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 SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Today's judgment certainly seems reasonable enough as a determination of what a capital-sentencing jury should be permitted to consider. That is not, however, what it purports to be. It purports to be a determination that any capital-sentencing scheme that does *not* permit jury consideration of such material is so incompatible with our national traditions of criminal procedure that it violates the Due Process Clause of the Constitution of the United States. There is really no basis for such a pronouncement, neither in any near uniform practice of our people, nor in the jurisprudence of this Court.

With respect to the former I shall discuss only current practice, since the parties and *amici* have addressed only that, and since traditional practice may be relatively uninformative with regard to the new schemes of capital sentencing imposed upon the States by this Court's recent jurisprudence. The overwhelming majority of the 32 States that permit juries to impose or recommend capital sentences do not allow specific information regarding parole to be given to the jury. To be sure, in many of these States the sentencing choices specifically include "life without parole," so that the jury charge itself conveys the information whether parole is available. In at least eight of those States, however, the jury's choice is not merely between "life without parole" and "death," but among some variation of (parole

eligible) "life," "life without parole" and "death"[1]—so that the precise date of availability of parole is relevant to the jury's choice. Moreover, even among those States that permit the jury to choose only between "life" (unspecified) and "death," South Carolina is not alone in keeping parole information from the jury. Four other States in widely separated parts of the country follow that same course,[2] and there are other States that lack any clear practice.[3] By contrast, the parties and their *amici* point to only ten States that arguably employ the procedure which, according to today's opinions, the Constitution requires.[4] This picture of national practice falls far

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[1]The eight States are Georgia, see Ga. Code Ann. §17–10–31.1 (Supp. 1993), Indiana, see Ind. Code §35–50–2–9 (1993), Maryland, see Md. Ann. Code, Art. 27, §413(c)(3) (Supp. 1993), Nevada, see Nev. Rev. Stat. §175.554(2)(c)(2) (1993), Oklahoma, see Okla. Stat., Tit. 21, §701.10(A) (Supp. 1993), Oregon, see Ore. Rev. Stat. §163.150 (Supp. 1991), Tennessee, see Tenn. Code Ann. §39–13–204(a) (Supp. 1993), and Utah, see Utah Code Ann. §76–3–207(4) (Supp. 1993).

[2]The four States are Pennsylvania, see *Commonwealth* v. *Henry*, 524 Pa. 135, 159–161, 569 A. 2d 929, 941 (1990), Texas, see *Jones* v. *State*, 843 S. W. 2d 487, 495 (Tex. Crim. App. 1992), Virginia, see *Eaton* v. *Commonwealth*, 240 Va. 236, 247–250, 397 S. E. 2d 385, 392–393 (1990), and North Carolina, see *State* v. *Brown*, 306 N.C. 151, 182–184, 293 S. E. 2d 569, 589 (1982), which will alter its practice effective January 1, 1995, see 1993 N.C. Sess. Laws, Ch. 538, §29.

[3]The States that allow the jury to choose between "life without parole" and "death" and have not squarely decided whether the jury should receive information about parole include South Dakota, see S. D. Codified Laws §24–15–4 (1988), and Wyoming, see Wyo. Stat. §7–13–402(a) (Supp. 1993).

[4]The ten States identified by the parties and their *amici* are Colorado, see Colo. Rev. Stat. §16–11–103(1)(b) (Supp. 1993), Florida, see Standard Jury Instructions—Criminal

short of demonstrating a principle so widely shared that it is part of even a current and temporary American consensus.

Cases, Report No. 92–1, 603 So. 2d 1175 (1992), Illinois, see *People* v. *Gacho*, 122 Ill. 2d 221, 262–264, 522 N. E. 2d 1146, 1166 (1988), Maryland, see *Doering* v. *State*, 313 Md. 384, 545 A. 2d 1281 (1988), Mississippi, see *Turner* v. *State*, 573 So. 2d 657 (Miss. 1990), New Jersey, see *State* v. *Martini*, 131 N. J. 176, 312–314, 619 A. 2d 1208, 1280 (1993), New Mexico, see *State* v. *Henderson*, 109 N. M. 655, 789 P. 2d 603 (1990), Nevada, see *Petrocelli* v. *State*, 101 Nev. 46, 692 P. 2d 503 (1985), Oklahoma, see *Humphrey* v. *State*, 864 P. 2d 343 (Okla. Crim. App. 1993), Oregon, see Brief for State of Idaho et al. as *Amici Curiae* 8.

As for our prior jurisprudence: The opinions of JUSTICE BLACKMUN and JUSTICE O'CONNOR rely on the Fourteenth Amendment's guarantee of Due Process, rather than on the Eighth Amendment's "cruel and unusual punishments" prohibition, as applied to the States by the Fourteenth Amendment. But cf. *ante*, at 1–2 (SOUTER, J., concurring). The prior law applicable to that subject indicates that petitioner's due process rights would be violated if he was "sentenced to death `on the basis of information which he had no opportunity to deny or explain.'" *Skipper* v. *South Carolina*, 476 U. S. 1, 5, n. 1 (1986), quoting *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977). Both opinions try to bring this case within that description, but it does not fit.

The opinions paint a picture of a prosecutor who repeatedly stressed that petitioner would pose a threat to society *upon his release*. The record tells a different story. Rather than emphasizing future dangerousness as a crucial factor, the prosecutor stressed the nature of petitioner's crimes: the crime that was the subject of the prosecution, the brutal murder of a 79–year-old woman in her home, and three prior crimes confessed to by the petitioner, all rapes and beatings of elderly women, one of them his grandmother. I am sure it was the sheer depravity of those crimes, rather than any specific fear for the future, which induced the South Carolina jury to conclude that the death penalty was justice.

Not only, moreover, was future dangerousness not emphasized, but future dangerousness *outside of prison* was not even mentioned. The trial judge undertook specifically to prevent that, in response to the broader request of petitioner's counsel that the prosecutor be prevented from arguing future dangerousness *at all*:

> "Obviously, I will listen carefully to the argument of the solicitor to see if it contravenes the actual factual circumstance. Certainly, I recognize the

> right of the State to argue concerning the defendant's dangerous propensity. I will not allow the solicitor, for example, to say to the jury anything that would indicate that the defendant is not going to be jailed for the period of time that is encompassed within the actual law. The fact that we do not submit the parole eligibility to the jury does not negate the fact that the solicitor must stay within the trial record." App. 56–57.

As I read the record, the prosecutor followed this admonition—and the Due Process Clause requires nothing more.

Both JUSTICE BLACKMUN and JUSTICE O'CONNOR focus on two portions of the prosecutor's final argument to the jury in the sentencing phase. First, they stress that the prosecutor asked the jury to answer the question of "what to do with [petitioner] now that he is in our midst." That statement, however, was not made (as they imply) in the course of an argument about future dangerousness, but was a response to petitioner's mitigating evidence. Read in context, the statement is not even relevant to the issue in this case:

> "The defense in this case as to sentence . . . [i]s a diversion. It's putting the blame on society, on his father, on his grandmother, on whoever else he can, spreading it out to avoid that personal responsibility. That he came from a deprived background. That he didn't have all of the breaks in life and certainly that helps shape someone. But we are not concerned about how he got shaped. We are concerned about what to do with him now that he is in our midst." *Id.*, at 110.

Both opinions also seize upon the prosecutor's comment that the jury's verdict would be "an act of self-defense." That statement came at the end of admonition of the jury to avoid emotional responses and enter a rational verdict:

> "Your verdict shouldn't be returned in anger. Your verdict shouldn't be an emotional catharsis. Your

> verdict shouldn't be . . . a response to that eight-year-old kid [testifying in mitigation] and really shouldn't be a response to the gruesome grotesque handiwork of [petitioner]. Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Id*., at 109–110.

This reference to "self-defense" 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. Thus, as I read the record (and bear in mind that the trial judge was on the lookout with respect to this point), the prosecutor did not *invite* the jury to believe that petitioner would be eligible for parole—he did not *mislead* the jury.

The rule the majority adopts in order to overturn this sentence therefore goes well beyond what would be necessary to counteract prosecutorial misconduct (a disposition with which I might agree). It is a rule at least as sweeping as this: that the Due Process Clause overrides state law limiting the admissibility of information concerning parole *whenever* the prosecution argues future dangerousness. JUSTICE BLACKMUN appears to go even further, requiring the admission of parole-ineligibility even when the prosecutor does *not* argue future dangerousness. See *ante*, at 9; but see *ante*, at 1 (GINSBURG, J., concurring). I do not understand the basis for this broad prescription. As a general matter, the Court leaves it to the States to strike what *they* consider the appropriate balance among the many factors—probative value, prejudice, reliability, potential for confusion, among others—that determine whether evidence ought to be admissible. Even in the capital punishment context, the Court has noted that "the wisdom of the decision to permit juror consideration of [post-sentencing contingencies] is best left to the

States." *California* v. *Ramos*, 463 U. S. 992, 1014 (1983). "[T]he States, and not this Court, retain `the traditional authority' to determine what particular evidence . . . is relevant." *Skipper* v. *South Carolina*, 476 U. S. 1, 11 (1986) (Powell, J., concurring). One reason for leaving it that way is that a sensible code of evidence cannot be invented piecemeal. Each item cannot be considered in isolation, but must be given its place within the whole. Preventing the *defense* from introducing evidence regarding parolability is only half of the rule that prevents the *prosecution* from introducing it as well. If the rule is 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 (or if you impose anything less than life without parole) 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 defendants can call attention to the unavailability of parole, but prosecutors cannot note its availability. This Court should not force state legislators into such a difficult choice unless the isolated state evidentiary rule that the Court has before it is not merely less than ideal, but beyond a high threshold of unconstitutionality.

The low threshold the Court constructs today is difficult to reconcile with our almost simultaneous decision in *Romano* v. *Oklahoma*, 512 U. S. ___ (1994). There, the Court holds that the proper inquiry when evidence is admitted in contravention of a state law is "whether the admission of evidence . . . so infected the sentencing proceedings with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Id*., at ___ (slip op., at 11). I do not see why the unconstitutionality criterion for *excluding* evidence *in accordance with* state law

should be any less demanding than the unconstitutionality criterion *Romano* recites for *admitting* evidence *in violation of* state law: "fundamental unfairness." And "fundamentally unfair" the South Carolina rule is assuredly not. The notion that the South Carolina jury imposed the death penalty "just in case" Simmons might be released on parole seems to me quite far-fetched. And the notion that the decision taken on such grounds would have been altered by information on the *current state of the law* concerning parole (which could of course be amended) is even more far-fetched. And the scenario achieves the ultimate in far-fetchedness when there is added the fact that, according to uncontroverted testimony of prison officials in this case, even *current* South Carolina law (as opposed to discretionary prison regulations) does not prohibit furloughs and work-release programs for life-without-parole inmates. See App. 16–17.

When the prosecution has not specifically suggested parolability, I see no more reason why the United States Constitution should compel the admission of evidence showing that, under the State's current law, the defendant would be nonparolable, than that it should compel the admission of evidence showing that parolable life-sentence murderers are in fact almost never paroled, or are paroled only after age 70; or evidence to the effect that escapes of life-without-parole inmates are rare; or evidence showing that, though under current law the defendant *will* be parolable in 20 years, the recidivism rate for elderly prisoners released after long incarceration is negligible. All of this evidence may be thought relevant to whether the death penalty should be imposed, and a petition raising the last of these claims has already arrived. See Pet. for Cert. in *Rudd* v. *Texas*, O. T. 1993, No. 93–7955.

As I said at the outset, the regime imposed by today's judgment is undoubtedly reasonable as a

matter of policy, but I see nothing to indicate that the Constitution requires it to be followed coast-to-coast. I fear we have read today the first page of a whole new chapter in the "death-is-different" jurisprudence which this Court is in the apparently continuous process of composing. It adds to our insistence that State courts admit "all relevant mitigating evidence," see, *e.g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978), a requirement that they adhere to distinctive rules, more demanding than what the Due Process Clause normally requires, for admitting evidence of other sorts—Federal Rules of Death Penalty Evidence, so to speak, which this Court will presumably craft (at great expense to the swiftness and predictability of justice) year-by-year. The heavily outnumbered opponents of capital punishment have successfully opened yet another front in their guerilla war to make this unquestionably constitutional sentence a practical impossibility.

I dissent.