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Criminal Law - Capital Sentencing Jurors May Be Informed about a Defendant's Period of Parole Ineligibility: *Clark v. Tansy*

Theresa M. Montoya

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CRIMINAL LAW—Capital Sentencing Jurors May Be Informed About A Defendant's Period Of Parole Ineligibility: *Clark v. Tansy*

I. INTRODUCTION

In *Clark v. Tansy*,¹ the New Mexico Supreme Court vacated Terry Clark's death sentence.² The court held that when a prosecutor urges a defendant's future dangerousness as cause for imposing the death penalty, due process assures the defendant an opportunity to inform the jury of the period of his parole ineligibility.³ Furthermore, the court held that trial courts must sentence the defendant⁴ for the noncapital charges against him if the defendant chooses to present the length of that sentence to the jury in order to rebut the prosecution's argument for the death penalty.⁵ This note reviews New Mexico and United States Supreme Court decisions relevant to the capital sentencing procedures utilized in *Clark*, examines the rationale of *Clark*, and explores the effect of this decision on capital sentencing procedures in New Mexico.

II. STATEMENT OF THE CASE

In *State v. Clark*,⁶ Terry D. Clark received the death penalty for the kidnapping and first degree murder of Dena Lynn Gore.⁷ Clark raped and murdered nine-year-old Gore while released on bond pending appeal of a prior conviction.⁸ After Clark pleaded guilty to Gore's murder, a capital jury sentenced him to death.⁹

1. 118 N.M. 486, 882 P.2d 527 (1994) [hereinafter *Clark II*].

2. *Clark II*, 118 N.M. at 495, 882 P.2d at 536. See N.M. STAT. ANN. § 31-20A-4(D) (Repl. Pamp. 1994) (providing that no error in sentencing shall result in reversal of a capital felony conviction). On appeal, if the trial court is reversed because of error in the sentencing proceeding, the Supreme Court shall remand solely for a new sentencing hearing. *Id.*

3. *Id.* at 492, 882 P.2d at 533.

4. See *State v. Henderson*, 109 N.M. 655, 659, 789 P.2d 603, 607 (1990), *overruled by Clark v. Tansy*, 118 N.M. 486, 882 P.2d 527 (1994) (holding that the court *should*, if requested, either impose sentence for collateral noncapital offenses or give the possible range of sentences for those offenses).

5. *Clark II*, 118 N.M. at 493, 882 P.2d at 534.

6. 108 N.M. 288, 772 P.2d 322 (1989) [hereinafter *Clark I*].

7. *Id.* at 290, 772 P.2d at 324.

8. While released on appeal bond, Clark was living at his brother's ranch in Chavez County, New Mexico. *Id.* On the afternoon of July 17, 1986, Clark abducted Gore near her home in Artesia, New Mexico. *Id.* at 291, 772 P.2d at 325. Clark drove Gore to his brother's ranch where he raped her, shot her in the head, and buried her body in a shallow grave on the ranch. *Id.* Clark's brother discovered Gore's body and then notified the authorities who arrested Clark. *Id.*

9. *Clark I*, 108 N.M. at 291, 772 P.2d at 325. "[U]pon a plea of guilty to a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment" N.M. STAT. ANN. § 31-20A-1(B) (Repl. Pamp. 1994).

On direct appeal to the New Mexico Supreme Court,¹⁰ Clark argued that the jury's understanding of the sentencing alternatives¹¹ was improperly affected by two factors: Clark's ineligibility for parole if sentenced to life imprisonment,¹² and the court's delay in sentencing Clark for his noncapital convictions.¹³ The New Mexico Supreme Court affirmed Clark's death sentence, holding that Clark's Eighth Amendment rights were not violated.¹⁴

Subsequently, Clark filed a petition for a writ of habeas corpus¹⁵ in the district court.¹⁶ Clark alleged that fundamental error occurred during the capital sentencing phase of trial. After a hearing,¹⁷ the district court denied Clark relief on the habeas corpus petition.¹⁸ Clark then filed,¹⁹ and was granted, writ²⁰ to the New Mexico Supreme Court.²¹

III. CONTEXTUAL BACKGROUND

In *Furman v. Georgia*,²² the United States Supreme Court held that Georgia's imposition of the death penalty under then existing state statutes violated the Eighth Amendment²³ prohibition against "cruel and unusual punishment."²⁴ The *Furman* Court held that capital punishment was being carried out in an arbitrary manner.²⁵ In particular, the Court criticized

10. Under New Mexico law, a death sentence is automatically reviewed by the New Mexico Supreme Court. N.M. STAT. ANN. § 31-20A-4(A) (Repl. Pamp. 1994).

11. Under the Criminal Sentencing Act, conviction of a capital felony requires the jury to choose either a sentence of death or life imprisonment. N.M. STAT. ANN. § 31-18-14 and § 31-20A-1(B) (Repl. Pamp. 1994).

12. See Probation & Parole Act, N.M. STAT. ANN. § 31-21-10(A) (Repl. Pamp. 1987) (stating that an inmate who is sentenced to life imprisonment for the commission of a capital felony becomes eligible for a parole hearing after he has served thirty years of his sentence).

13. *Clark I*, 108 N.M. at 293, 772 P.2d at 327.

14. *Id.* at 311, 772 P.2d at 345. See also *infra* note 24.

15. See *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (stating that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody and that the traditional function of the writ is to secure release from illegal custody.").

16. *Clark II*, 118 N.M. at 488, 882 P.2d at 529. Rules 5-802(A) and (D)(1) of the New Mexico Rules of Criminal Procedure governs the procedure for filing a writ of habeas corpus by persons in custody in violation of the New Mexico or United States laws or constitutions. The petition to vacate, set aside, or correct a sentence, shall be filed in the judicial district in which the petitioner was convicted. N.M. R. CRIM. P. 5-802(D)(1).

17. See N.M. R. CRIM. P. 5-802(E)(3) and (4) (requiring that the district court order an evidentiary hearing on the habeas petition and conduct such hearing as promptly as practicable).

18. *Clark II*, 118 N.M. at 488, 882 P.2d at 529.

19. See N.M. R. CRIM. P. 5-802(G) (providing that if a writ of habeas corpus is denied, a writ of certiorari may be filed with the New Mexico Supreme Court).

20. See N.M. R. APP. P. 12-501 (governing petitions for issuance of writs of certiorari seeking review of district court's denial of habeas corpus petition pursuant to rule 5-802 of the New Mexico Rules of Criminal Procedure).

21. *Clark II*, 118 N.M. at 488, 882 P.2d at 529.

22. 408 U.S. 238 (1972).

23. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

24. *Furman*, 408 U.S. at 239. But see *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that the death penalty does not per se violate Eighth Amendment prohibitions against cruel and unusual punishment). *Id.* at 169. Instead, the Court found that the Eighth Amendment places substantial restrictions upon the states in imposing the death penalty. See generally, *id.* at 176-87.

25. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

the unfettered discretion states gave to sentencing juries and judges, finding the exercise of that discretion "wanton" and "freakishly imposed."²⁶ Since *Furman*, states have reformed their capital sentencing procedures to eliminate arbitrariness by adopting procedures designed to guide sentencing discretion²⁷ and ensure consideration of the character and record of the individual being sentenced.²⁸

The Eighth Amendment requirements of individualized sentencing determinations and guided discretion are designed to ensure reliability in sentencing,²⁹ thus avoiding arbitrary imposition of the death penalty.³⁰ In addition, the Eighth Amendment also achieves reliability by providing sentencing juries with accurate sentencing information as "an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision."³¹

The practice of informing jurors in a capital case of post-sentencing procedures, such as the defendant's parole ineligibility, is sometimes criticized.³² Critics argue that apprising jurors of the defendant's parole ineligibility introduces an entirely speculative element into deliberations, thus violating the Eighth Amendment's reliability requirement.³³ However, withholding information about the defendant's parole ineligibility is also criticized as violating the Eighth Amendment's requirement that the sentencing jury "have before it all possible relevant information about the individual defendant whose fate it must determine."³⁴ Debate over whether to inform sentencing jurors about the defendant's parole ineligibility is

26. *Id.* See also *McCleskey v. Kemp*, 753 F.2d 877, 899 (11th Cir. 1985), *aff'd*, 481 U.S. 279 (1987) (stating that "[i]n pre-*Furman* days, there was no rhyme or reason as to who got the death penalty and who did not.").

27. See *Gregg*, 428 U.S. at 189 (explaining that capital sentencing discretion must be "suitably directed and limited"). See also *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (approving Florida's capital sentencing procedures because the sentencer is given "specific and detailed guidance" in deciding whether to impose the death penalty).

28. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (explaining that in capital cases the "fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."). See also *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (holding that individualized consideration means that a sentencer cannot exclude as a matter of law any relevant mitigating evidence).

29. In *Woodson*, the Court explained that:

the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson, 428 U.S. at 305.

30. *Saffle v. Parks*, 494 U.S. 484, 493 (1990).

31. *Gregg*, 428 U.S. at 190.

32. See *Simmons v. South Carolina*, 114 S. Ct. 2187, 2195 (1994). In *Simmons*, the State argued that providing the jury with information about the defendant's parole ineligibility is "inherently misleading" because "future exigencies such as legislative reform, commutation, clemency, and escape" might result in the defendant being released into society. *Id.* at 2195.

33. *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (explaining that the Eighth Amendment invalidates "procedural rules that tend to diminish the reliability of the sentencing determination.").

34. *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

particularly contentious when the state urges the defendant's future dangerousness as a reason to choose the death penalty.³⁵

The Fourteenth Amendment's Due Process Clause operates similarly to the Eighth Amendment in prohibiting the arbitrary imposition of the death penalty.³⁶ The Due Process Clause is primarily concerned with evidentiary fairness. Due process guarantees a criminal defendant the opportunity to present evidence to rebut the prosecution's case for death, thus permitting sentencing jurors to make a reasoned determination whether to impose the death penalty.³⁷ Furthermore, due process forbids states from sentencing defendants to death on the basis of information which the defendant had "no opportunity to deny or explain."³⁸

Parole ineligibility is a relevant factor for jurors to consider under the Due Process Clause when sentencing a defendant.³⁹ Any sentencing authority "must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."⁴⁰ Permitting a defendant to inform sentencing jurors that he is parole ineligible satisfies due process by allowing the defendant to explain or deny information that the sentencing jury considers.⁴¹

New Mexico has addressed Eighth and Fourteenth Amendment principles in determining whether to inform capital sentencing jurors of the length of time a defendant must serve before becoming eligible for parole.⁴² The New Mexico Supreme Court has determined that a defendant's period of parole ineligibility is a relevant consideration for the sentencing jury under the Fourteenth Amendment,⁴³ but not under the Eighth Amendment.⁴⁴

A. Parole Ineligibility and the Eighth Amendment

New Mexico first addressed whether a jury may consider a defendant's parole ineligibility during sentencing deliberations in *State v. Clark*.⁴⁵ In

35. See *Simmons*, 114 S. Ct. at 2195 (Defendant argued that the sentencing jury would not choose to impose the death penalty if they were informed that the defendant would be ineligible for parole or would have to serve a very long sentence before becoming eligible if he were sentenced to life imprisonment.).

36. Compare U.S. CONST. amend. XIV (providing "nor shall any State deprive any person of life, liberty, or property, without due process of law") with U.S. CONST. amend. VIII (stating "nor cruel and unusual punishments inflicted").

37. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986).

38. *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

39. *Simmons*, 114 S. Ct. at 2194.

40. *Jurek*, 428 U.S. at 275.

41. See *Skipper*, 476 U.S. at 5 n.1 (explaining that elemental due process principles require admission of the defendant's relevant information to rebut the prosecution's case for death when the prosecution relies upon future dangerousness).

42. See *State v. Clark (Clark I)*, 108 N.M. 288, 772 P.2d 322 (Ct. App. 1989); *Clark v. Tansy (Clark II)*, 118 N.M. 486, 882 P.2d 527 (1994).

43. See *Clark II*, 118 N.M. at 493, 882 P.2d at 534 (holding that due process permits a defendant to inform the sentencing jury the length of incarceration he must serve without parole if sentenced to life imprisonment instead of death).

44. See *Clark I*, 108 N.M. at 294, 772 P.2d at 328 (holding that the length of time a capital defendant sentenced to life imprisonment must serve before becoming eligible for parole is not a mitigating factor for the jury to consider under the Eighth Amendment).

45. 108 N.M. 288, 772 P.2d 322 (1989).

Clark I, defense counsel, in his opening statement, argued to the jury that Clark should not be released into society.⁴⁶ Clark's defense strategy was designed to convince the jury that if Clark were sentenced to life, he would pose no future threat to society.⁴⁷ Additionally, defense counsel moved the trial court to sentence Clark on the noncapital charges prior to the jury's deliberations in order to fix the length of time Clark would serve before becoming eligible for parole.⁴⁸ The trial court refused Clark's motion. However, the court did allow Clark to inform the jury about the possible noncapital sentencing options available⁴⁹ under the Criminal Sentencing Act.⁵⁰

Clark argued that he would pose no future threat to society if sentenced to life.⁵¹ Clark introduced a chart explaining to the jury the length of time he could serve on various sentencing alternatives and the effect of good time reductions⁵² on a life sentence.⁵³ In addition, Clark called a State Corrections Department administrator as an expert witness to explain the chart.⁵⁴ On cross examination of the expert, the state highlighted a difference of opinion between the Corrections Department and the State Attorney General's office over the issue of whether meritorious deductions could be applied to a life sentence.⁵⁵ If meritorious deductions were applied, Clark could be released as early as age forty-six.⁵⁶ The expert also disclosed that other factors—commutation, judicial decisions, and policy changes—could affect Clark's life sentence.⁵⁷

The prosecution responded to the issue of parole by emphasizing Clark's future dangerousness as a reason to choose the death penalty.⁵⁸ Clark's

46. *Id.* at 294, 772 P.2d at 328.

47. *Id.* at 295, 772 P.2d at 329.

48. *Id.* at 293-94, 772 P.2d at 327-28.

49. *Id.* at 293, 772 P.2d at 327 (explaining that Clark faced an eighteen year sentence for the kidnapping. See N.M. STAT. ANN. § 31-18-15(A)(1) (Repl. Pamp. 1987). Additionally, upon hearing evidence of mitigating or aggravating circumstances, the court could increase or decrease the eighteen-year sentence by one third. See N.M. STAT. ANN. § 31-18-15.1 (Repl. Pamp. 1987). The court then would decide whether the sentence would be served concurrently or consecutively with the sentence imposed for Clark's previous conviction. See N.M. STAT. ANN. § 31-18-21 (Repl. Pamp. 1987). Finally, Clark's basic sentence was subject to a one-year enhancement for the use of a firearm as well as a one-year enhancement under the habitual offender statute. See N.M. STAT. ANN. §§ 31-18-16(A) and -17(B) (Repl. Pamp. 1987)).

50. *Clark I*, 108 N.M. at 292, 772 P.2d at 327.

51. *Id.* at 295, 772 P.2d at 329.

52. Section 33-2-34 of the New Mexico Statutes provides that any inmate confined in the penitentiary may be awarded a meritorious deduction of thirty days per month for his good conduct under the Corrections Act. N.M. STAT. ANN. § 33-2-34 (Repl. Pamp. 1987 & Supp. 1988).

53. *Clark I*, 108 N.M. at 295, 772 P.2d at 329. The chart showed that if Clark received a life sentence and maximum leniency from the court on the kidnapping charge, he would not be eligible for parole until age sixty-one. *Id.*

54. *Id.* at 296, 772 P.2d at 330.

55. *Id.* Clark's chart was premised upon the assumption that good-time meritorious deductions were inapplicable towards a life sentence. However, the expert stated during cross examination that the Corrections Department currently applied meritorious deductions against a prisoner's thirty year minimum life sentence.

56. *Id.*

57. *Id.*

58. In closing argument the prosecutor stated:

defense counsel made no objections during the prosecutor's cross examination or closing argument.⁵⁹ Clark appealed the court's refusal to impose sentence on the noncapital charges prior to the jury's deliberations. On review, the New Mexico Supreme Court held that the potential period of incarceration facing a defendant sentenced to life imprisonment does not qualify as a relevant mitigating factor under the Eighth Amendment.⁶⁰ Therefore, the Court held that the trial court judge did not abuse his discretion by delaying sentencing on the noncapital charges.⁶¹

Clark also argued on appeal that the prosecution improperly introduced Clark's future parole eligibility in cross-examination and closing arguments.⁶² The supreme court rejected Clark's argument.⁶³ The court explained that because defense counsel failed to preserve error for appeal, review on appeal is discretionary unless the issue involves fundamental error.⁶⁴

The court held that fundamental error did not apply in Clark's case.⁶⁵ Clark introduced the issue of parole as part of his case, and consequently, the prosecutor was entitled to respond to defense counsel's arguments.⁶⁶ Fundamental error, the court concluded, has no place "where the defendant by his own actions created the error"⁶⁷

B. Parole Ineligibility and the Due Process Clause

In *Simmons v. South Carolina*,⁶⁸ the United States Supreme Court held that the trial court's failure to instruct the jury on the defendant's parole ineligibility when the prosecution argued future dangerousness, deprived the defendant of due process.⁶⁹ In *Simmons*, the defendant was sentenced to death for the murder of an elderly woman.⁷⁰ *Simmons* was ineligible for parole because of two prior convictions for violent offenses.⁷¹

[Defense counsel] talked briefly about sentencing in this case and the possible length of time. The question is not when Terry Clark will get out—it's, I'm sorry, it's not if Terry Clark will get out, it's when he'll get out. It is inevitable. And as we tried to point out to you on cross examination when this man, if this man is sentenced to life, there are no guarantees. No guarantees. Somewhere down the road is another victim. Whether it's ten years from tomorrow, twenty years from tomorrow, or longer, she's out there, or she will be out there.

Clark I, 108 N.M. at 296, 772 P.2d at 330.

59. *Id.*

60. *Id.* at 294, 772 P.2d at 328. The Court stated that relevant mitigating circumstances under the Eighth Amendment are facts about the defendant's character or background or the circumstances of the particular offense that call for a penalty less than death.

61. *Id.* at 295, 772 P.2d at 329.

62. *Id.*

63. *Id.* at 297, 772 P.2d at 331.

64. *Id.* at 296, 772 P.2d at 330. Fundamental error is "to be applied only under exceptional circumstances and solely to prevent a miscarriage of justice." *Id.* at 297, 772 P.2d at 331.

65. *Id.*

66. *Clark I*, 108 N.M. at 297-98, 772 P.2d at 331-32.

67. *Id.* at 298, 772 P.2d at 332.

68. 114 S. Ct. 2187 (1994).

69. *Id.* at 2190.

70. *Id.*

71. *Id.* *Simmons* pleaded guilty to two counts of criminal sexual conduct in connection with two prior assaults on elderly women. The guilty pleas resulted in convictions for violent offenses which rendered him ineligible for parole if convicted for any subsequent violent offense.

Defense counsel sought to explain to the jury that Simmons was ineligible for parole in an effort to rebut the prosecution's argument that Simmons' future dangerousness was a factor for the jury to consider in imposing the death penalty.⁷² However, the trial court prohibited the defense from making any reference to parole ineligibility during the trial.⁷³ Additionally, the court refused Simmons' requested instruction that would have defined the meaning of a life sentence.⁷⁴ During deliberations, the jury sent a note to the judge which asked "Does the imposition of a life sentence carry with it the possibility of parole?"⁷⁵ The judge instructed the jury not to consider parole eligibility in reaching a verdict.⁷⁶ The jury returned with a death sentence.⁷⁷

In a plurality decision, the Supreme Court relied on the Due Process Clause of the Fourteenth Amendment to overturn Simmons' death sentence.⁷⁸ The Court explained that due process prohibits execution based upon information the defendant had no opportunity to deny or explain.⁷⁹ The Court concluded that the jury reasonably may have believed that Simmons would be released on parole if the death penalty were not imposed.⁸⁰

Furthermore, the prosecution's argument that Simmons represented a future threat to society encouraged this misunderstanding of the sentencing alternatives available to the jury.⁸¹ Thus, the State secured a death penalty

72. *Id.* at 2191. The prosecution argued that the question for the jury was "what to do with [petitioner] now that he is in our midst." *Id.* at 2203. Furthermore, the prosecution argued that a death sentence would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Id.*

73. *Id.* at 2190 (the court barred the defense from asking any questions during voir dire or trial about the subject of parole).

74. *Simmons* 114 S. Ct. at 2192. The requested instruction reads:

I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand you recommend that he be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.

In your deliberations you are not to speculate that these sentences mean anything other than what I have just told you, for what I told you is exactly what will happen to the defendant depending on what your sentencing decision is.

Id.

75. *Id.*

76. *Id.* The judge's instructions included the following:

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.

Id.

77. *Id.*

78. *Simmons*, 114 S. Ct. at 2192.

79. *Id.* (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

80. *Id.* at 2193.

81. *Id.* at 2190-91. In closing argument, the prosecutor argued that the defendant's future dangerousness was a factor for the jury to consider when deliberating whether to impose the death penalty. See *supra* note 72.

based upon Simmons' future dangerousness while concealing from the jury that Simmons was ineligible for parole, and therefore posed no threat to society.⁸² As a result, the Court stated, "it is clear that the State denied petitioner due process."⁸³

IV. RATIONALE

Before addressing Clark's claims, the court in *Clark II*, determined whether principles of collateral estoppel barred a prisoner from relitigating claims in his petition for habeas corpus that had already been decided on a previous appeal.⁸⁴ In his petition for habeas corpus, Clark raised many of the same arguments decided in *Clark I* on direct appeal.⁸⁵ The New Mexico Supreme Court held that collateral estoppel principles bar relitigation of issues decided on a previous habeas corpus petition.⁸⁶ However, Clark's petition did not raise issues decided on a previous habeas corpus petition.⁸⁷ Instead, Clark's petition concerned the preclusive effect of issues decided on direct appeal.⁸⁸

The court explained that the purpose of the habeas corpus writ is to protect the individual from erroneous deprivation of life or liberty.⁸⁹ Thus, principles of finality do not apply the same way in a habeas corpus proceeding as they do in regular litigation.⁹⁰ As a result, a habeas petitioner may relitigate issues decided against him on direct appeal when the petitioner can show an intervening change of law or fact, or that the ends of justice would otherwise be served.⁹¹

Clark contended that the State improperly presented his future dangerousness to the jury as a reason to choose the death penalty, while preventing Clark from explaining the length of time he would serve if sentenced to life.⁹² After Clark lost this issue on direct appeal to the New Mexico Supreme Court, the United States Supreme Court decided *Simmons v. South Carolina*.⁹³ *Simmons* changed previous law and held that when the prosecution urges a defendant's future dangerousness as reason to impose the death sentence, a defendant must be allowed the opportunity to inform the sentencing jury that he is parole ineligible.⁹⁴ This decision, along with the nature of the writ of habeas corpus and

82. *Id.* at 2193.

83. *Id.*

84. *Clark II*, 118 N.M. 486, 490, 882 P.2d 527, 531 (1994).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* Collateral estoppel principles prevent relitigation of issues raised and decided on a previous habeas corpus petition. *Id.* The preclusive effect given to issues raised in the first petition for habeas corpus which were decided on direct appeal are in a different posture. *Id.*

90. *Id.*

91. *Clark II*, 118 N.M. at 492, 882 P.2d at 533.

92. *Id.* at 489, 882 P.2d at 530.

93. 114 S. Ct. 2187 (1994).

94. *Id.* at 2190. See also *supra* notes 68-83 and accompanying text.

the qualitative difference of death from other punishments,⁹⁵ persuaded the *Clark II* court to readdress Clark's claim that the length of his imprisonment should have been disclosed to the jury prior to their deliberations.⁹⁶

The court specifically relied on the Fourteenth Amendment Due Process Clause in deciding Clark's claims.⁹⁷ The majority of the *Clark II* court agreed with Justice Souter's concurring opinion in *Simmons* that the Eighth Amendment requires the jury to be advised of the significance of a life sentence in death penalty sentencing proceedings.⁹⁸ Notwithstanding their agreement, the court declined to decide Clark's petition under the Eighth Amendment⁹⁹ or under Article II, section 13 of the New Mexico Constitution,¹⁰⁰ because a majority of the Supreme Court did not decide *Simmons* on Eighth Amendment grounds.¹⁰¹

In *Clark II*, the court explained that *Clark I* held that the period of incarceration facing a defendant sentenced to life is not a mitigating circumstance under the Eighth Amendment.¹⁰² However, *Clark I* failed to address whether the potential period of confinement was relevant mitigating evidence under the Due Process Clause.¹⁰³ The *Clark II* court determined that due process allows the defendant to "rebut, with all mitigating evidence, the prosecutor's argument that the defendant's future dangerousness is cause for the death penalty."¹⁰⁴ Thus, the term of imprisonment the defendant must serve if he is not sentenced to death is relevant mitigating evidence within the Due Process Clause.¹⁰⁵

Because Clark was not eligible for parole until age eighty-six, the court concluded that the jury must have misunderstood the sentencing alternatives it could choose.¹⁰⁶ As a result, the state secured a death sentence while concealing from Clark's jury the true meaning of its sentencing alternatives.¹⁰⁷ The *Clark II* court held that trial courts must instruct the jury on the length of a life sentence facing a defendant so the jury may meaningfully consider life imprisonment as an alternative to the death penalty.¹⁰⁸ This must be done before the jury deliberates on the death penalty and only if the defendant requests that the jury be given this

95. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

96. *Clark II*, 118 N.M. at 489, 882 P.2d at 530.

97. *Id.* at 490, 882 P.2d at 531.

98. *Id.*

99. See *supra* note 14 and accompanying text.

100. N.M. CONST. art. II, § 13 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.').

101. *Simmons*, 114 S. Ct. at 2193 n.4.

102. *Clark II*, 118 N.M. at 492, 882 P.2d at 533.

103. See *id.*

104. *Id.*

105. *Id.*

106. *Clark II*, 118 N.M. at 492, 882 P.2d at 533. Assuming good time deductions for his noncapital convictions, Clark, who was 31 years old at the time of sentencing, would have to serve at least 55 years before becoming eligible for parole at age 86. See also *supra* note 11 and accompanying text.

107. *Id.*

108. *Id.* at 493, 882 P.2d at 534.

information.¹⁰⁹ To withhold this information after the defendant requests an instruction would violate his due process right to present the jury with accurate information to rebut the prosecution's case for death.¹¹⁰

Furthermore, the *Clark II* court overruled *State v. Henderson*,¹¹¹ and held that the trial court has no discretion to delay sentencing on capital charges if the defendant asserts this as relevant mitigating evidence.¹¹² If the defendant is sentenced prior to the jury's deliberations, the jury will be able to firmly fix when the defendant will become eligible for parole if sentenced to life.¹¹³ This evidence will give the defendant the opportunity to rebut the prosecution's case for death.¹¹⁴

Moreover, the *Clark II* court cautioned that the jury must not be given incomplete information that allowed it to speculate about future legislative or executive actions.¹¹⁵ Thus, arguments about whether meritorious deductions could be applied to a life sentence were improper.¹¹⁶ Such unsubstantiated arguments allowed the jury to speculate about matters that were beyond proof and would not be reconciled with the requirement that the jury's sentencing discretion be limited and directed to ensure reliability.¹¹⁷

V. ANALYSIS AND IMPLICATIONS

A. Creating Reversible Error

The holding in *Clark II* is at odds with the facts presented in *Clark I*. In *Clark II*, the court based its decision in part on the impropriety of the State's argument that Clark's future dangerousness was a reason for the jury to choose the death penalty.¹¹⁸ However, *Clark I* explained that defense counsel first introduced the subject of future dangerousness

109. *Id.*

110. *Id.*

111. 109 N.M. 655, 789 P.2d 603 (1990), overruled by 118 N.M. 486, 882 P.2d 527 (1994). In *Henderson*, the defendant appealed the trial court's decision not to instruct the jury on the meaning of a life sentence—a defendant must serve at least 30 years in prison before becoming eligible for parole. *Henderson*, 109 N.M. at 659, 789 P.2d at 607. The defendant contended that instruction was crucial because during voir dire, several jurors who served on Henderson's jury indicated their belief that a life sentence meant a defendant served as little as 10 years. *Id.* at 658, 789 P.2d at 606. The New Mexico Supreme Court vacated Henderson's death sentence ruling that the jury must have before it all relevant information about the defendant. *Id.* Furthermore, the court held that the jurors' erroneous misunderstanding of the length of a life sentence oriented them towards choosing the death penalty. *Id.* at 659, 789 P.2d at 607. Therefore, the trial court erred by not tendering Henderson's requested instruction and restoring a proper balance to the jury's deliberations. *Id.* The *Henderson* decision, however, did not require trial courts to sentence capital defendants prior to the jury's deliberations. *Id.* Instead, the trial courts could sentence the defendant or they could instruct the jury on the range of sentences facing the defendant. *Id.* The court distinguished *Henderson* from *Clark* by explaining that Clark chose to instruct the jury on his length of imprisonment without the possibility of parole. *Id.*

112. *Clark II*, 118 N.M. at 493, 882 P.2d at 534.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Clark II*, 118 N.M. 486, 492, 882 P.2d 527, 533 (1994).

as part of its case in chief.¹¹⁹ The prosecutor in *Clark I* merely responded to defense counsel's arguments.¹²⁰ In *Clark II*, the court characterized the prosecution's actions at trial as "concealing from the sentencing jury the true meaning of its noncapital sentencing alternative."¹²¹ Yet *Clark I* demonstrated that information about the sentencing alternatives available was given to the jury rather than being concealed from it.¹²²

The *Clark II* court did not acknowledge the specific facts in *Clark I*. The impact this oversight may have upon future cases is difficult to predict. One possible implication is that defendants may use the sentencing hearing as an opportunity to create reversible error on appeal by presenting improper arguments to the sentencing jury.¹²³ A second possibility is that *Clark II* will be read to suggest that concealment occurs when the prosecutor responds to the defendant's argument, thus stripping the prosecution of its right to rebut the defendant's case.

To avoid such confusion, the court could have premised its rationale on the argument that due process is violated by jurors' misunderstanding of available sentencing options. When jurors have an inaccurate understanding of the defendant's parole eligibility, the defendant is sentenced to death on the basis of information he cannot deny or explain thus violating due process.¹²⁴ The Court could have reasoned that due process demands that the defendant have the opportunity to provide the jury with accurate information to clear up any misconception and to ensure that the jury's ultimate sentencing determination is reliable.

B. *Clark II* Broadens *Simmons*' Protections

The *Clark II* decision broadened the United States Supreme Court's holding in *Simmons v. South Carolina*.¹²⁵ The *Simmons* holding is very narrow, applying only when (1) the state emphasizes the defendant's future dangerousness as reason to choose the death penalty and (2) the defendant is parole ineligible under state law.¹²⁶ The *Clark II* court

119. *Clark I*, 108 N.M. 288, 297, 772 P.2d 322, 331 (Ct. App. 1989).

120. *Id.* at 298, 772 P.2d at 332. "Once the issue was introduced it was not surprising that the prosecutor, in rebuttal, sought to point out all of the factors which bear upon the possibility of release after conviction of a life sentence." *Id.* (emphasis added).

121. *Clark II*, 118 N.M. at 492, 882 P.2d at 533.

122. See *supra* notes 51-57 and accompanying text.

123. *Clark I* acknowledged that it was error to place the issues of parole eligibility and post-sentencing occurrences before the jury. See *Clark I*, 108 N.M. at 298, 772 P.2d at 332. However, the court refused Clark's claim that fundamental error occurred in the sentencing hearing. *Id.* To invoke the fundamental error doctrine where a defendant creates error by his own actions would violate the doctrine's purpose to guard against "the corruption of justice." *Id.* The *Clark II* court did not address the *Clark I* court's reasoning for refusing Clark's claim of error.

124. See *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

125. 114 S. Ct. 2187 (1994).

126. Justice Blackmun's plurality opinion would seem to suggest that the holding applies even where the defendant is not parole ineligible under state law: "In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant." *Simmons*, 114 S. Ct. at 2194. However, further language in the opinion indicates otherwise: "The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Id.* at 2198.

expanded *Simmons* by holding that "the Due Process Clause assures the defendant a right to have the jury informed of the period of his parole ineligibility."¹²⁷ The insertion of the word *period* assures all capital defendants the opportunity to inform sentencing juries how long they must serve on a life sentence before becoming eligible for parole.¹²⁸ Thus, in New Mexico, capital defendants do not have to be absolutely "parole ineligible" in order to provide juries with information about their length of incarceration.¹²⁹ As a result, the *Clark II* court provides capital defendants with greater constitutional protection during death penalty sentencing proceedings than the Supreme Court determined were mandated under the Federal Constitution.

C. The Need for Clarification on Future Dangerousness

Clark II purports to follow *Simmons*, which requires the State to argue the defendant's future dangerousness as reason to choose the death penalty before the jury may be apprised of the defendant's parole ineligibility.¹³⁰ However, *Clark II* also uses language which suggests that the State does not need to argue future dangerousness in order for the defendant to be able to inform the jury about his length of incarceration if sentenced to life imprisonment.¹³¹ The court states:

The length of incarceration facing a capital defendant before he can be considered for parole, as an alternative to a death sentence, is information that must be provided to a jury before it deliberates on the capital charge if the defendant decides it is in his best interest to have the jury apprised of this information. To withhold this information after it is requested violates the petitioner's due process right to have accurate information presented to the jury to rebut the prosecution's case for death.¹³²

The court should clarify whether the sentencing jury must always be apprised of the defendant's period of parole ineligibility or whether this rule only applies when the State argues the defendant's future dangerousness as reason to choose the death penalty. If sentencing juries must always be apprised of the defendant's parole eligibility regardless of whether the defendant's future dangerousness is directly at issue, then the court's reliance on *Simmons* as support for their decision has eroded. The court's decision will have disregarded the central premise underlying *Simmons* that if the State urges the defendant's future dangerousness as reason to choose the death penalty, then due process requires that the

127. *Clark II*, 118 N.M. at 491, 882 P.2d at 532.

128. *See id.*

129. *But see* State v. Price, 448 S.E.2d 827, 831 (N.C. 1994) ("We think the United States Supreme Court's decision in *Simmons* is limited to those situations where the alternative to a sentence of death is life imprisonment without possibility of parole.").

130. *Simmons*, 114 S. Ct. at 2194.

131. *See Clark II*, 118 N.M. at 492, 882 P.2d at 533.

132. *Id.*

sentencing jury must be informed that the defendant is parole ineligible.¹³³

D. Clark II's Reasoning is Ultimately Correct

The *Clark II* court correctly recognizes that there is little practical difference between Clark spending fifty-five years in prison and spending life.¹³⁴ Thus, the due process rationale supporting informing the jury about the defendant's parole eligibility applies in both cases. Furthermore, if the jury is concerned that the defendant will pose a future threat to society, the information that the defendant will serve twenty, thirty, or fifty-five years in prison before becoming eligible for parole may assuage their fears.

Juries invariably consider future dangerousness regardless of whether the State argues the issue.¹³⁵ To the extent that juries consider future dangerousness in making a sentencing determination, they must be presented with accurate information whether the defendant will in fact present a future threat to society. Failure to present the jury with accurate information about its sentencing options results in jury determinations that may be contrary to their "true assessment of the appropriate punishment."¹³⁶

Accurate information must also be considered in conjunction with the erroneous assessments that many jurors have about the length of a life sentence.¹³⁷ Knowing that a defendant will be sentenced to life, but yet believing that life means 10 years or less will cause jurors to erroneously assess the defendant's future threat to society. The danger is that juries will sentence a defendant to death based on their erroneous assessment of his future threat and not based on a reasoned determination of whether death is an appropriate punishment.¹³⁸

However, trial courts must take special precautions to ensure that *Clark II* is not interpreted to allow defendants to bring irrelevant and improper arguments before the sentencing jury. Additionally, a question that the

133. See *Simmons*, 114 S. Ct. at 2194.

134. See *supra* note 106.

135. See Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 7 (1993) (stating that "about thirty percent of jurors in both life and death cases believe, incorrectly, that the law requires them to impose a death sentence if the evidence proves that the defendant will be dangerous in the future.").

136. See William Hood III, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1627 (1989) (providing that "because the jury harbors misconceptions about the defendant's eligibility for parole and underestimates the actual time the defendant would serve, it may impose the death penalty contrary to its true assessment of the appropriate punishment.").

137. See *State v. Henderson*, 109 N.M. 655, 658, 789 P.2d 603, 606 (1990). One prospective juror stated that convicts serving a life term usually get out in 10 years. *Id.* Another juror stated that some convicts serving life sentences get out in 5 or 6 years and that the death penalty was more effective in deterring crime. *Id.* Yet another stated that "life imprisonment means ten years and they parole out. Is anybody kept in prison for life?" *Id.*

138. See Eisenberg & Wells, *supra* note 135, at 7 ("Not surprisingly, jurors assessing dangerousness attach great weight to the defendant's expected sentence if a death sentence is not imposed. Most importantly, jurors who believe the alternative to death is a relatively short time in prison tend to sentence to death. Jurors who believe the alternative treatment is longer tend to sentence to life.").

New Mexico Supreme Court may face in the future is whether fairness dictates that the prosecution may also present arguments to the jury based upon the defendant's parole eligibility.¹³⁹

VI. CONCLUSION

Clark v. Tansy (Clark II) provides capital defendants with greater tactical control over what information to present to a sentencing jury. Capital defendants can choose to be sentenced on noncapital charges before the jury deliberates on the death penalty in order to firmly fix the defendant's period of parole ineligibility if sentenced to life. Juries will be able to take into account the defendant's future dangerousness without speculation about his length of incarceration to determine whether death is the appropriate punishment. However, the New Mexico Supreme Court must clarify whether a defendant can always request that the jury be instructed on his period of parole ineligibility or whether a defendant can only demand this when the State argues his future dangerousness as a reason for the jury to choose the death penalty.

THERESA M. MONTROYA

139. See, e.g., *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994).

If the rule changed for defendants, many will think that evenhandedness demands a change for prosecutors as well. State's attorneys ought to be able to say that if, ladies and gentlemen of the jury, you do not impose capital punishment upon this defendant . . . he may be walking the streets again in eight years! Many would not favor the admission of such an argument—but would prefer it to a State scheme in which the defendants can call attention to the unavailability of parole, but prosecutors cannot note its availability.

Id. at 2204 (Scalia, J., dissenting).