SUPREME COURT OF THE UNITED STATES

No. 92–9059

JONATHAN DALE SIMMONS, PETITIONER *v.* SOUTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

[June 17, 1994]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, concurring in the judgment.

"Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause," *Clemons* v. *Mississippi*, 494 U. S. 738, 746 (1990), and one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him. Cf. *Crane* v. *Kentucky*, 476 U. S. 683, 690 (1986). In capital cases, we have held that the defendant's future dangerousness is a consideration on which the State may rely in seeking the death penalty. See *California* v. *Ramos*, 463 U. S. 992, 1002–1003 (1983). But "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, . . . the elemental due process requirement that a defendant not be sentenced to death `on the basis of information which he had no opportunity to deny or explain' [requires that the defendant be afforded an opportunity to introduce evidence on this point]." *Skipper* v. *South Carolina*, 476 U. S. 1, 5, n. 1 (1986), quoting *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977) (plurality opinion); see also 476 U. S., at 9–10 (Powell, J., concurring in judgment).

In this case, petitioner physically and sexually assaulted three elderly women—one of them his own grand-
mother—before killing a fourth. At the capital sentencing proceeding, the State sought to show that petitioner is a vicious predator who would pose a

continuing threat to the community. The prosecutor argued that the jury's role was to decide "what to do with [petitioner] now that he is in our midst," App. 110, and told the jury: "Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Ibid.*; see also *id.*, at 102, 112. Petitioner's response was that he only preyed on elderly women, a class of victims he would not encounter behind bars. See *id.*, at 121; *ante*, at 3. This argument stood a chance of succeeding, if at all, only if the jury were convinced that petitioner would *stay* in prison. Although the only available alternative sentence to death in petitioner's case was life imprisonment without possibility of parole, S. C. Code Ann. §§16–3–20(A) and 24–21–640 (Supp. 1993), the trial court precluded the jury from learning that petitioner would never be released from prison.

Unlike in *Skipper*, where the defendant sought to introduce factual evidence tending to disprove the State's showing of future dangerousness, see 476 U. S., at 3; *id.*, at 10–11 (Powell, J., concurring in judgment), petitioner sought to rely on the operation of South Carolina's sentencing law in arguing that he would not pose a threat to the community if he were sentenced to life imprisonment. We have previously noted with approval, however, that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon, or parole." *California* v. *Ramos*, *supra*, at 1013, n. 30. The decision whether or not to inform the jury of the possibility of early release is generally left to the States. See *id.*, at 1014. 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.

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. I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention—by way of argument by defense counsel or an instruction from the court—as a means of responding to the State's showing of future dangerousness. 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. Of course, in such cases the prosecution is free to argue that the defendant would be dangerous in prison; the State may also (though it need not) inform the jury of any truthful information regarding the availability of commutation, pardon, and the like. See *id.*, at 1001–1009.

The prosecutor in this case put petitioner's future dangerousness in issue, but petitioner was not permitted to argue parole ineligibility to the capital sentencing jury. Although the trial judge instructed the jurors that "[t]he terms life imprisonment and death sentence are to be understood in their pla[i]n and ordinary meaning," App. 146, I cannot agree with the court below that this instruction "satisfie[d] in substance [petitioner's] request for a charge on parole ineligibility." ___ S. C. ___, ___, 427 S. E. 2d 175, 179 (1993). The rejection of parole by many States (and the Federal Government) is a recent development that displaces the longstanding practice of parole availability, see *ante*, at 15–16, and common sense tells us that many jurors might not know whether a life sentence carries with it the

possibility of parole. While it may come to pass that the "plain and ordinary meaning" of a life sentence is life without parole, that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison. Moreover, the prosecutor, by referring to a verdict of death as an act of "self-defense," strongly implied that petitioner *would* be let out eventually if the jury did not recommend a death sentence.

Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible. In this case, the prosecution argued at the capital sentencing proceeding that petitioner would be dangerous in the future. Although the only alternative sentence to death under state law was life imprisonment without possibility of parole, petitioner was not allowed to argue to the jury that he would never be released from prison, and the trial judge's instruction did not communicate this information to the jury. I therefore concur in the Court's judgment that petitioner was denied the due process of law to which he is constitutionally entitled.