SUPREME COURT OF THE UNITED STATES

No. 00–9280

WILLIAM ARTHUR KELLY, PETITIONER *v.*
SOUTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

[January 9, 2002]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE KENNEDY joins, dissenting.

In Simmons v. *South Carolina*, 512 U. S. 154 (1994), the prevailing opinion said:

> "In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact. Likewise, if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death is life imprisonment without possibility of parole.
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> "When the State seeks to show the defendant's future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case. . . . And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a

threat to society in the future." *Id.,* at 176–177 (O'CONNOR, J., concurring in judgment).

But today, while purporting to merely "apply" *Simmons*, the Court converts a tenable due process holding into a "truth in sentencing" doctrine which may be desirable policy, but has almost no connection with the due process rationale of *Simmons*.

In some States—Texas, for example, see Tex. Crim. Proc. Code Ann. §§37.071(b) and (g) (2001)—"future dangerousness" is itself a ground for imposing the death penalty in a capital case. In *California* v. *Ramos*, 463 U. S. 992 (1983), we held that such a system was consistent with the Eighth Amendment. But South Carolina's capital punishment system does not work that way. There are 11 statutory aggravating factors which may be found by the jury that must be weighed against mitigating factors.* See S. C. Code Ann. §16–3–20(C) (2001). At the

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*The statutory aggravating factors are:

"(1) The murder was committed while in the commission of the following crimes or acts:

"(a) criminal sexual conduct in any degree;

"(b) kidnapping;

"(c) burglary in any degree;

"(d) robbery while armed with a deadly weapon;

"(e) larceny with use of a deadly weapon;

"(f) killing by poison;

"(g) drug trafficking as defined in Section 44–53–370(e), 44–53–375(B), 44–53–440, or 44–53–445;

"(h) physical torture; or

"(i) dismemberment of a person.

"(2) The murder was committed by a person with a prior conviction for murder.

"(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

"(4) The offender committed the murder for himself or another for the

sentencing phase of petitioner's trial, the State argued, and the jury found, the statutory aggravators that the murder was committed while in the commission of: kidnaping; burglary; robbery while armed with a deadly weapon; larceny with use of a deadly weapon; and physical torture. Once a South Carolina jury has found the necessary aggravators, it may consider future dangerousness in determining what sentence to impose.

In the present case, the prosecutor did not argue future dangerousness—as he did in *Simmons*—in any meaningful sense of that term. But the Court says that he need not, in order for the defendant to invoke *Simmons;* it is enough if evidence introduced to prove other elements of the case has a tendency to prove future dangerousness as

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purpose of receiving money or a thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

"(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. 'Family member' means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

"(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

"(10) The murder of a child eleven years of age or under.

"(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime." S. C. Code Ann. §16–3–20(C) (2001).

well. Gone is the due process basis for the rule—that where the State argues that the defendant will be dangerous in the future, the defendant is entitled to inform the jury by way of rebuttal that he will be in prison for life. Thus, the *Simmons* rule is invoked, not in reference to any contention made by the State, but only by the existence of evidence from which a jury might infer future dangerousness. And evidence there will surely be in a case such as the present one, correctly described by the Court as "an extraordinarily brutal murder." *Ante*, at 1.

That today's decision departs from *Simmons* is evident from the Court's rejection of the South Carolina Supreme Court's distinction between evidence regarding danger to fellow inmates and evidence regarding danger to society at large. *Simmons* itself recognized this distinction. Immediately after holding that the defendant should be allowed to show that "he never would be released on parole and thus, in his view, would not pose a future danger *to society*," 512 U. S., at 165 (emphasis added), *Simmons* noted that "[t]he State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff," *id.*, at 165, n. 5. See also *id.*, at 177 (O'CONNOR, J., concurring in judgment) (noting that where a parole ineligibility instruction is given, "the prosecution is free to argue that the defendant would be dangerous in prison"). This makes eminent good sense, for when the State argues that the defendant poses a threat to his cellmates or prison guards, it is no answer to say that he never will be released from prison.

But the test is no longer whether the State argues future dangerousness to society; the test is now whether evidence was introduced at trial that raises an "implication" of future dangerousness to society. *Ante*, at 7. It is difficult to envision a capital sentencing hearing where the State presents no evidence from which a juror might make

such an inference. I would hazard a guess that many jurors found the sheer brutality of this crime—petitioner bound the hands of the victim (who was six months pregnant) behind her back, stabbed her over 30 times, slit her throat from ear to ear, and left dollar bills fastened to her bloodied body—indicative of petitioner's future threat to society. Yet all of this evidence was introduced not to prove future dangerousness, but to prove other elements required by South Carolina law, including the statutory aggravating factor that the murder was committed while in the commission of physical torture. To be sure, the prosecutor's arguments about the details of the murder, as well as the violent episodes in prison, demonstrated petitioner's evil character. Yet if this were what *Simmons* intended with the phrase "future dangerousness," it would have held that the Constitution *always* required an instruction about parole ineligibility. It plainly did not.