State has proven a statutory aggravating circumstance.[41] If the jury fails to decide unanimously that the State has met this burden, the judge will sentence the defendant to life imprisonment without parole or a mandatory thirty year sentence.[42] If the jury decides the State has proven at least one aggravating factor, it must sentence the defendant to either death or life imprisonment without parole.[43]

At Shafer's trial, the judge explained that he refused to instruct the jury on the parole issue because the prosecutor did not place the

---

To Watch My 12-Year-Old Daughter's Murderer Go Down, NEWSWEEK, June 12, 2000, at 35.

37. *Simmons*, 512 U.S. at 179 (Scalia, J., dissenting).

38. 121 S. Ct. 1263 (2001).

39. *Id.* at 1270; State v. Shafer, 531 S.E.2d 524, 528 (S.C. 2000).

40. *Shafer*, 121 S. Ct. at 1267.

41. *Id.* Such a circumstance must be established beyond a reasonable doubt. *Id.*; *see also* S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. 2001) ("When the state seeks the death penalty, upon conviction . . . of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. . . . [T]he jury or judge shall hear additional evidence in . . . aggravation of the punishment."). Aggravating factors are meant to narrow the death-eligible class in order to conform to the requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), that a death penalty scheme must limit the risk of arbitrary application. NINA RIVKIND & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY 120 (2001). In South Carolina, these factors include circumstances such as murder committed in the course of kidnapping or burglary, murder that knowingly creates a great risk of death to more than one person in a public place, murder for money, murder of two or more people in the same act, murder of a child, and murder of a peace officer during the performance of his official duties. § 16-3-20(C)(a).

42. *Shafer*, 121 S. Ct. at 1267; *see also* § 16-3-20(C) (stating that if the jury fails to unanimously agree to a death sentence, the judge must impose a sentence of life imprisonment or mandatory term of thirty years).

43. *Shafer*, 121 S. Ct. at 1267; *see also* § 16-3-20(B) (stating that if any aggravating factor is found, the jury must impose death or life imprisonment); *infra* note 52 and accompanying text (discussing under what circumstances the jury makes the sentencing decision).

defendant's future dangerousness at issue.[44] Like the *Simmons* jury, the *Shafer* jury sent a note to the judge during deliberation inquiring about the possibility of parole.[45] Also similar to *Simmons*, the judge simply told the jurors that parole was not their concern.[46] After receiving the judge's notice, the jury quickly sentenced Shafer to death.[47] On appeal, the South Carolina Supreme Court did not address the issue of future dangerousness, but instead decided that *Simmons* was inapplicable under the new sentencing scheme.[48] Specifically, the court held that because death and life without parole were no longer the only two sentencing alternatives for a defendant convicted of a capital offense, *Simmons* no longer applied.[49]

The U.S. Supreme Court, this time with a clear majority, overturned the ruling of South Carolina's highest court.[50] The Court rejected South Carolina's argument because, although a minimum thirty-year sentence is available to capital defendants, it may only be imposed by a judge in cases involving no aggravating factors and may never be imposed by a jury.[51] The jury is permitted to decide on the appropriate sentence only if it finds the presence of an aggravating circumstance, and if it does so, its only sentencing options are life imprisonment without parole or death.[52] The Court held that when future dangerousness is at issue, even under South Carolina's new sentencing scheme, the jury must be informed about parole ineligibility.[53] Justice Scalia dissented, reiterating his earlier

44. *Shafer*, 121 S. Ct. at 1268. Whether future dangerousness was actually at issue is not clear; the trial judge found that the prosecutor's closing argument only had come close to the line, but had not crossed it. *Id.*

45. *Id.* at 1269; State v. Shafer, 531 S.E.2d 524, 527 (S.C. 2000).

46. *Shafer*, 121 S. Ct. at 1269; *Shafer*, 531 S.E.2d at 527.

47. *Shafer*, 121 S. Ct. at 1270. The jury deliberated for nearly three and one-half hours before asking the judge about Shafer's parole eligibility, but it returned a sentence approximately eighty minutes after the judge told them parole was not their concern. *Id.* at 1269–70. Because almost three-fourths of the jury's deliberation had occurred before it was told not to consider parole, it is possible that much of the earlier debate involved parole eligibility.

48. *Id.*; *Shafer*, 531 S.E.2d at 528.

49. *Shafer*, 121 S. Ct. at 1270–71; *Shafer*, 531 S.E.2d at 528.

50. *Shafer*, 121 S. Ct. at 1275. Only Justices Scalia and Thomas dissented in this opinion; all of the other Justices joined in the majority opinion written by Justice Ginsburg. *Id.* at 1265.

51. *Id.* at 1272; *see also* S.C. CODE ANN. § 16-3-20(C) (Supp. 2001) (stating that if the jury finds a statutory aggravating circumstance but does not recommend death, the trial judge must sentence the defendant to life imprisonment without the possibility of parole).

52. *Shafer*, 121 S. Ct. at 1272.

53. *Id.* at 1273. The Court also found that because of " 'the longstanding practice of parole availability,' " many jurors may not know whether or not the defendant will be eligible for parole, and more than just a passing word about the defendant spending his

objections and stating that while this holding was a logical extension of *Simmons*, it still lacked constitutional basis.[54] Justice Thomas also reiterated his earlier objections and further stated that, even accepting the decision in *Simmons*, he believed that the judge's instructions were sufficient.[55]

Against this backdrop, the Supreme Court granted certiorari and heard *Kelly v. South Carolina*.[56] The defendant in *Kelly* was convicted of "an extraordinarily brutal murder, kidnaping and armed robbery, and for possession of a knife during the commission of a violent crime."[57] At the sentencing phase, the defense counsel requested a jury instruction on the issue of parole, as provided for in *Simmons*.[58] The State indicated it would not argue future dangerousness in order to avoid *Simmons*, but the defense claimed the State had already argued the issue through the evidence presented.[59] The trial judge disagreed and found that the evidence went to character, not future dangerousness.[60] During closing arguments the prosecutor referred to the defendant as "the butcher of Batesburg" and "Bloody Billy," and stated that "murderers will be murderers."[61] On appeal, the South Carolina Supreme Court affirmed the trial judge's decision to not instruct the jury on parole ineligibility and held that *Simmons* did not apply for two reasons: first, under the new sentencing scheme, life without parole is not the only alternative to a death sentence; and second, future dangerousness was not at issue.[62]

---

natural life in prison is required to inform the jury. *Id.* (quoting Simmons v. South Carolina, 512 U.S. 154, 177–78 (1994)). The Court noted that the fact that the jury asked about parole illustrated their uncertainty. *Id.* at 1273–74. Finally, the Court disposed of the State's final argument that future dangerousness was not actually at issue by determining that the issue was not ripe. *Id.* at 1274–75. Because the South Carolina Supreme Court had ruled that *Simmons* did not apply, it did not decide if Shafer's future dangerousness had been at issue. *Id.* The Court, therefore, remanded that issue to the South Carolina Supreme Court after determining that *Simmons* did apply. *Id.*

54. *Id.* at 1275 (Scalia, J., dissenting).

55. *Id.* at 1276 (Thomas, J., dissenting) (stating that "it is not the Court's role to micromanage state sentencing proceedings or develop model jury instructions").

56. 122 S. Ct. 726 (2002).

57. *Id.* at 729.

58. *Id.*; State v. Kelly, 540 S.E.2d 851, 856 (S.C. 2001).

59. *Kelly*, 122 S. Ct. at 729; *Kelly*, 540 S.E.2d at 856–57. The prosecution had presented testimony regarding the defendant's behavior in jail, including evidence that Kelly had made a knife and taken part in an escape attempt. *See Kelly*, 122 S. Ct. at 729; *Kelly*, 540 S.E.2d at 856.

60. *Kelly*, 122 S. Ct. at 729; *Kelly*, 540 S.E.2d at 856.

61. *Kelly*, 122 S. Ct. at 729–30.

62. *Id.* at 730–31; *Kelly*, 540 S.E.2d at 857–58.

The U.S. Supreme Court quickly rejected the first argument because the issue had already been resolved in *Shafer*.[63] In regard to the second argument, the Court held that the South Carolina Supreme Court had used the appropriate standard, but applied it incorrectly to the facts.[64] The correct inquiry was "whether [the defendant's] future dangerousness was 'a logical inference from the evidence' or was 'injected into the case through the State's closing argument.' "[65] The South Carolina Supreme Court had decided that because the evidence presented by the prosecution related to the defendant's dangerousness while *in prison*, it was not the type of evidence contemplated by *Simmons*, nor was it the type of evidence that required a jury instruction regarding parole.[66] The Court, however, held that the evidence still supported the notion that the defendant was dangerous in general.[67] The majority found that the evidence of the defendant's future dangerousness remained relevant to a *Simmons* analysis, even if that same evidence could support inferences other than the consequences that would follow if a defendant were released on parole.[68] Further, the Court was unpersuaded by the prosecution's argument that *Kelly* was distinguishable because the *Kelly* jury had not sent a note to the judge inquiring about parole as the juries in the two prior cases had done.[69]

The number of dissenters in *Kelly* was greater than in the two earlier cases discussing the issue.[70] Chief Justice Rehnquist's dissenting opinion, joined by Justice Kennedy, suggested the idea that the *Kelly* holding indicated a shift in the Court's stance regarding

63. *Kelly*, 122 S. Ct. at 730. The South Carolina Supreme Court handed down its decision in *Kelly* on January 8, 2001, and the U.S. Supreme Court's decision in *Shafer* was not issued until more than two months later on March 20, 2001. State v. Kelly, 343 S.C. 350, 350 (2001); Shafer v. South Carolina, 121 S. Ct. 1263, 1263 (2001).

64. *Kelly*, 122 S. Ct. at 731.

65. *Id.*

66. *Id.*

67. *Id.* The Court also held that the prosecutor's references to the defendant as "Bloody Billy" were meant to instill the idea of dangerousness. *Id.* at 732–33.

68. *Id.* at 732.

69. *Id.* at 733. The Court held that it was the trial judge's duty to properly explain the law to the jury, whether they asked for it or not. *Id.* (citing 2A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 485, at 375 (3d ed. 2000)).

70. In both *Simmons* and *Shafer*, Justices Scalia and Thomas were the only dissenters. Shafer v. South Carolina, 121 S. Ct. 1263, 1275 (2001) (Scalia, J., dissenting); *Id.* at 1275–76 (Thomas, J. dissenting); Simmons v. South Carolina, 512 U.S. 154, 178 (1994) (plurality opinion) (Scalia, J., dissenting). In *Kelly*, however, Chief Justice Rehnquist and Justice Kennedy joined the dissent to make a total of four dissenters. *Kelly*, 122 S. Ct. at 734 (Rehnquist, C.J., dissenting); *Id.* at 736 (Thomas, J., dissenting).

when a judge must instruct a jury on the issue of parole eligibility.[71] Under the new heightened standard, evidence that raises an *implication* of future dangerousness triggers a judge's instruction.[72] Rehnquist stated that if *Simmons* meant to encompass this situation, the Court would have held that a jury instruction on parole eligibility is always required.[73] Rehnquist believed that the holding in *Kelly* had virtually no connection with the due process rationale in *Simmons*.[74] Justice Thomas also wrote a dissenting opinion, in which Justice Scalia joined. He stated that "[w]hile we were informed in *Simmons* that the Court's intent was to create a requirement that would apply in only a limited number of cases, today's sweeping rule was an *entirely foreseeable consequence of* Simmons."[75] Justice Thomas again admonished the majority for meddling in and micromanaging the state's jury instruction proceedings "under the guise that the Constitution requires us to do so."[76]

Thus, the rule that began in *Simmons* has continued to grow into a new tool for defendants who will be sentenced for capital offenses. While the dissenters in *Kelly* were uncomfortable with the direction the rule is taking, this direction is a logical extension of the Court's previous holdings. Perhaps defendants may use *Kelly*'s broad holding as a way around the requirement that the prosecution present evidence of the defendants' future dangerousness, by simply showing some slight implication of future dangerousness.[77]

As noted above, the new dissenters were concerned that the broad holding of *Kelly* has weakened the requirement that future dangerousness be at issue.[78] Although the holding of *Kelly* is quite broad, it did not abolish the future dangerousness requirement.

---

71. *Kelly*, 122 S. Ct. at 735 (Rehnquist, C.J., dissenting).

72. *Id.* (Rehnquist, C.J., dissenting).

73. *Id.* at 734 (Rehnquist, C.J., dissenting). Arguably, *Kelly* has created a rather large loophole in the "evidence of future dangerousness" requirement. *See infra* notes 90–92 and accompanying text.

74. *Kelly*, 122 S. Ct. at 734 (Rehnquist, C.J., dissenting).

75. *Id.* at 736 (Thomas, J., dissenting) (emphasis added). Justice Thomas first noted Chief Justice Rehnquist's statement that the due process basis for the *Simmons* rule is no longer relevant and pointed out that he never thought such a basis existed in the first place. *Id.* (Thomas, J., dissenting).

76. *Id.* at 737 (Thomas, J., dissenting).

77. *See id.* at 731–33 (citing examples of evidence that gave only an implication of future dangerousness and was not introduced for that purpose); *id.* at 735 (Rehnquist, C.J., dissenting) (stating that "the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society" and noting that it is hard to imagine a capital case where no evidence is presented from which a juror might make such an inference).

78. *See supra* notes 72–76 and accompanying text.

Rather, it recognized that future dangerousness can be at issue even if the prosecutor does not explicitly say the words, "This defendant poses a future danger to society."[79] This recognition is good news for capital defendants, and likely an accurate reflection of reality.[80]

One study of South Carolina capital juries argues that future dangerousness is at issue in virtually all capital trials.[81] The study reveals that "future dangerousness plays a highly prominent role in the jury's discussions during the penalty phase."[82] Other than the defendant's possible return to society, the only topic that juries spend more time discussing is the crime itself.[83] Discussion of the defendant's future dangerousness outweighed both mitigating factors and the defendant's dangerousness in prison.[84] The study concludes that, ironically, defendants are better situated when the prosecution introduces their potential for future dangerousness directly, because the judge then instructs the jury on parole eligibility.[85] A better approach would be to do away with the "at issue" requirement altogether so that all defendants would be entitled to the instruction.[86]

The State may make a tactical decision not to mention future dangerousness. Indeed, the prosecutors in both *Shafer* and *Kelly* specifically informed the judge that they would not argue future dangerousness in order to take their cases out of the scope of

79. This is a phrase created by the author to demonstrate what may be required under a very strict standard. The recognition by the Court that this phrase is not required is important because it may change the tactical decisions of the prosecution. *See infra* notes 87–89 and accompanying text.

80. *See infra* notes 81–85 and accompanying text.

81. *See* Blume et al., *supra* note 36, at 398–99. This study was conducted through individual interviews of 916 jurors who sat on 257 capital trials in eleven different states, including South Carolina. *Id.* at 403. Each juror answered a series of questions that covered a variety of topics, including the guilt and penalty phases of the trial, evidence presented, legal instructions given, and the deliberation process. *Id.*

82. *Id.* at 404.

83. *Id.*

84. *Id.*

85. *Id.* at 410.

86. *Id.* Another approach would be for state legislators to provide for the instruction in their statutes. Indeed, Pennsylvania is the only state other than South Carolina that offers life without parole as an alternative to the death penalty, which does not require the judge to inform the jury of parole ineligibility. 42 PA. CONS. STAT. ANN. § 9711(c) (West 1998 & Supp. 2002); *see* Shafer v. South Carolina, 121 S. Ct. 1263, 1271 n.4 (2001); *see also* Linda Greenhouse, *Justices Chide South Carolina in a Death Sentence, Again*, N.Y. TIMES, Jan. 10, 2002, at A25 (noting that "[o]f 30 states with the death penalty that offer the choice of life without parole, only South Carolina and Pennsylvania do not require that jurors be fully informed about the choice"). As long as even one state refuses to provide the instruction, however, the Court must step in to protect a defendant's due process rights.

Simmons.[87] If prosecutors believe it is inherent in the other statements they make, they may choose not to argue future dangerousness specifically. They would rather risk that future dangerousness was implied and not introduce parole ineligibility, than point out the obvious danger and be forced to explain clearly to the jury their choice of sentence.[88] This kind of behavior makes one wonder why, if a prosecutor is so sure that a jury will find death to be the appropriate punishment, he will so vehemently resist making the sentencing choices clear.[89]

Although the Court in *Kelly* has not expressly terminated the requirement that future dangerousness be at issue in order to get a jury instruction on parole, its broad ruling on what meets the "at issue" requirement has given future capital defendants room to breathe. As Chief Justice Rehnquist emphasized, "[i]t is difficult to envision a capital sentencing hearing where the State presents no evidence from which a juror might make [an inference regarding the defendant's future dangerousness]."[90] Capital defendants likely hope that the Chief Justice's prediction is correct when they want the instruction on parole eligibility—a clear benefit of the broad holding in *Kelly*. Because nearly all cases imply future dangerousness, *Kelly* requires the instruction on parole eligibility in nearly all cases.[91] The next logical step would be to eliminate the requirement that future dangerousness be at issue. The decision to take someone's life away is a very important one, and juries should be fully informed of the options available to them when making that decision. The Court in *Kelly* extended the protection of a defendant further by deciding that future dangerousness only needs to be implied to trigger the

87. Kelly v. South Carolina, 122 S. Ct. 726, 729 (2002); *Shafer*, 121 S. Ct. at 1267–68.

88. In fact, in the State's brief in *Kelly*, South Carolina argued that it was free to make such a tactical decision and that in doing so it was not receiving any unfair advantage. Brief for Respondent at 35–36, Kelly v. South Carolina, 122 S. Ct. 726 (2002) (No. 00-9280). The State further pointed out that its law disfavors the introduction of collateral circumstances, such as parole, and argued that this practice is acceptable as long as it stays within the due process limits of *Simmons*. *Id.* at 49–50. In its brief for *Shafer*, the State argued that, because the prosecution did not argue future dangerousness, *Simmons* did not apply. Brief for Respondent at 42–49, Shafer v. South Carolina, 121 S. Ct. 1263 (2001) (No. 00-5250).

89. *See supra* note 86 (discussing how most other states require the jury instruction on parole ineligibility in their statutes).

90. *Kelly*, 122 S. Ct. at 735 (Rehnquist, C.J., dissenting).

91. *See supra* notes 66–69 and accompanying text (discussing the Court's broad holding in *Kelly* and the evidence that implied future dangerousness).

requirement for a jury instruction on parole eligibility.[92] Therefore, one could easily imagine the Court finding that fairness and due process require the instruction, even without an implication of future dangerousness.

An argument to require a jury instruction on parole eligibility is worth very little without some evidence that, as a practical matter, whether a defendant will ever be eligible for parole makes any difference to a jury. A national survey of opinions about the death penalty reveals that although a majority of Americans support the death penalty in the abstract, those numbers are reduced to a minority percentage as alternatives are offered.[93] Only forty-nine percent of Americans support the death penalty if life imprisonment without the possibility of parole is an option.[94] One juror stated that for the jury on which he sat to opt for life imprisonment, they had to be assured the defendant would never be released; but because they did not believe that would happen, they believed that they had no alternative to a death sentence.[95] Notably, for a jury to select an alternative to the death penalty, it must believe that the alternative is meaningful or similarly harsh.[96]

---

92. *Kelly*, 122 S. Ct. at 732 (noting that even though the evidence presented may have gone towards Kelly's character, it also implied that he would be a danger to society in the future).

93. *See* Richard C. Dieter, *Sentencing For Life: Americans Embrace Alternatives to the Death Penalty* (Apr. 1993), http://www.deathpenaltyinfo.org/dpic.r07.html (on file with the North Carolina Law Review). The poll results cited in this report are based on a nationwide survey of one thousand registered voters conducted between February 28 and March 1, 1993, by Greenberg/Lake and the Tarrance Group. *Id.* This sample likely yields a margin of error of +/- 3.1%. *Id.*

94. *Id.* Further, only forty-one percent of Americans continue their support if restitution to the victim's family is included with the life imprisonment without parole option. *Id.* This type of punishment would include some kind of monetary payment from the convicted murderer to the victim's family. *Id.*

95. 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, 392 (1993). For a disturbing look at numerous cases with jury questions regarding parole, see *id.* app. I, at 368–90, of Professor Lane's article. *See also supra* note 36 (discussing juror misconceptions about life imprisonment and the ramifications of those misconceptions).

96. William Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, *in* PUNISHMENT AND THE DEATH PENALTY 223, 227 (Robert M. Baird & Stuart E. Rosenbaum eds., 1995). People accept the death penalty because they do not believe there is a meaningful alternative, but support for the death penalty plummets when life without the possibility of parole plus restitution is offered as an alternative. *Id.* at 227–31. These misconceptions about the possibility of parole make people think life imprisonment is not a meaningful alternative. *Id.* at 232. If jurors knew that life imprisonment truly existed without the possibility of parole, they might choose that sentence over death. *Id.*

Perhaps one of the most telling examples of juries needing to be certain that the defendant would never be released from prison is that the juries in both *Shafer* and *Simmons* must have been concerned about parole because they actually sent a note to the judge asking for clarification. It seems unlikely that the jury would ask about parole eligibility if the issue of parole did not matter to them. The *Kelly* Court was correct in holding that the fact that a jury asks about parole eligibility is simply illustrative of the point, and not determinative to getting the instruction on parole.[97] Assuming that jurors will not think about parole eligibility just because a judge instructs them not to is unrealistic. Whether a convicted murderer will ever be out on the streets again likely will weigh on a juror's mind.[98] Our justice system cannot afford to ignore the chance that parole does matter to the jury. Such ignorance would risk sentencing people to death, when, perhaps, those chosen to pass judgment would find a more appropriate punishment if given the option.

Kelly v. South Carolina has taken the previous holdings by the U.S. Supreme Court in a welcome, new direction. The broad holding now requires an instruction to capital juries on parole ineligibility when life imprisonment without parole is the jury's alternative sentence and the defendant's future dangerousness is at issue, even if only by implication. This extension will cover many new cases, because dangerousness almost certainly is inherent in the idea of being a cold-blooded killer.[99] This progression is a logical step because defendants have the right to have a decision as critical as whether they live or die decided by a group of twelve fully-informed peers. Furthermore, future dangerousness can easily be on everyone's mind without the prosecutor saying the words.[100] Current Supreme Court decisions clearly provide more protection for defendants facing the death penalty than those prior to *Kelly*. Even more protection, however, could be afforded to defendants by eliminating the "at issue" requirement. For now, capital defendants will have to take what they can get, and be thankful for it.

KRISTIE ELLISON SHUFELT

97. *See supra* note 69 and accompanying text.

98. In fact, one study of South Carolina capital jurors concluded that "jurors' deliberations emphasize dangerousness and that misguided fears of early release generate death sentences." Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instruction in Capital Cases*, 79 CORNELL L. REV. 1, 4 (1993).

99. *See supra* notes 67–68, 90 and accompanying text.

100. *See supra* notes 81–84 and accompanying text.