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INFORMING SOUTH CAROLINA CAPITAL JURIES ABOUT PAROLE

JAMES M. HUGHES

I. INTRODUCTION

After convicting a defendant of a capital crime, a jury in South Carolina must sentence the defendant either to death or to life imprisonment.¹ Two current statutes, enacted as part of The Omnibus Criminal Justice Improvements Act of 1986,² dictate the minimum time a capital defendant must serve before becoming eligible for parole. South Carolina Code section 16-3-20(A) provides that capital defendants sentenced to life imprisonment are not eligible for parole until they serve at least twenty years.³ If the jury finds an aggravating circumstance, the defendant must serve at least thirty years of a life sentence before becoming eligible for parole.⁴ Under section 24-21-640 of the South Carolina Code, a defendant serving a sentence for a previous violent crime conviction is wholly ineligible for parole from a subsequently imposed life sentence.⁵

However, evidence indicates that almost half of the citizens in South Carolina who are eligible to serve on capital juries believe that a convicted murderer sentenced to life imprisonment would probably spend less than twenty years in prison.⁶ An overwhelming majority of potential jurors sur-

¹ B.A., University of Minnesota; M.A., Ph.D., University of Illinois at Chicago Circle; J.D., University of South Carolina. Thanks to Daniel T. Stacey and Professor William S. McAninch for comments on earlier versions of this Note.
⁶ Affidavit of Dr. Robert W. Oldendick, Record at 2327, State v. Simmons, 427
veyed believes that a capital defendant would not have to serve a life sentence to completion. Finally, more than three out of four of the potential jurors surveyed stated that information about the length of time a convicted murderer would serve if sentenced to life imprisonment would figure importantly in their capital sentencing decision. These results are consistent with the findings of similar studies in Georgia and Virginia.

The implications of the discrepancy between statutory reality and juror misconception concerning parole eligibility are obvious. If a jury mistakenly believes that a defendant sentenced to life imprisonment will actually spend less time in prison than the jury thinks he or she deserves, the jury will be inclined to render a death sentence.

Despite potential jurors’ misinformation about the parole possibilities of capital defendants, the South Carolina Supreme Court recently overruled State v. Atkins and reinstituted the ban on providing capital sentencing juries with information about parole. The purpose of this Note is to examine critically the supreme court’s reasoning in State v. Torrence and to trace the evolution of the supreme court’s position on informing capital

S.E.2d 175 (S.C. 1993). Dr. Oldendick, Director of the Survey Research Laboratory of the University of South Carolina’s Institute for Public Affairs, conducted this random telephone survey between June 17 and June 22, 1991. The potential sampling error is ± 4.4%. “Tables 1-3 present the data for those people whose opinion concerning the death penalty depended upon the circumstances of the case; that is, they neither favored nor opposed the death penalty in all cases in which a person is convicted of murder.” Id. at 2325. Tables 1-3 are reproduced in the Appendix to this Note.

7. See Appendix, Table 1.
8. See Appendix, Table 3.
9. The evidence from similar studies in Georgia and Virginia shows that a majority of potential jurors who favor the death penalty believes: (1) that a defendant sentenced to life imprisonment would spend between seven and ten years in prison; and (2) that actual time to be served is important to the penalty determination. See Anthony Paduano & Clive A.S. Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 COLUM. HUM. RTS. L. REV. 211, 221-25 & nn.30-35 (1987) (providing statistics from Georgia study); William W. Hood, III, Note, The Meaning of “Life” for Virginia Jurors and Its Effect on Reliability in Capital Sentencing, 75 VA. L. REV. 1605, 1620-25 & nn.98-105 (1989) (providing statistics from Virginia study). Moreover, the Virginia study revealed that a majority of the potential jurors surveyed would disregard a judge’s instructions not to consider parole. Id. at 1624 & n.103.

10. See, e.g., State v. Hinton, 210 S.C. 480, 486-88, 43 S.E.2d 360, 362-63 (1947) (remanding a capital case for a new trial after the solicitor told the jury that a sentence of life imprisonment “does not mean that [the defendant] will serve for life”).
13. Id.
sentencing juries about parole. The author argues that the Torrence court overlooked the original rationale behind prohibiting parole information in capital cases, and that the original rationale actually provides good reasons for lifting the ban on informing capital juries about parole.

Part II of this Note summarizes the Torrence concurring opinion that overruled Atkins and introduces some of the important issues. Part III is a detailed analysis of the evolution of the South Carolina Supreme Court's position on informing capital juries about parole possibilities. This analysis supports the view that the original reason for the proscription on providing capital juries with information about parole was to shield defendants from prejudice that could unnecessarily cost them their lives. The author's main argument is that the court formalized its original concern in a "legislative intent" rationale, but eventually lost sight of the underlying purpose of protecting capital defendants from inappropriate death sentences. By losing sight of the original justification for the rule, the court has turned the legislative intent rationale on its head.

Part IV addresses some of the constitutional issues raised by the exclusion of parole information from jury consideration. Although the United States Supreme Court has recognized the states' rights to prevent informing juries about parole, this right does not support the South Carolina Supreme Court's view on this issue. Finally, in Part V, the author proposes a model jury instruction that provides an equitable solution.

II. THE TORRENCE DECISION

A jury convicted Michael R. Torrence of armed robbery, burglary, and two murders. At the time of the trial, Torrence was already serving a life sentence for a previous unrelated murder conviction. Before closing arguments in the penalty phase, defense counsel requested a charge that, under section 24-21-640 of the South Carolina Code, imposition of a life sentence would require imprisonment without the possibility of parole. The trial court refused to give the charge, but stated that it would, upon request, give an Atkins charge on parole eligibility.

State v. Atkins authorized a trial court, upon a capital defendant's

14. Id. at 55-60, 406 S.E.2d at 321-23 (Chandler, J., concurring).
15. Id. at 52-53, 406 S.E.2d at 319-20. The pertinent part of § 24-21-640 provides: "The [B]oard [of Probation, Parole, and Pardon Services] must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60." S.C. CODE ANN. § 24-21-640 (Law. Co-op. Supp. 1992). Under the statutory definition, murder is a violent crime. Id. § 16-1-60.
17. 293 S.C. 294, 360 S.E.2d 302 (1987), overruled by Torrence, 305 S.C. 45, 406
request, to give one of two charges regarding possible sentences and parole eligibility. First, the court could charge the sentencing jury that "the term 'life imprisonment' is to be understood in its ordinary and plain meaning."\(^1\) Second, instead of the "ordinary and plain meaning" charge, the defendant could request a charge that imposition of a life sentence would require service of at least twenty or thirty years without the possibility of parole, depending on the absence or presence of aggravating circumstances.\(^2\) Torrence's defense counsel requested the latter charge, which the court gave.\(^3\) The jury sentenced Torrence to life imprisonment for one murder and to death for the other.

On appeal, the court addressed the issue of whether the trial court committed prejudicial error by refusing to charge the jury that if Torrence was sentenced to life imprisonment, he would be ineligible for parole. Writing the main opinion, Justice Finney concluded that denying the charge request was prejudicial error in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article V, section 21 of the South Carolina Constitution.\(^4\) Justice Finney stated that Torrence "sought only to have the court declare correct and current law relevant to his case,"\(^5\) and that, "as applied to facts of the present case, the Atkins charge was an incorrect statement of appellant's parole eligibility had another life sentence been imposed."\(^6\) Finally, Justice Finney observed that "[t]he requested charge was a correct statement of law which would have provided the jury with accurate information regarding appellant's parole eligibility."\(^7\)

However, in Justice Chandler's concurrence, the remainder of the court effectively overruled Atkins, "reinstat[ing] earlier precedent prohibiting capital sentencing juries from being informed about parole."\(^8\) The

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S.E.2d 315.

18. \textit{Id.} at 300, 360 S.E.2d at 305.

19. \textit{Id.} at 300, 360 S.E.2d at 305-06. Section 16-3-20(A) of the South Carolina Code dictates the parole possibilities for defendants convicted of murder. S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. Supp. 1992); \textit{see supra} notes 3-4 and accompanying text.


22. \textit{Id.}

23. \textit{Id.}

24. \textit{Id.}

25. \textit{Id.} at 55, 406 S.E.2d at 321 (Chandler, J., concurring). The \textit{Torrence} decision contains four separate opinions. As previously discussed, the main opinion, written by Justice Finney, concluded that the denial of Torrence's request to inform the jury about his parole ineligibility was unconstitutional. \textit{Id.} at 54, 406 S.E.2d at 320 (Finney, J.). In addition, Justice Finney's opinion stated that, although a defendant may present witnesses who know and care for him to ask for mercy on his behalf, a defendant may
concurrence characterized *Atkins* as an ill-conceived aberration from a long line of cases that disapprove of providing capital juries with parole information. Justice Chandler stated that the *Atkins* instructions were "incompatible not only with the rationale of the substantial body of law preceding *Atkins*, but also with that of our decisions which followed."

An analysis of the evolution of the court's view shows *Atkins* to be an attempt to apply precedential rationale in an equitable and reasonable manner and *Torrence* as a reversion to the letter of the law at the expense of its spirit. The initial prohibition against informing capital juries about defendants' parole possibilities was rooted in an admirable and rational concern for preventing the most egregious possible prejudice to a defendant: an unnecessary death sentence. Unfortunately, in light of recent statutory changes, the proscription reinstated by *Torrence* actually prejudices the defendant in many cases.

III. EVOLUTION OF THE COURT'S VIEW

The South Carolina Supreme Court first addressed the issue of informing capital juries about parole in *State v. Hinton*. The solicitor in *Hinton* told the jury: "'If you recommend mercy the sentence would be life imprisonment, but even that does not necessarily mean that he will serve for life there.'" Defense counsel objected, and the solicitor remarked to the

not present witnesses merely to testify about their religious or philosophical attitudes about the death penalty, nor may the defendant present witnesses to give an opinion about what verdict the jury "ought" to reach. *Id.* at 50-51, 406 S.E.2d at 318-19 (citing *Childs* v. *State*, 357 S.E.2d 48, 60 (Ga.), cert. denied, 484 U.S. 970 (1987)). In Part II of the opinion the court held that when a capital defendant's disputed statement is introduced during the penalty phase of a trial, the jury should be instructed to determine the voluntariness of the disputed statement if the jury has not previously made that determination. *Id.* at 51-52, 406 S.E.2d at 319.

Justice Chandler, joined by Chief Justice Gregory and Justices Harwell and Toal, concurred in the result, but called for reinstating the ban on informing capital sentencing juries about parole. *Id.* at 55, 406 S.E.2d at 321 (Chandler, J., concurring).

Justice Toal, joined by Chief Justice Gregory and Justices Harwell and Chandler, filed an opinion concurring in the result and abolishing the doctrine of *in favorem vitae*, which required the supreme court to review the entire record of a capital trial and to consider unpreserved errors. *Id.* at 60-61, 406 S.E.2d at 323-24 (Toal, J., concurring). Justice Finney filed a separate opinion dissenting with the majority's concurring decision to abolish *in favorem vitae*. *Id.* at 72, 406 S.E.2d at 330 (Finney, J., dissenting). For a discussion of the *Torrence* court's treatment of *in favorem vitae*, see James M. Hughes, Survey, Criminal Law—State v. Torrence, 44 S.C. L. REV. 55, 56-58 (1992).

26. *Id.* at 58, 406 S.E.2d at 323 (Chandler, J., concurring).
28. *Id.* at 486, 43 S.E.2d at 362 (quoting solicitor's closing argument).
court: "That is the law, as they are eligible for parole after five to ten years."29 Ruling that the statements were unjustified and possibly prejudicial, the court observed that "the only logical inference" a jury could draw from the statements was that "a verdict of murder should be rendered because some other department of the state government might shorten or commute a life sentence."30 Clearly, the reasoning of the court was that the solicitor’s remarks concerning parole were prejudicial because they may have improperly induced the jury to render a death sentence.

In State v. Morris31 the court reiterated its concern about the prejudicial effect of comments about parole. The Morris jury asked the trial judge a question concerning parole and possible verdicts. Although exactly what the jury had asked was unclear, the supreme court approved the trial judge’s limited response. The supreme court stated that had the trial court given the jury information about the possibility of parole, "it could well be argued that the court erred in doing so to the prejudice of [the defendant]."32 Again, preventing prejudice to the defendant was the court’s justification for the prohibition on informing the jury about parole.

Both Hinton and Morris stand for the proposition that remarks to a capital jury about a defendant’s parole possibilities may prejudice the defendant. However, one may extract a narrower rule from these two cases: neither the solicitor nor the trial court should inform a capital jury about the defendant’s chances for parole. Although most defendants likely would not request a jury charge that they would be eligible for parole in ten years if sentenced to life imprisonment, the situation is dramatically different when the defendant is completely ineligible for parole.

Almost twenty years later, in State v. Atkinson,33 the supreme court delivered one of its most important opinions about providing capital juries with parole information. Atkinson is pivotal because the supreme court articulated a "legislative intent" rationale for its rule that capital juries should not be informed about a defendant’s parole possibilities.34 More
importantly, however, all of the sources upon which Atkinson relies specify that preventing prejudice to the defendant is the underlying justification for the prohibition on informing capital juries about a defendant's parole eligibility.35

In Atkinson the jury interrupted its deliberations to ask the court whether the defendant would become eligible for parole or pardon if the jury rendered a verdict carrying a life sentence.36 The trial court told the jury members that the issue of parole was no concern of theirs and that the parole board decides whether to release eligible prisoners.37 Shortly thereafter, the jury returned a verdict of guilty without recommendation of mercy, which carried a sentence of death by electrocution. The defendant complained that the trial court gravely prejudiced him by commenting, even briefly, about the parole system.38

The supreme court affirmed, ruling that a sentencing jury should not be invited to speculate on the possible effect of parole. The court concluded that the trial court's instructions were consistent with this rule.39 The Atkinson court relied upon several sources for its decision40 and stated that "[t]he rationale of this view was well exprseed [sic]" in the New Jersey case of State v. White:41

"The Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is no concern of theirs. It is no more proper for a jury to conclude that death be the penalty sentencing phase of the bifurcated trial provided under our present death penalty law." Torrence, 305 S.C. at 56, 406 S.E.2d at 321 (Chandler, J., concurring).

35. See infra note 40 (listing the sources upon which Atkinson relies to support the "legislative intent" rationale).
37. Id.
38. Id.
39. Id. at 535, 172 S.E.2d 112-13.
because a life sentence may be commuted or the defendant paroled, then (sic) it would be for a trial judge in other criminal cases deliberately to impose an excessive sentence to frustrate the statutory scheme committing parole to another agency.\textsuperscript{42}

The \textit{Torrence} concurrence was also impressed with some of the reasoning in \textit{White}, but quoted only the first half of this passage, up to the phrase “no concern of theirs.”\textsuperscript{43} Thus, \textit{Torrence} misleadingly implies that the \textit{Atkinson} court’s sole rationale for prohibiting juries from hearing parole information was that the legislature intended the duties of the jury and the parole board to be distinct, without regard to possible prejudice to the defendant.

Although quoted by neither the \textit{Atkinson} nor the \textit{Torrence} court, the next three sentences of the \textit{White} opinion illustrate the concerns underlying the original “legislative intent” view:

\begin{quote}
That death should be inflicted when a life sentence is appropriate is an abhorrent thought. We should not attribute that purpose to the Legislature. The Legislature could not have intended that juries shall weigh the death penalty against something less than a life sentence and by that process arrive at a punishment which does not fit the facts.\textsuperscript{44}
\end{quote}

Furthermore, other sources relied upon by \textit{Atkinson} support the conclusion that preventing prejudice to the defendant was the underlying motive for invoking the legislative intent rationale.\textsuperscript{45} In discussing cases which hold that informing capital juries about parole ordinarily results in prejudicial error, an annotation cited by \textit{Atkinson} provides the following explanation:

The theory underlying this proposition is that the guilt and punishment of a defendant in a criminal case should be determined at the time of the trial, and the essential and relevant factors be considered and incorporated into a decision settling all the issues to which the judicial process is applicable, and that because questions of parole, probation, and pardon rest largely upon future conditions and considerations determinable by

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{42} \textit{Atkinson}, 253 S.C. at 535, 172 S.E.2d at 112 (alteration in original) (quoting \textit{White}, 142 A.2d at 76).
\item \textsuperscript{44} \textit{White}, 142 A.2d at 76 (emphasis added). The \textit{Atkinson} court may have refrained from including this passage because it would have undermined the court’s affirmation of \textit{Atkinson’s} death sentence.
\item \textsuperscript{45} \textit{See infra} notes 46-50 and accompanying text.
\end{itemize}
\end{footnotesize}
other than judicial officials, anticipation of or reliance upon the attitudes and actions of those officials, in making the judicial decision, to the likely detriment of the defendant, is prejudicial and therefore reversible error.\(^\text{46}\)

The Atkinson court also cited People v. Morse,\(^\text{47}\) a California decision that is a leading case on the issue. Morse recognized that the original purpose behind informing the jury about parole was "to assist [the jury] in assessing the significance of a life sentence."\(^\text{48}\) Even though such information may be relevant, the Morse court observed that "the instruction, abetted by the introduction of evidence as to the possibility of parole, has brought about untoward consequences to defendants."\(^\text{49}\) The California Supreme Court eloquently expressed the reasons for invoking the legislative intent rationale to prohibit courts from informing juries about parole:

The final and most dangerous error of permitting the jury to consider the [parole board's] possible grant of parole is to induce it to pass judgment upon the very issue foreclosed to it and to prevent the proper body from deciding the issue at the proper time. The jury can conclude that the [parole board] will improperly grant defendant parole in the future; it may fear that the [parole board] will permit a "dangerous" defendant to walk the streets; it may then foreclose the [parole board] from ever granting parole by imposing the death penalty. The jury would thus improperly preempt the whole parole system and defeat the legislative design. The jury would then utilize the death penalty for fear that the [parole board] will not properly perform the function that the Legislature has specifically delegated to it.\(^\text{50}\)

In cases following Atkinson the South Carolina Supreme Court has increasingly relied on the legislative intent rationale to prohibit trial courts from informing capital juries about parole. However, attention to the underlying justification—preventing juries from rendering inappropriate death sentences—has steadily diminished. Statutory changes increasing the time that capital defendants must serve before becoming eligible for parole

\(^{46}\) Shipley, Prejudicial Effect, supra note 40, § 3, at 835 (emphasis added).
\(^{47}\) 388 P.2d 33 (Cal. 1964) (en banc).
\(^{48}\) Id. at 36-37 (quoting People v. Purvis, 346 P.2d 22, 30 (Cal. 1959)).
\(^{49}\) Id. at 37 (emphasis added).
\(^{50}\) Id. at 41. In a footnote the Morse court continued, "As one writer put it, 'That the fact that a person sentenced for life might be released before he may safely be returned to society indicates a weakness in the parole system—not that he ought to have been executed.'" Id. at 41 n.10 (alteration in original) (quoting Robert E. Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. PA. L. REV. 1099, 1119 (1953)).
or eliminating parole possibilities altogether have removed the justification for the legislative intent rationale in many cases. In such cases, these statutory changes have made reliance on the rationale inimical to its raison d'etre. Accordingly, the Torrence court relied on a rationale that, at best, often no longer has an underlying justification or, at worst, cuts against its original logical underpinnings.

In State v. Brooks,51 the first post-Atkinson case to address the issue of informing jurors about parole, the trial judge made detailed references to parole eligibility while charging the jury on murder and manslaughter. The judge informed the jurors that a defendant sentenced to life imprisonment for murder would be eligible for release or parole after serving ten years and that a defendant convicted of manslaughter, which carried a maximum sentence of thirty years, would be eligible for parole after serving one-third of the maximum term, or ten years.52 Finally, the judge instructed the jury that a defendant sentenced to twenty-five years would be eligible for parole after serving approximately eight years and four months, which is "a difference of twenty months in a life sentence."53 The jury returned a murder conviction.

The supreme court reversed Brooks's conviction and stated that the "appellant was entitled to have his guilt or innocence determined without regard to his eligibility for parole."54 The court declared that the impression given to the jury—that there was no real distinction between the penalties for murder and manslaughter—was "false and operated to appellant's disadvantage when the jury returned a verdict of guilty of murder."55 By citing Atkinson, the court implicitly relied on the legislative intent rationale; however, the Brooks court explicitly stated its concern about the prejudicial effect of parole information given to the jury.

In State v. Goolsby56 the supreme court followed Atkinson and Brooks. The trial judge in Goolsby charged the capital sentencing jury that a defendant sentenced to life imprisonment would not be eligible for parole until the service of at least twenty years, but later specifically instructed the

52. Id. at 357-58, 247 S.E.2d at 437-38.
53. Id. at 358, 247 S.E.2d at 438 (quoting jury charge).
55. Id. at 360, 247 S.E.2d at 438-39 (emphasis added).
jurors not to consider parole in their deliberations.\textsuperscript{57} On appeal, the supreme court stated that the charge referring to parole was erroneous,\textsuperscript{58} but that the subsequent instruction cured the charge of "whatever minimal prejudice" may have resulted.\textsuperscript{59}

\textit{State v. Butler}\textsuperscript{60} was the first indication of the supreme court's willingness to eschew the original justification for the prohibition on informing capital juries about parole and to rely solely on encapsulated precedent. Butler's defense counsel requested a charge informing the jury about parole ineligibility, but the trial judge denied the request. On appeal, the court stated: "We have determined that a 'jury should be neither invited nor permitted to speculate upon the possible effects of parole upon a conviction.'"\textsuperscript{61} The court noted that if the jury had inquired about parole, the proper charge would have been the \textit{Atkinson} charge that parole is "no concern of yours."\textsuperscript{62}

Although the \textit{Butler} court relied on \textit{Atkinson} and \textit{Brooks} for the rule that capital sentencing juries should not be informed about parole, the court abandoned the rule's underlying purpose of preventing prejudice to the defendant. In \textit{Butler} the defense counsel requested the charge. Unless motivated by paternalism, the court's decision in \textit{Butler} represents a triumph of form over substance, marking the beginning of an unswerving adherence to a rule whose justification is not always present.

In \textit{State v. Copeland}\textsuperscript{63} one of the issues the court addressed was whether the trial judge should have instructed the capital sentencing jury that "life imprisonment means one will actually spend his life in prison."\textsuperscript{64} On appeal, Copeland asserted that "the jury will consider the possibility of parole in its deliberations and the failure of the trial court to instruct the jury not to consider it injects an arbitrary factor into the trial."\textsuperscript{65} The supreme court disagreed.

While recognizing that jurors should not consider the possibility of

\textsuperscript{57} \textit{Id.} at 124-25, 268 S.E.2d at 39.
\textsuperscript{58} See \textit{id.} at 124-25, 268 S.E.2d at 39.
\textsuperscript{59} \textit{Id.} at 125, 268 S.E.2d at 39.
\textsuperscript{60} 277 S.C. 543, 290 S.E.2d 420 (1982), overruled on other grounds by Torrence, 305 S.C. 45, 406 S.E.2d 315.
\textsuperscript{62} \textit{Id.} at 548, 290 S.E.2d at 422.
\textsuperscript{64} \textit{Id.} at 585, 300 S.E.2d at 71.
\textsuperscript{65} \textit{Id.}
parole, the court stated that the trial judge’s duty is not “to anticipate or speculate that jurors might consider [parole] in their deliberations and instruct them accordingly.” The court opined that specifically instructing a jury not to consider parole “may, in fact, inject consideration of parole into their deliberations where it may not before have been.”

This reasoning, quoted in *State v. Torrence,* is questionable, but it illustrates the dilemma that a trial court may have to confront. In many cases the sentencing jury specifically requests information about the possibility of parole. When the issue of parole has come spontaneously to the jury’s attention, it is perhaps not unduly cynical to doubt the efficacy of any instruction to give it no weight or consideration, and the alternatives would seem to be (1) to discharge the jury forthwith, (2) to inform them of the law upon the subject, thus insuring that if they do not heed the admonition to give the matter no weight, they at least act upon correct information, a course which, however, probably unavoidably encourages the consideration of such matters, or (3) to refuse to answer, with admonition not to consider the matter, and a reference to or repetition of the instructions upon the assessment of punishment, a course which incurs the risk that the admonition may be disregarded and the matter solved upon the basis of the layman’s information or misinformation upon the subject.

Little justification exists for accepting the *Copeland* court’s view that jurors do not consider parole when deciding capital sentences, even in the absence of their request for such information.

In *State v. Plath* the supreme court forcefully reiterated the legislative intent rationale for disallowing information about parole, but the court did not expressly mention the underlying justification for the prohibition. In *Plath* defense counsel presented a witness who testified about the living conditions of inmates serving life sentences. On cross-examination the solicitor asked the witness if he had investigated the case of an inmate who had escaped while serving a life sentence. The solicitor brought up the subject again in subsequent jury argument. Defense counsel objected that the solicitor’s question and comments introduced speculation about the

66. Id.
67. Id.
69. Shipley, *Procedure to be Followed,* supra note 40, at 770 (emphasis added) (footnotes omitted).
70. See supra note 8 and accompanying text.
72. Id. at 12-14, 313 S.E.2d at 625-26.
defendant's possible escape or premature release.\footnote{Id. at 14, 313 S.E.2d at 626.}

The \textit{Plath} court stated that the jury shall understand the term "life imprisonment" in its ordinary and plain meaning.\footnote{Id. at 14, 313 S.E.2d at 627.} Arguably, this admonition serves both as an implicit admission that juries probably \textit{do} consider parole in their deliberations and as an unrealistic attempt to prevent that consideration.

Furthermore, without citing \textit{Atkinson}, the \textit{Plath} court declared:

\begin{quote}
In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection [of life imprisonment or death]. . . . Such determinations as . . . the matter of parole are reserved by statute and our cases to agencies other than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty . . . .
\end{quote}

The \textit{Plath} court's adamantly reliance on legislative intent, without any citations or underlying consideration, suggests that the court was merely embracing a precedential shell.

The issue in \textit{State v. Norris}\footnote{Id. at 14-15, 313 S.E.2d at 627 (emphasis added).} was similar to that presented in \textit{Atkinson}. After deliberating for two hours, the jury in \textit{Norris} asked whether the defendant would be eligible for parole if sentenced to life imprisonment.\footnote{285 S.C. 86, 328 S.E.2d 339 (1985), overruled on other grounds by \textit{State v. Torrence}, 305 S.C. 45, 406 S.E.2d 315 (1991).} Although the trial judge stated that the jury should not engage in such speculation, he informed the jury that a defendant sentenced to life "'shall not be eligible for parole until the service of twenty years.'"\footnote{Id. at 94, 328 S.E.2d at 344.} The jury sentenced the defendant to death, but the supreme court reversed the sentence and remanded the case for resentencing.\footnote{Id. (quoting jury charge).} The \textit{Norris} court based its holding on both legislative intent and prevention of prejudice to the defendant. The court recognized that a defendant is entitled to have his guilt or innocence determined without regard to parole.\footnote{Id. at 96, 328 S.E.2d at 345.} Furthermore, the court held that the trial judge's remark that jurors should not speculate about parole did not cure the potential
prejudice to the defendant. 81 Then, the court repeated the view that parole eligibility is a matter of legislative determination. 82

The Norris court developed a two-part instruction that a trial court should give to a jury inquiring about parole. First, in accord with Atkinson, Brooks, and Butler, trial courts should instruct a jury “that it shall not consider parole eligibility in reaching its decision.” 83 Second, in accord with Plath, the jury instruction should provide “that the terms ‘life imprisonment’ and ‘death sentence’ should be understood in their ordinary and plain meaning.” 84

In State v. Peterson 85 the court upheld the Norris instruction. During sentencing phase deliberations, the jury in Peterson asked if one of its choices was life imprisonment without parole. In violation of Norris, the trial judge responded that the choices were death by electrocution or life imprisonment, and that life without parole was not a choice. 86 Again, the jury returned a death sentence and the supreme court reversed. 87

Peterson is more important for its implications concerning the popular meaning of “life imprisonment” than for its express holding. Before the jury’s deliberations in the sentencing phase, the court charged the jury that the possible sentences were life imprisonment or death. Nevertheless, the jury returned and asked the court if one of the choices was life imprisonment without parole. 88 The obvious inference is that the jury did not understand “life imprisonment” to mean that a defendant would spend the rest of his life in jail without the possibility of parole.

Furthermore, the trial judge’s response confirmed the jury’s suspicions. Instructing a jury that its sentencing choices are death or life imprisonment, and that life imprisonment without parole is not a possible sentence, is tantamount to telling the jury that “life imprisonment” does not mean life imprisonment without parole. After receiving a Norris instruction, a jury’s speculation about possible parole is merely replaced by another form of speculation: What is the ordinary and plain meaning of “life imprisonment”?

The Norris instruction is consistent with the legislative intent rationale in that the instruction flatly tells jurors not to consider parole. However, whether a Norris instruction actually prevents prejudice to the defendant

81. Id. at 95, 328 S.E.2d at 344.
82. Id. (citing State v. Plath, 281 S.C. 1, 14, 313 S.E.2d 619, 627 (1984)).
83. Id.
84. Id. (citing Plath, 281 S.C. at 14, 313 S.E.2d at 627).
86. Id. at 248, 335 S.E.2d at 802.
87. Id. at 245, 335 S.E.2d at 801.
88. Id. at 248, 335 S.E.2d at 802.
depends on the circumstances of the case and the amount of information or misinformation the jury has about a particular defendant’s parole possibilities. By asking a question about parole during sentencing deliberations, a capital jury indicates that it is aware that the possibility of parole often exists for a defendant sentenced to life imprisonment. If the underlying goal of the instruction is to prevent prejudice to the defendant by minimizing the chances that a jury will render an unnecessary death sentence, the instruction will have inconsistent results depending upon the particular circumstances of the cases.

The Norris instruction would certainly prejudice a defendant who, if sentenced to life imprisonment, would be wholly ineligible for parole because he or she is serving a sentence for a prior violent crime conviction. 89 Instead of preventing prejudice to the defendant or eliminating the jury’s speculation, the instruction implies that the defendant would be eligible for parole. Under Norris, the jury is instructed not to consider parole, paradoxically implying that the defendant will be eligible for parole. Next, under the Norris instruction, the jury is told to understand “life imprisonment” in its ordinary and plain meaning. 90 But, as the trial judge in Peterson implied, most jurors believe the ordinary meaning of “life imprisonment” is life with the possibility of parole. 91

As part of The Omnibus Criminal Justice Improvements Act of 1986, 92 the South Carolina General Assembly enacted section 16-3-20(A) of the South Carolina Code. 93 This section provides that defendants convicted of murder and sentenced to life imprisonment instead of death must spend at least twenty or thirty years in prison without the possibility of parole, depending on the absence or presence of aggravating circumstances. 94 Also enacted as part of the 1986 Act, 95 section 24-21-640 of the South Carolina Code prohibits granting parole “to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes.” 96

One year after the 1986 Act was passed, the South Carolina Supreme Court issued a unanimous opinion in State v. Atkins. 97 The defendant in

90. See supra text accompanying note 84.
91. See Peterson, 287 S.C. at 248, 335 S.E.2d at 802.
94. Id., discussed supra notes 3-4 and accompanying text.
Atkins was convicted of murder and sentenced to death. On appeal, defense counsel claimed that “the trial judge should have instructed the jury on the law governing parole consideration in capital sentencing.” The supreme court, citing Norris and Butler, held that the trial judge properly refused to give such instructions. Then, in a move that the Torrence concurrence claimed was incompatible with earlier rationale, the Atkins court announced the following rule:

In all death penalty cases which proceed to trial after this opinion is published, if requested by the defendant, the trial judge shall charge the jury that the term “life imprisonment” is to be understood in its ordinary and plain meaning.

In death penalty cases controlled by the Omnibus Criminal Justice Improvements Act of 1986, 1986 S.C. Acts 2955, which proceed to trial after this opinion is published, if the defendant so requests, he may have the following charge given in lieu of the “life imprisonment is to be understood in its plain and ordinary meaning” charge:

A person who is convicted of murder must be punished by death or by imprisonment for life. When the state seeks the death penalty and a statutory aggravating circumstance is specifically found beyond a reasonable doubt, and a recommendation of death is not made, the trial court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. When a statutory aggravating circumstance is not found beyond a reasonable doubt, the defendant shall be sentenced to life imprisonment and he shall not be eligible for parole until the service of twenty years. No person sentenced under either of the sentencing schemes just explained may receive any work-release credits, good-time credits, or any other credit that would reduce the mandatory imprisonment.

Unfortunately, the Atkins court failed to justify its apparently startling rule, thus opening the way for the Torrence claim that the Atkins instructions were incompatible with prior caselaw. In reality, the rule was startling only because it showed that the Atkins court implicitly recognized that refusing defense counsel’s requests to inform capital sentencing juries about parole could, in some cases, actually subvert the goal of preventing prejudice to the defendant.

98. Id. at 300, 360 S.E.2d at 305.
99. Id.
100. Torrence, 305 S.C. at 58, 406 S.E.2d at 323 (Chandler, J., concurring).
101. Atkins, 293 S.C. at 300, 360 S.E.2d at 305-06.
The *Atkins* decision presented a reasonable, fair, and enlightened solution to cases in which defense counsel requests a jury charge concerning parole. The ruling recognized and attempted to address a jury’s possible confusion about a defendant’s possibility for parole. Additionally, *Atkins* minimized potential prejudice to the defendant by allowing the defendant to choose whether to have an instruction about parole.

The *Atkins* instruction originated in response to a defendant’s request for an instruction about parole; however, the court made no mention about the application of the rule when a jury requests parole information. As *Torrence* notes, the supreme court refrained from subsequently extending the *Atkins* rule to cases in which the jury asked for information about parole possibilities.

In both *State v. Johnson* and *State v. Plemmons* the supreme court refused to extend *Atkins* to jury inquiry cases and held that the trial judge must give both parts of the *Norris* instruction if the jury requests information about the defendant’s parole eligibility. In *Johnson* and *Plemmons* the juries asked if they could recommend a life sentence without the possibility of parole. Both trial judges gave only the first part of the *Norris* instruction, the “no concern of yours” part. In both cases the juries returned a death sentence and the supreme court reversed, upholding the requirement that the trial judge give both parts of the *Norris* instruction.

In *State v. Smith*, however, the court held that the second part of the *Norris* instruction, the “ordinary meaning” part, was sufficient. During its deliberations, the *Smith* jury asked the court in a note: “What does life in prison mean (the term specifically regarding parole)?” Smith’s trial counsel submitted that *Atkins* required the trial judge to give the charge that “the term life imprisonment is to be understood in its ordinary and plain meaning.” Thereafter, the trial judge gave the requested instruction twice, but the jury sentenced Smith to death.

On appeal, Smith argued that “the trial judge’s failure to instruct the

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102. *See id.* at 300, 360 S.E.2d at 305.
106. *See supra* text accompanying notes 83-84.
108. *Johnson*, 293 S.C. at 327, 360 S.E.2d at 321; *Plemmons*, 296 S.C. at 79, 370 S.E.2d at 872.
110. *Id.* at 487, 381 S.E.2d at 726-27 (quoting jury’s note).
111. *Id.* at 487, 381 S.E.2d at 727.
112. *Id.*
jury "not to consider parole"—the first part of the Norris instruction—was prejudicial error. The supreme court disagreed, supporting its holding with a contrived and unconvincing semantic analysis. First, the court correctly noted that the jury's question was an attempt to determine whether Smith, if sentenced to life imprisonment, could be paroled before he died. The Smith court then reasoned that "[i]n its 'ordinary and plain meaning,' 'life imprisonment' can mean only what it says—in prison for life. Being imprisoned for life and being paroled are mutually exclusive propositions." The trial judge's instruction answered the jury's question because the only logical conclusion that a reasonable juror could draw from the judge's instruction was that Smith would not be eligible for parole if sentenced to life in prison. The court continued with the following fiction: "To require reversal here based on the trial judge's failure to mechanically recite the Norris charge is to ignore the fact that a 'life imprisonment in its ordinary and plain meaning' charge necessarily precludes jury consideration of parole eligibility." The Smith majority then attempted to distinguish Johnson and Plemmons by stating that those "juries, instructed only that parole was not their concern, would have logically inferred that parole was someone else's concern. Simply put, those juries were practically invited to speculate about parole eligibility." The majority declared that the Smith jury was not afforded such an opportunity for speculation because the trial judge's "ordinary meaning" charge adequately instructed the jury not to consider parole in sentencing deliberations.

In his Smith dissent, Justice Chandler, author of the Torrence concurrence that overruled Atkins, noted that the jury specifically requested information about parole but was given a charge making "[n]o reference whatsoever . . . to 'parole.'" In a telling comment, he recognized "the reality, known to 'the reasonable juror,' that, historically, life-term defendants have been eligible for parole.

The Smith majority admitted that, standing alone, an instruction that a jury should not be concerned with parole "practically invite[s]" the jury to

113. Id.
114. Id.
115. Id.
116. Id.
117. Id. (emphasis added).
118. Id. at 488, 381 S.E.2d at 727 (second emphasis added).
119. Id.
120. Id. at 489, 381 S.E.2d at 728 (Chandler, J., concurring and dissenting).
121. Id. at 489-90, 381 S.E.2d at 728.
speculate about parole eligibility. Yet, it is difficult to understand how an instruction concerning the "ordinary and plain meaning" of life imprisonment can alleviate jurors' concerns about parole, given that jurors understand life imprisonment to include the possibility of parole.

Nevertheless, in two post-Torrence decisions, the supreme court has persisted in embracing the fiction that the "ordinary and plain meaning" charge allays jurors' questions about the relationship between a life sentence and parole possibilities and precludes their consideration of parole eligibility. In State v. Davis the court emphasized that, in eliminating parole information, "Torrence leaves intact the defendant's right upon request for a plain meaning charge."

State v. Simmons presented the court with the question of whether Torrence applies to a proposed charge on a defendant's eligibility, as well as eligibility, for parole. The defendant in Simmons requested a charge that he would be ineligible for parole under South Carolina Code section 24-21-640. The trial judge refused the request and gave a general sentencing charge, but the jury returned with the question: "Does the imposition of a life sentence carry with it the possibility of parole?" In response to the jury's question, the judge gave the State v. Norris charge that the jury was not to consider parole and that "life imprisonment" should be understood in its ordinary and plain meaning.

The Simmons court avoided the question of whether Torrence applies to parole eligibility by simply concluding that "a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole." The court also apparently adopted the erroneous view that, under California v. Ramos, the issue of informing juries about parole eligibility or ineligibility "is solely a matter of state law."

122. Id. at 488, 381 S.E.2d at 727.
124. Id. at 251, 411 S.E.2d at 222.
125. 427 S.E.2d 175 (S.C. 1993).
127. Simmons, 427 S.E.2d at 178 (quoting the jury's question).
129. Simmons, 427 S.E.2d at 178.
130. Id. at 179 (Finney, J., dissenting).
132. Simmons, 427 S.E.2d at 178 (emphasis added).
IV. CONSTITUTIONAL ISSUES

In California v. Ramos the United States Supreme Court addressed the constitutionality of a jury instruction which explained that a governor may modify a life-without-parole sentence. The jury in Ramos convicted the defendant of murder. During the penalty phase, the trial judge gave the statutorily mandated "Briggs Instruction," informing the jury that "a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole." On appeal, the defendant contended that inviting capital sentencing juries to consider commutation was unconstitutional. The California Supreme Court affirmed the conviction, but reversed the death sentence.

The United States Supreme Court held that the instruction did not violate either the Eighth or the Fourteenth Amendment. The Court stated that the instruction "was merely an accurate statement of a potential sentencing alternative," and that the instruction "corrects a misconception and supplies the jury with accurate information for its deliberation in selecting an appropriate sentence." The Court also noted that "it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision." The Court made it clear that, in the interest of providing greater protections in their criminal justice systems than those required by the Constitution, states are free to impose restrictions concerning information about capital sentencing.

However, in both Torrence and Simmons the South Carolina Supreme Court certainly did not provide greater protection for the defendant. Indeed, by overruling State v. Atkins, the Torrence court reopened the possibility that juries will impose death sentences in an arbitrary manner.

Consider the following hypothetical of two separate trials in which each defendant is convicted of a capital crime. Assume that the two capital crimes are identical and that each defendant is serving a sentence for a previous

134. Id. at 995 & n.4.
135. Id. at 996 (quoting jury instruction, Tr. at 1198-90).
136. Id.
137. Id. at 1013.
138. Id. at 1009.
139. Id.
140. Id. at 1009 n.23 (quoting Gregg v. Georgia, 428 U.S. 153, 203-04 (1976)).
141. Id. at 1013-14.
violent crime conviction. Further assume that in each case the jury agrees the defendant deserves life without the possibility of parole, which is, in fact, a sentence mandated by the statute; however, each jury will render a death sentence if it thinks that there is any chance the defendant will serve less than an entire life sentence in prison. In each case, defense counsel requests a charge on parole ineligibility, but the trial judge denies the charge under State v. Torrence and State v. Simmons. Jury 1, which happens to know the law regarding parole eligibility, realizes that the defendant would be ineligible for parole if sentenced to life. However, jury 2 labors under the popular misconception that a "lifer" could be paroled in seven or eight years. Jury 2 does not ask about parole, but even if it did, the court would be permitted to give only the "ordinary meaning" charge because of State v. Smith. Of course, jury 2 sentences the defendant to death, even though it believes a life-without-parole sentence is appropriate. However, under the same facts, jury 1 imposes a life sentence, secure in the knowledge that the defendant has no possibility of parole.

In limiting the information available to the sentencing jury, the Torrence and Simmons courts ignored the United States Supreme Court's sentiment expressed in Gregg v. Georgia:

If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information . . . to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is 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.

V. A PROPOSED SOLUTION

A capital sentencing jury must decide whether to render either a sentence of death or a sentence of life imprisonment. If the jury believes that a life sentence without the possibility of parole for a minimum period of time is appropriate, but renders a death sentence because it mistakenly believes that imposition of a life sentence would result in parole eligibility before service of that minimum period, the defendant has been severely prejudiced. Of course, at the time of the sentencing it is impossible to

144. 305 S.C. at 58, 406 S.E.2d at 323 (Chandler, J., concurring).
146. See supra notes 6-9 and accompanying text.
149. Id. at 190.
determine whether a jury is even considering a life sentence. Moreover, if
the jury believes a life sentence is appropriate, one cannot determine what
the jury considers to be a satisfactory minimum period of incarceration.

As discussed previously, a state-wide poll indicates that most potential
jurors in South Carolina believe that capital defendants sentenced to life
imprisonment will eventually be eligible for parole. The same study also
indicates that potential jurors are often misinformed about the minimum time
defendants with life sentences must serve before becoming eligible for pa-
role. However, statutes mandate the actual time any given capital
defendant sentenced to life must serve before becoming eligible for parole.

Using the evidence of juror misperception and the actual statutory
provisions, the author has formulated the following jury instruction as a
solution to the complex problem of informing capital juries about parole:

In all death penalty cases in which the sentencing jury inquires about
the parole possibilities of a defendant sentenced to life imprisonment or
the meaning of the phrase "life imprisonment," or in which the
defendant requests a jury charge concerning the parole possibilities of
a defendant sentenced to life imprisonment or a jury charge concerning
the meaning of the phrase "life imprisonment," the trial judge shall give
one of the following two charges, whichever one the defendant elects.

(1) The term "life imprisonment" is to be understood in its ordinary
and plain meaning.

(2) If a defendant is convicted of murder and a recommendation of
death is not made, and the defendant is serving a sentence for a prior
violent crime conviction unrelated to the crime for which he is being
sentenced, the defendant shall be sentenced to life imprisonment without
the possibility of parole. A defendant who has not previously been
convicted of a violent crime but whose present conviction is for a crime
specifically found beyond a reasonable doubt to include a statutory
aggravating circumstance shall be sentenced to life imprisonment without
eligibility for parole until the service of thirty years. A defendant who
has not previously been convicted of a violent crime and whose present
conviction is for a crime not found beyond a reasonable doubt to include
a statutory aggravating circumstance shall be sentenced to life imprison-
ment without eligibility for parole until the service of twenty years. No
person under any of the sentencing schemes just explained may receive
any work-release credits, good-time credits, or any other credit that
would reduce the mandatory imprisonment. Decisions regarding parole,
however, are made by the parole board, and you are not to consider the

150. See supra text accompanying note 7; Appendix, Table 1.
151. See supra text accompanying note 6; Appendix, Table 2.
152. See supra notes 1-5 and accompanying text.
possibility of parole in rendering your sentence. To do so would be a 
violation of your oaths as jurors.

This instruction is consistent with the goals of providing juries with 
information about parole and preventing prejudice to the defendant. In 
particular, the proposed instruction alleviates prejudice to the defendant 
in the most conspicuous case in which it is likely to arise—when the defendant 
is ineligible for parole. In other cases, the defendant would decide which 
instruction is the most advantageous.

Admonishing the jury not to consider parole in their deliberations is not 
hypocritical when accurate information about parole precedes the admoni-
tion. However, such an admonition is misleading, or at least confusing, 
when it is appended to an “ordinary and plain meaning” instruction. By 
adopting the proposed instruction, South Carolina would join the ranks of 
those states that allow capital juries to be informed of a defendant’s parole 
possibilities when a life sentence carries no possibility of parole.\textsuperscript{153}

\textsuperscript{153} Twenty-two states other than South Carolina both allow juries to participate in 
capital sentencing and authorize, in at least some cases, life imprisonment without the 
possibility of parole as an alternative to the death penalty.

The following thirteen states expressly inform the jury of the defendant’s 
ineligibility for parole by the terms of the sentencing verdict or the recommendation 
itself:

\begin{itemize}
\item \textbf{Alabama:} see ALA. CODE § 13A-5-46(e) (1982) (compelling capital sentencing jury 
to return advisory verdict either of life imprisonment without parole or of 
death).
\item \textbf{Arkansas:} see ARK. CODE ANN. § 5-4-603(b), (c) (Michie Supp. 1991) (stating 
that jury must impose sentence of death or of “life imprisonment without 
parole”).
\item \textbf{California:} see CAL. PENAL CODE § 190.3 (West 1988) (providing that penalty 
shall be death or confinement for “a term of life without the possibility of 
parole”).
\item \textbf{Connecticut:} see CONN. GEN. STAT. ANN. § 53a-46a(f) (West 1985) (providing 
for sentence of death or of “life imprisonment without the possibility of 
release”).
\item \textbf{Delaware:} see DEL. CODE ANN. tit. 11, § 4209(a) (1987) (stating that sentencing 
alternatives are death or “imprisonment for the remainder of his or her natural 
life without benefit of probation or parole or any other reduction”).
\item \textbf{Louisiana:} see LA. CODE CRIM. PROC. ANN. art. 905.6 (West Supp. 1993) 
(providing that jury must render sentence of death or of “life imprisonment 
without benefit of probation, parole, or suspension of sentence”).
\item \textbf{Maryland:} see MD. ANN. CODE art. 27, § 412(b) (1992) (stating that jury must 
choose between sentence of “death, imprisonment for life, or imprisonment for 
life without the possibility of parole”).
\item \textbf{Missouri:} see MO. ANN. STAT. § 565.020(2) (Vernon Supp. 1993) (stating that
\end{itemize}
punishment shall be death or "imprisonment for life without eligibility for probation or parole, or release except by act of the governor".

Nevada: see NEV. REV. STAT. ANN. § 175.552 (Michie 1992) (providing that defendant shall be sentenced to death or to "life imprisonment with or without possibility of parole").

New Hampshire: see N.H. REV. STAT. ANN. § 630:5(V) (Supp. 1992) (specifying that court must impose sentence of death or of "life imprisonment without possibility of parole").

Oklahoma: see OKLA. STAT. ANN. tit. 21, § 701.10(A) (West Supp. 1993) (stating that sentencing alternatives are death, "life imprisonment without parole or life imprisonment").

Oregon: see OR. REV. STAT. § 163.105(l)(a) (1990) (specifying that available sentences are death, "life imprisonment without the possibility of release or parole or life imprisonment").

Washington: see WASH. REV. CODE ANN. § 10.95.030(1) (West 1990) (providing choice between death and "life imprisonment without possibility of release or parole").

Three other states, by statute or decision, require the capital sentencing jury to be informed that the defendant will be ineligible for parole, either in all cases or when the defendant's prior criminal record precludes parole eligibility:

Colorado: see COLO. REV. STAT. § 16-11-103(l)(b) (Supp. 1992) (providing that capital sentencing jury shall be instructed that life imprisonment means life without the possibility of parole for twenty years, for forty years, or without any possibility of parole, depending upon the time and nature of the murder).

Illinois: see People v. Gacho, 522 N.E.2d 1146 (Ill.) (holding that when a term of natural life imprisonment is the statutorily required alternative to a death sentence, jury must be instructed to that effect and that such a sentence carries no possibility of parole), cert. denied, 488 U.S. 910 (1988).

Mississippi: see Turner v. State, 573 So. 2d 657, 675 (Miss. 1990) (Lee, C.J., dissenting) ("At the sentencing phase, the jury shall be entitled to know by instruction whether the defendant is eligible for parole."), cert. denied, 111 S. Ct. 910 (1991).

Four states appear not to have considered the issue of informing capital sentencing juries about a defendant's parole ineligibility:

Florida: see FLA. STAT. ANN. ch. 921.142(d)(b) (Harrison Supp. 1992) (providing that capital drug trafficking felonies carry sentence of death or life without parole); no case law on whether jury may be informed of defendant's parole ineligibility.

South Dakota: see S.D. CODIFIED LAWS ANN. § 24-15-4 (1988) ("A person sentenced to life imprisonment is not eligible for parole . . ."); no case law on whether jury may be informed of defendant's parole ineligibility.

Utah: see UTAH CODE ANN. § 76-3-408 (1990) (providing sentence of life imprisonment without parole for person convicted of third sex offense); id. §
77-27-9 (Supp. 1992) (stating that parole board can parole person sentenced to life without parole if board finds person is "permanently incapable of being a threat to safety of society"); no case law on whether jury may be informed of defendant's parole ineligibility.

Wyoming: see WYO. STAT. § 7-13-402(a) (Supp. 1992) (providing that person serving life sentence may not be paroled); no case law on whether jury may be informed of defendant's parole ineligibility.

Two states with life-without-parole sentences refuse jurors information about a defendant's ineligibility for parole:


Virginia: see VA. CODE ANN. § 18.2-10 (Michie Supp. 1992) (authorizing death or imprisonment for life as punishment for Class 1 felony); id. § 53.1-151(B), (B1), (B2) (1991) (providing circumstances under which person will not be eligible for parole); Jenkins v. Commonwealth, 423 S.E.2d 360, 369-70 (Va. 1992) (declining invitation by defendant to change court's long-standing position that "a jury may not be informed by evidence or instructions of a defendant's parole eligibility in the event of a life sentence"), cert. denied, 113 S. Ct. 1862 (1993).
APPENDIX

TABLE 1

POSSIBILITY OF RELEASE IF SENTENCED TO LIFE IMPRISONMENT

Question: "When a person is convicted for murder in South Carolina, they must be sentenced to life imprisonment or to the death penalty. If a person is sentenced to life imprisonment does this mean that they will have to spend the rest of their life in prison or can they be released from prison at some point in the future?"

<table>
<thead>
<tr>
<th>Response</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Will Have To Serve Rest Of Their Life</td>
<td>82</td>
<td>20.0</td>
</tr>
<tr>
<td>Can Be Released At Some Point</td>
<td>293</td>
<td>71.6</td>
</tr>
<tr>
<td>Don’t Know</td>
<td>34</td>
<td>8.3</td>
</tr>
</tbody>
</table>

TABLE 2

AMOUNT OF TIME SPENT IN PRISON IF SENTENCED TO LIFE IMPRISONMENT

Question: "If you heard today that someone was sentenced by a court in South Carolina to life imprisonment for committing a murder, about how much time do you think they would have to spend in prison?"

<table>
<thead>
<tr>
<th>Years</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
<td>2</td>
<td>0.5</td>
</tr>
<tr>
<td>Two</td>
<td>3</td>
<td>0.7</td>
</tr>
<tr>
<td>Four</td>
<td>3</td>
<td>0.7</td>
</tr>
<tr>
<td>Five</td>
<td>3</td>
<td>0.7</td>
</tr>
<tr>
<td>Six</td>
<td>3</td>
<td>0.7</td>
</tr>
<tr>
<td>Seven</td>
<td>10</td>
<td>2.4</td>
</tr>
<tr>
<td>Eight</td>
<td>15</td>
<td>3.7</td>
</tr>
<tr>
<td>Nine</td>
<td>4</td>
<td>1.0</td>
</tr>
<tr>
<td>Ten</td>
<td>25</td>
<td>6.1</td>
</tr>
<tr>
<td>Eleven</td>
<td>8</td>
<td>2.0</td>
</tr>
<tr>
<td>Twelve</td>
<td>15</td>
<td>3.7</td>
</tr>
<tr>
<td>Thirteen</td>
<td>2</td>
<td>0.5</td>
</tr>
</tbody>
</table>

https://scholarcommons.sc.edu/sclr/vol44/iss2/5
(IF DON'T KNOW, PROBE: “Do you think it would be less than ten years, between ten and nineteen years, twenty to twenty-nine years, or thirty years, or more?”)

<table>
<thead>
<tr>
<th>Categories (All Responses)</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less Than Ten Years</td>
<td>64</td>
<td>15.6</td>
</tr>
<tr>
<td>Ten To Nineteen Years</td>
<td>131</td>
<td>32.0</td>
</tr>
<tr>
<td>Twenty To Twenty-Nine Years</td>
<td>101</td>
<td>24.7</td>
</tr>
<tr>
<td>Thirty Years Or More</td>
<td>61</td>
<td>14.9</td>
</tr>
<tr>
<td>Don’t Know</td>
<td>23</td>
<td>5.6</td>
</tr>
<tr>
<td>Rest Of Their Life</td>
<td>29</td>
<td>7.1</td>
</tr>
</tbody>
</table>

TABLE 3

IMPORTANCE OF KNOWING TIME BEFORE CHANCE
OF RELEASE

Question: “As you may know, in South Carolina the jury normally decides whether to sentence a convicted murderer to life imprisonment or to the death penalty. If you were on a jury and had to make that decision, how important would it be for you to know how much time the person would have to spend in prison before they would have a chance to be
released, if you sentenced them to life imprisonment . . . extremely important, very important, somewhat important, not too important, or not at all important?”

<table>
<thead>
<tr>
<th>Response</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extremely Important</td>
<td>176</td>
<td>43.0</td>
</tr>
<tr>
<td>Very Important</td>
<td>137</td>
<td>33.5</td>
</tr>
<tr>
<td>Somewhat Important</td>
<td>42</td>
<td>10.3</td>
</tr>
<tr>
<td>Not Too Important</td>
<td>10</td>
<td>2.4</td>
</tr>
<tr>
<td>Not At All Important</td>
<td>18</td>
<td>4.4</td>
</tr>
<tr>
<td>Don’t Know</td>
<td>26</td>
<td>6.4</td>
</tr>
</tbody>
</table>