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]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

THE CHIEF JUSTICE, in dissent, concludes that, with the Court's opinion, "[g]one is the due process basis for the [*Simmons*] 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." *Ante*, at 4. I write separately because I continue to believe that there never was a "basis for such a pronouncement." *Simmons* v. *South Carolina,* 512 U. S. 154, 178 (1994) (SCALIA, J., dissenting). Indeed, the decision today merely solidifies my belief that the Court was wrong, in the first instance, to hold that the Due Process Clause requires the States to permit a capital defendant to inform the jury that he is parole ineligible in cases where the prosecutor argues future dangerousness.

While we were informed in *Simmons* that the Court's intent was to create a requirement that would apply in only a limited number of cases, today's sweeping rule was an entirely foreseeable consequence of *Simmons*. See *id.,* at 183. The decisive opinion[1] noted that "if the prosecu-

[1] Justice Blackmun's plurality opinion in *Simmons* was joined by three Members of the Court. JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, provided the necessary votes to sustain

tion 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." *Id.,* at 176–177 (O'CONNOR, J., concurring in judgment). One might think from this language that the Court meant to preserve in most cases the State's role in determining whether to instruct a jury regarding a defendant's eligibility for parole. But the decisive opinion seriously diminished the State's discretion in this area, holding that due process requires that "[w]hen the State *seeks to show* the defendant's future dangerousness . . . the defendant should be allowed to bring his parole ineligibility to the jury's attention." *Id.,* at 177 (emphasis added).[2] Applying this rule, the Court concluded that the prosecution "put [Simmons'] future dangerousness in issue" and that due process required that the instruction be given. *Id.,* at 177–178.

After *Simmons*, we were left with a due process requirement that hinged on a factual inquiry as to whether the State somehow "show[ed] the defendant's future dangerousness," "argue[d] future dangerousness, " or "put . . . future dangerousness in issue." *Id.,* at 176–177. Given such an imprecise standard, it is not at all surprising that the Court today easily fits the State's argument during Kelly's proceedings into the universe of arguments that trigger the *Simmons* requirement. But the Court

---

the judgment. Concurring in the judgment, JUSTICE O'CONNOR therefore wrote the decisive opinion. See *O'Dell* v. *Netherland,* 521 U. S. 151, 158–159 (1997).

[2] The plurality opinion used broader language, stating that due process requires the instruction when the "prosecution allude[s]" to the defendant's future dangerousness or "advanc[es] generalized arguments regarding the defendant's future dangerousness." *Simmons* v. *South Carolina,* 512 U. S., at 164, 171.

goes even further. In making this factual judgment, the Court dilutes the *Simmons* test, now requiring that a parole ineligibility instruction be given where the prosecution makes arguments that have a "*tendency* to prove dangerousness in the future." *Ante*, at 8 (emphasis added).

This expansion is not surprising when one considers that in *Simmons* the Court applied its own rule loosely. Placed in context, the prosecutor *there* neither "emphasiz[ed] future dangerousness as a crucial factor" nor even mentioned "future dangerousness *outside of prison*." 512 U. S., at 181 (SCALIA, J., dissenting).[3] Thus, while I agree with THE CHIEF JUSTICE that the prosecutor *here* did not argue future dangerousness, an effort to distinguish this case from *Simmons* amounts to hairsplitting, demonstrating that the Court's inability to construct a limited rule inhered in *Simmons* itself. Today, the Court acknowledges that "the evidence in a substantial proportion, if not all, capital cases will show a defendant likely to be dangerous in the future." *Ante*, at 8, n. 4. "All" is the more accurate alternative, given that our capital jurisprudence has held that routine murder does not qualify, but only a more narrowly circumscribed class of crimes such

---

[3] Turning to the statements upon which the *Simmons* plurality and concurring opinions relied, JUSTICE SCALIA noted that the prosecutor's comment concerning "'what to do with [petitioner] now that he is in our midst' . . . was not made (as they imply) in the course of an argument about future dangerousness, but was a response to petitioner's mitigating evidence." *Id.,* at 181–182. Similarly, "the prosecutor's comment that the jury's verdict would be an 'act of self-defense' . . . came at the end of admonition of the jury to avoid emotional responses and enter a rational verdict." *Id.,* at 182. As JUSTICE SCALIA indicates, the reference "obviously alluded, neither to defense of the jurors' own persons, nor specifically to defense of persons outside the prison walls, but to defense of all members of society against this individual, wherever he or they might be. . . . [T]he prosecutor did not *invite* the jury to believe that petitioner would be eligible for parole—he did not *mislead* the jury." *Ibid.*

as those that "reflec[t] a consciousness materially more 'depraved' than that of any person guilty of murder," *Godfrey* v. *Georgia,* 446 U. S. 420, 433 (1980) (plurality opinion). See also *Lowenfield* v. *Phelps*, 484 U.S. 231, 246 (1988) ("Here, the 'narrowing function' was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that 'the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.'"). It is hard to imagine how, for example, the depravity of mind that such a crime displays will not always have a "tendency" to show future dangerousness. And it is of little comfort that today's opinion technically requires not merely evidence with this tendency, but argument by the prosecutor, *ante*, at 8, n. 4. When does a prosecutor *not* argue the evidence, and when will argument regarding depravity not also constitute argument showing dangerousness? Thus, today the Court eviscerates the recognition in the *Simmons*' decisive opinion that "[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the States." *Id.*, at 176 (O'CONNOR, J., concurring in judgment).

Today's decision allows the Court to meddle further in a State's sentencing proceedings under the guise that the Constitution requires us to do so. I continue to believe, without qualification, that "it is not this Court's role to micromanage state sentencing proceedings." *Shafer* v. *South Carolina,* 532 U. S. 36, 58 (2001) (THOMAS, J., dissenting). As a matter of policy, it may be preferable for a trial court to give such an instruction, but these are "matters that the Constitution leaves to the States." *Ibid.*

For these reasons, I respectfully dissent.