

# Kelly v. South Carolina: Extending Due Process Creates an Untenable Standard for Determining when Capital Sentencing Juries Should Be Informed of Parole Ineligibility

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## Note

### **KELLY V. SOUTH CAROLINA: EXTENDING DUE PROCESS CREATES AN UNTENABLE STANDARD FOR DETERMINING WHEN CAPITAL SENTENCING JURIES SHOULD BE INFORMED OF PAROLE INELIGIBILITY**

In *Kelly v. South Carolina*,<sup>1</sup> the United States Supreme Court considered whether the Supreme Court of South Carolina properly refused a jury instruction on a capital defendant's parole ineligibility when the prosecution alluded to indicia of the defendant's future dangerousness during the trial.<sup>2</sup> The Supreme Court held that evidence presented by the prosecution raised the issue of future dangerousness; therefore, pursuant to the Court's decision in *Simmons v. South Carolina*,<sup>3</sup> the Due Process Clause of the Fourteenth Amendment<sup>4</sup> requires a jury instruction indicating that Kelly would be ineligible for parole if sentenced to life imprisonment.<sup>5</sup> Although the Court reached the correct result by requiring that the jury be informed of Kelly's parole ineligibility, the Court's rationale weakened an already imprecise standard for determining when parole ineligibility must be disclosed to the jury.<sup>6</sup> This issue should have been addressed by relying on the Eighth Amendment's requirement of an individualized sentencing determination in capital sentencing cases.<sup>7</sup>

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1. 534 U.S. 246 (2002).

2. *Id.* at 248-51.

3. 512 U.S. 154 (1994) (plurality).

4. Section One of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. All future references to the Fourteenth Amendment will concern only the Due Process Clause.

5. *Kelly*, 534 U.S. at 252.

6. *Id.* at 259 (Rehnquist, C.J., dissenting) (arguing that the majority decision has "almost no connection with the due process rationale of *Simmons*").

7. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The United States Supreme Court, in *Woodson v. North Carolina*, interpreted the Eighth Amendment's ban on cruel and unusual punishment as requiring that the state exercise the power to punish capital defendants "'within the limits of civilized standards.'" 428 U.S. 280, 288 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality)). The Court

An individualized sentencing determination would have allowed the Court to require a parole ineligibility instruction in capital cases without relying on the due process rationale of *Simmons*, and its adverse consequences.

### I. THE CASE

In 1996, a South Carolina jury convicted William Kelly of murder, kidnapping, armed robbery, and possession of a knife during the commission of a violent crime.<sup>8</sup> During the sentencing phase, the prosecution presented testimony from fellow inmates and prison employees of Kelly's actions while incarcerated.<sup>9</sup> A prison administrator testified that Kelly gouged out a mortar joint in his cell.<sup>10</sup> Kelly's former cellmate also testified that Kelly had made a shank and spoke of taking a female correctional officer hostage.<sup>11</sup> In addition, the prosecution elicited testimony during cross-examination from a psychologist concerning Kelly's "inclination to kill anyone who rubbed him the wrong way."<sup>12</sup>

Prior to closing arguments, Kelly's counsel asked the trial judge to instruct the jury that if Kelly were to receive life imprisonment, he would not be eligible for parole.<sup>13</sup> In seeking this instruction, Kelly's counsel relied on the United States Supreme Court's decision in *Simmons*.<sup>14</sup> The *Simmons* instruction sought by Kelly's counsel was a near-verbatim recitation of the definition of life imprisonment under South Carolina law, which defines life imprisonment as "until death of

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found that the "fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304. The Court referred to this practice as "individualizing sentencing determinations." *Id.*

8. *State v. Kelly*, 540 S.E.2d 851, 853 (S.C. 2001). The victim, Shirley Shealy, Kelly's former co-worker, was found dead with her hands taped behind her back and money strewn over the floor and her body. *Id.* Shealy, who was twenty-three weeks pregnant at the time of the murder, had been stabbed thirty-one times and bled to death. After being arrested, Kelly confessed to the murder. *Id.*

9. *Id.* at 855.

10. *Id.*

11. *Id.*

12. *Kelly v. South Carolina*, 534 U.S. 256, 248-49 (2002).

13. *Id.* at 249.

14. The Court in *Simmons* held that when the prosecution argues a capital defendant's future danger to society as a reason to impose a death sentence, due process entitles the defendant to inform the jury of his parole ineligibility. *Simmons v. South Carolina*, 512 U.S. 154, 168-69 (1994) (plurality).

the offender.”<sup>15</sup> The prosecution objected on the basis that he would not argue Kelly’s future dangerousness and therefore the *Simmons* rule did not apply.<sup>16</sup> Kelly’s counsel responded, arguing that the prosecution had already raised the issue of future dangerousness through evidence presented earlier in the trial.<sup>17</sup> Nevertheless, the trial judge denied the requested instruction, explaining that the evidence presented by the prosecution had not actually raised the issue of future dangerousness; it simply described Kelly’s character.<sup>18</sup>

During closing arguments, despite defense counsel’s objection, the prosecution referred to Kelly as “Bloody Billy” and the “butcher of Batesburg,”<sup>19</sup> and described Kelly as “intelligent” and “quick-witted” arguing that this made him “a little more dangerous” and unpredictable.<sup>20</sup> The prosecution concluded by stating that “murderers will be murderers” and “he is the cold-blooded one right over there.”<sup>21</sup> After closing arguments, the trial judge instructed the jury to consider five statutory aggravating circumstances and three statutory mitigating factors in deciding between recommendations of death or life imprisonment.<sup>22</sup> The trial judge did not inform the jury that if Kelly were sentenced to life imprisonment, he would be ineligible for parole.<sup>23</sup> The jury was simply told that Kelly’s future dangerousness should not

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15. *Kelly*, 534 U.S. at 269; S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. 2001). The South Carolina statute states in relevant part:

For purposes of this section, “life imprisonment” means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.

*Id.*

16. *Kelly*, 534 U.S. at 249.

17. *Id.*

18. *Id.*

19. *Id.* at 249-50.

20. *Id.* at 250. The trial judge never ruled on the objection from Kelly’s counsel and the prosecution’s closing statements continued without further objection. *Id.*

21. *Id.*

22. *Id.* South Carolina law allows the judge to include in the jury instruction eleven statutory aggravating circumstances and ten statutory mitigating circumstances should the judge feel these factors are supported by the evidence. S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. 2001). In addition, the judge may instruct the jury on other mitigating factors authorized by law. *Id.* If the jury determines that a statutory aggravating circumstance exists, then the jury must sentence the defendant to death or life imprisonment. *Id.* § 16-3-20(B). However, if the jury does not find an aggravating circumstance, then the jury does not make a sentencing determination and the judge must sentence the defendant to life imprisonment or a mandatory minimum prison term of thirty years. *Id.* § 16-3-20(C).

23. *Kelly*, 534 U.S. at 250.

be taken into consideration.<sup>24</sup> The trial judge simply told the jury that “the terms ‘life imprisonment’ and ‘death sentence’ are to be understood in [their] ordinary and plain meaning.”<sup>25</sup> Kelly’s counsel objected, reiterating her earlier request for a *Simmons* instruction or an instruction regarding the prosecution’s stipulation that future dangerousness was not at issue.<sup>26</sup> The trial judge denied both requests. After deliberation, the jury returned with a finding of all five statutory aggravating circumstances and a recommendation of death, with which the trial court agreed.<sup>27</sup>

On appeal, the South Carolina Supreme Court affirmed Kelly’s sentence.<sup>28</sup> The court explained that a *Simmons* instruction is only available to a defendant if two specific circumstances are met.<sup>29</sup> First, the state must place future dangerousness at issue and second, the only two sentencing recommendations available to a jury must be life imprisonment without parole or death.<sup>30</sup> Kelly argued that evidence presented by the prosecution at trial regarding his behavior in prison raised the issue of future dangerousness.<sup>31</sup> The court disagreed, holding that the evidence presented by the prosecution was not the kind contemplated by *Simmons*.<sup>32</sup> The court interpreted the Court’s holding in *Simmons* as requiring a jury instruction on parole ineligibility as a means of rebutting an argument of future dangerousness only when the argument pertains to the defendant’s future dangerousness outside of prison.<sup>33</sup> Informing the jury that Kelly would be ineligible for parole if sentenced to life in prison would not rebut the state’s evidence that Kelly was an escape risk.<sup>34</sup> Therefore, the court held that Kelly did not meet the first element necessary to trigger a *Simmons* instruction.<sup>35</sup>

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24. *Id.*

25. *Id.* (citation omitted).

26. *Id.*

27. *Id.* at 251.

28. *State v. Kelly*, 540 S.E.2d 851, 853 (S.C. 2001).

29. *Id.* at 856; *see also Simmons v. South Carolina*, 512 U.S. 154, 178 (1994) (O’Connor, J., concurring) (explaining that due process would entitle a defendant to inform the jury of his parole ineligibility when the state places future dangerousness at issue and the jury’s sentencing alternatives are limited to life imprisonment without parole and death).

30. *Kelly*, 540 S.E.2d at 853.

31. *Id.*

32. *Id.* at 857.

33. *Id.*

34. *Id.* The court further concluded that future dangerousness could not be logically inferred from the evidence presented nor was it presented by the prosecution in closing arguments. *Id.*

35. *Id.*

Kelly also argued that a *Simmons* instruction was required because the jury had no choice but to find at least one aggravating circumstance in the sentencing phase, thus automatically limiting their choice in sentencing alternatives under South Carolina law to life imprisonment or death.<sup>36</sup> Again, the court disagreed, reasoning that a jury may not always find a statutory aggravating factor.<sup>37</sup> Because the jury might not find any aggravating circumstances, life imprisonment was not the only alternative to a death sentence.<sup>38</sup> Accordingly, the court held that Kelly did not meet the second prong of the *Simmons* test.<sup>39</sup> The court concluded that the trial court properly refused Kelly's request for a *Simmons* instruction.<sup>40</sup> Consequently, Kelly appealed to the United States Supreme Court.<sup>41</sup> The Court granted certiorari to determine whether the holding in *Simmons* applied to the South Carolina statutory sentencing scheme and whether the Supreme Court of South Carolina properly concluded that future dangerousness was not at issue.<sup>42</sup>

## II. LEGAL BACKGROUND

The United States Supreme Court has taken two different approaches to examining state capital sentencing procedures.<sup>43</sup> Under the first approach, the Court has held that the Eighth Amendment's ban on cruel and unusual punishment prohibits state capital sentencing procedures that do not allow for individualized sentencing determinations.<sup>44</sup> In particular, the Court has invalidated sentencing procedures that deny consideration of potentially mitigating factors in sentencing determinations.<sup>45</sup> In the second approach, the Court has

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36. *Id.* at 858. Specifically, Kelly argued that the jury would have "violated its oath" had it not found at least one aggravating circumstance in this case. *Id.*

37. *Id.* The court noted that a conviction made in the guilt phase of a trial is not binding on the sentencing jury. *Id.* The sentencing jury is required to make an independent finding of an aggravating circumstance. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Kelly v. South Carolina*, 534 U.S. 246, 251 (2002).

42. *Id.*

43. *Compare Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality) (stating that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense"), *with Gardner v. Florida*, 430 U.S. 349, 358 (1977) (acknowledging that requirements of the Due Process Clause apply not only to the trial, but to the sentencing process as well).

44. *Woodson*, 428 U.S. at 304. The Court noted that the Eighth Amendment is applicable to the states through the Fourteenth Amendment. *Id.* at 287 n.8.

45. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (stating that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as

invalidated state capital sentencing procedures under the Due Process Clause of the Fourteenth Amendment that do not afford a capital defendant an opportunity to deny or explain evidence presented against him.<sup>46</sup>

These two lines of reasoning merge in the Court's consideration of whether a capital defendant is permitted to inform a jury that he will be ineligible for parole when the prosecution argues future dangerousness as a reason to sentence a capital defendant to death. The Court has determined that the Eighth Amendment requires that a capital defendant be given the opportunity to introduce evidence of his character and record to mitigate an offense, and that due process requires that a capital defendant be given the opportunity to deny or explain the evidence presented against him.<sup>47</sup> *Simmons*, however, marked a turn in the Supreme Court's analysis of the issue of future dangerousness. In *Simmons*, the Court relied exclusively on the Due Process Clause.<sup>48</sup> Since *Simmons*, the Supreme Court has abandoned the Eighth Amendment's individualized sentencing requirement in analyzing the issue of future dangerousness.<sup>49</sup>

A. *The Evaluation of State Capital Sentencing Procedures Under the Eighth and Fourteenth Amendments*

Under the Eighth Amendment's prohibition on cruel and unusual punishment, the Court has developed a framework for analyzing state capital sentencing procedures.<sup>50</sup> In particular, the Court has held that the Eighth Amendment permits the sentencer to consider,

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*a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").*

46. *Gardner*, 430 U.S. at 362 (holding that the defendant was denied due process when he was sentenced to death based on information he had no opportunity to deny or explain).

47. See *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) (noting that when the prosecution argues future dangerousness as a reason to impose death, the individualized sentencing rule from *Lockett* and *Eddings* requires the defendant be given an opportunity to rebut the assertion of future dangerousness, and due process requires an opportunity to deny or explain the prosecution's evidence).

48. See *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (plurality) (holding that due process requires that the jury be informed of the defendant's parole ineligibility when future dangerousness is at issue). The Court in *Simmons* expressly declined to consider whether the Eighth Amendment compelled the same result. *Id.* at 162 n.4.

49. See *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001) (holding that "whenever future dangerousness is at issue . . . due process requires that the jury be informed that a life sentence carries no possibility of parole").

50. See *Woodson v. South Carolina*, 428 U.S. 280, 304 (1976) (plurality) (explaining that a state's power to sentence a capital defendant to death is limited by the Eighth Amendment); see also *Gardner*, 430 U.S. at 364 (White, J., concurring) (explaining that the

as potentially mitigating, any evidence of the defendant's character, prior criminal record, or any particular circumstance of the committed offense that the defendant offers as a reason to impose a sentence other than death.<sup>51</sup> Specifically, in *Woodson v. North Carolina*,<sup>52</sup> the Supreme Court invalidated a North Carolina mandatory death penalty law, which required that defendants convicted of first-degree murder be automatically sentenced to death.<sup>53</sup> The Court held that North Carolina's mandatory death penalty statute was inconsistent with the Eighth Amendment's requirement that the state exercise the power to inflict the death penalty within limits set by contemporary societal standards.<sup>54</sup> Although this determination rested to a large extent on the Court's recognition that mandatory death penalty statutes contradict evolving standards of decency in a civilized society,<sup>55</sup> the Court also held that the North Carolina statute violated the Eighth Amendment because it did not allow a jury to consider factors particular to the defendant, such as his character and the circumstances of the offense prior to sentencing him to death.<sup>56</sup> The Court noted that although an individualized sentencing determination "generally reflects simply enlightened policy," requiring a consideration of the character of the defendant and the circumstances of the offense is a "constitutionally indispensable" part of a capital sentencing procedure.<sup>57</sup> The Court reasoned that the death penalty is qualitatively different from even a life term of imprisonment, and this difference creates a need for reliability in the determination that the punishment of death is appropriate in each capital case.<sup>58</sup> An individualized sentencing determination, therefore, allows the jury to focus on particular characteristics of the defendant, satisfying the need for heightened reliability in capital sentencing.<sup>59</sup>

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foundation of an individualized sentencing standard, as formulated by the Court in *Woodson*, is the Eighth Amendment's ban on cruel and unusual punishment).

51. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

52. 428 U.S. 280.

53. *Id.* at 305. *Woodson* was convicted of committing first-degree murder that occurred during an armed robbery of a convenience store. *Id.* at 282-83.

54. *Id.* at 301 (asserting that the Eighth Amendment "require[s] that the State's power to punish 'be exercised within the limits of civilized standards'" (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958))).

55. *See id.* at 289-301 (discussing the development of the Eighth Amendment and mandatory death penalty statutes from 1791 to 1977).

56. *Id.* at 304. The Court in *Woodson* also invalidated the North Carolina statute based on a third deficiency, that it failed to adequately curtail unbridled jury discretion in imposing death sentences. *Id.* at 302.

57. *Id.* at 304.

58. *Id.* at 305.

59. *Id.* at 304-05.



The Court reinforced the need for individualized sentencing in *Lockett v. Ohio*.<sup>60</sup> In *Lockett*, the Supreme Court considered the constitutionality of an Ohio statute under the Eighth and Fourteenth Amendments, because the statute did not require the sentencing judge to consider certain mitigating factors such as the defendant's prior record, character, or age.<sup>61</sup> A jury convicted the defendant of aggravated murder based on her participation in an armed robbery of a pawnshop and murder of the pawnbroker at the store.<sup>62</sup> Pursuant to Ohio law, the trial judge ordered a presentence report and psychological evaluations, which revealed detailed information concerning the defendant's background and character.<sup>63</sup> Based on these reports and arguments regarding the penalty that should be imposed, but without addressing all relevant mitigating factors, the trial judge determined that the offense was not the product of mental deficiency and sentenced the defendant to death.<sup>64</sup>

Prior to *Lockett*, the Supreme Court had not considered what evidence would be relevant to a proper individualized sentencing determination.<sup>65</sup> The Court held the Ohio statute to be unconstitutional, concluding that the Eighth and Fourteenth Amendments require consideration of *any* element of the defendant's character and record as a relevant mitigating factor that may provide a basis for imposing a lesser sentence.<sup>66</sup> The Court, citing to its decision in *Woodson*, reiterated that the qualitative difference between a sentence of death and a sentence of imprisonment provides a heightened need to consider the uniqueness of the individual in each case.<sup>67</sup> While the Court recognized that "no perfect procedure" exists to determine when the death penalty should be imposed, the failure to give mitigating weight

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60. 438 U.S. 586 (1978).

61. *Id.* at 597.

62. *Id.* at 590-93.

63. *Id.* at 594. The report described the defendant as a "21-year-old with low-average or average intelligence, and not suffering from a mental deficiency." *Id.*

64. *Id.* Under the Ohio statute, the trial judge was required to sentence the defendant to death unless it was found that "(1) the victim had induced or facilitated the offense, (2) it was unlikely that [the defendant] would have committed the offense but for the fact that she was under duress, coercion, or strong provocation, or (3) the offense was primarily the product of [the defendant's] psychosis or mental deficiency." *Id.* at 593-94 (internal quotation marks omitted) (citation omitted).

65. *Id.* at 604 (acknowledging that the Court's prior invalidation of a mandatory death penalty statute in *Woodson* did not consider which mitigating factors would be relevant or how much weight they should be given).

66. *Id.* (emphasis added).

67. *Id.* at 605.

to the defendant's character and record is "incompatible with the commands of the Eighth and Fourteenth Amendments."<sup>68</sup>

The Supreme Court again addressed the issue of individualized sentencing in *Eddings v. Oklahoma*.<sup>69</sup> In *Eddings*, the Court addressed an Oklahoma death penalty statute that did not explicitly define what constitutes mitigating evidence in a capital sentencing hearing and allowed the trial judge to disregard evidence of the defendant's troubled youth as not being relevant mitigating evidence.<sup>70</sup> The defendant, who was sixteen years old, killed a police officer during a routine traffic stop.<sup>71</sup> During the sentencing hearing, defense counsel presented substantial evidence of the defendant's troubled childhood and his mental and emotional developmental problems.<sup>72</sup> Although the sentencing judge did consider the defendant's age as mitigating, the Oklahoma law did not define what qualified as a mitigating circumstance, and thus the sentencing judge refused to consider the evidence of the defendant's troubled upbringing as mitigating.<sup>73</sup> The Supreme Court, relying on its decision in *Lockett*, held that the failure of the Oklahoma sentencing judge to consider potentially mitigating evidence precluded an individualized sentencing determination.<sup>74</sup> Therefore, the Court concluded, that although a sentencer is free to determine how much weight to afford mitigating circumstances, a sentencer may not refuse to consider relevant mitigating evidence.<sup>75</sup>

Under the Due Process Clause, the Court has formed a second foundation for the purpose of examining state capital sentencing procedures.<sup>76</sup> Specifically, the Court has held that due process requires that a capital defendant not be sentenced to death based upon evidence he had no opportunity to deny or explain.<sup>77</sup> The Supreme Court first discussed the application of the Due Process Clause to state

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68. *Id.*

69. 455 U.S. 104 (1982).

70. *Id.* at 106-09.

71. *Id.* at 105-06. The defendant, Eddings, and several of his friends had run away from their homes in his brother's car. *Id.* at 105. Eddings momentarily lost control of the car and was signaled to pull over by a highway patrol officer. *Id.* at 106. When the officer approached the car, Eddings stuck a loaded shotgun out the window and shot and killed the officer. *Id.*

72. *Id.* at 107.

73. *Eddings*, 455 U.S. at 109.

74. *Id.* at 113 (stating "[w]e find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*").

75. *Id.* at 114-15.

76. See *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality) (noting that a sentencing procedure "must satisfy the requirements of the Due Process Clause").

77. *Id.* at 362.

capital sentencing procedures in *Gardner v. Florida*.<sup>78</sup> In *Gardner*, the defendant was convicted of murdering his wife.<sup>79</sup> The jury, finding that the mitigating circumstances outweighed the aggravating circumstances, returned an advisory verdict suggesting that the court sentence the defendant to life imprisonment.<sup>80</sup> The trial judge then ordered a presentence investigation report on the defendant.<sup>81</sup> After reviewing the report, the judge made an ultimate finding that the aggravating circumstances outweighed the mitigating circumstance and sentenced the defendant to death.<sup>82</sup> Although the trial judge considered the entirety of the presentence investigation report when making his sentencing determination, one portion of the report was deemed confidential and not disclosed to the defendant.<sup>83</sup>

The Supreme Court reversed the death sentence, recognizing that state sentencing procedures must satisfy the Due Process Clause.<sup>84</sup> The Court reasoned that while the defendant may not have a substantive right to a particular sentence, he does have an interest in the nature of the procedures leading to the sentencing determination.<sup>85</sup> In this case, the sentencing procedures allowed the trial judge to impose a death sentence based on confidential information not disclosed to the defendant.<sup>86</sup> Accordingly, the Court held that the defendant was denied due process of law because his sentence was imposed based in part on information he had no opportunity to deny or explain.<sup>87</sup>

Although the majority relied on the Due Process Clause, Justice White, in a concurring opinion, argued that the Eighth Amendment, as interpreted in *Woodson*, would have compelled the same result.<sup>88</sup> Justice White contended that *Woodson* and *Gardner* were indistinguishable, in that, both concerned state capital sentencing procedures.<sup>89</sup>

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78. 430 U.S. 349.

79. *Id.* at 351. The defendant killed his wife by assaulting her with a blunt object. *Id.* Evidence presented at trial showed that the defendant had been drinking all day and had no recollection of the assault. *Id.* at 352.

80. *Id.* at 352-53. The jury was instructed to determine if the prosecution proved the aggravating circumstance that the crime committed was "especially heinous, atrocious, or cruel," whether any mitigating circumstances outweighed this aggravating circumstance, and whether the defendant should be sentenced to life imprisonment or death. *Id.* at 352.

81. *Id.* at 353.

82. *Id.*

83. *Id.*

84. *Id.* at 358.

85. *Id.*

86. *Id.*

87. *Id.* at 362.

88. *Id.* at 364 (White, J., concurring).

89. *Id.* at 363.

Justice White further argued that a state sentencing procedure that allows a sentencer to consider secret information concerning the defendant's character and record fails to meet the need for reliable sentencing determinations.<sup>90</sup> Justice White interpreted the Court's decision in *Woodson* as relying exclusively on the Eighth Amendment, and expressly disclaimed the possible application of the Fourteenth Amendment as unnecessary "other than as the vehicle by which the strictures of the Eighth Amendment are triggered."<sup>91</sup>

*B. The Court's Examination of Future Dangerousness and Parole Ineligibility in State Capital Sentencing Procedures*

The Supreme Court's examination of state capital sentencing procedures has raised the issue of whether indicia of future dangerousness and the capital defendant's parole status are proper factors for a jury to consider in making a sentencing determination.<sup>92</sup> The Supreme Court has determined that a sentencer may consider future dangerousness as an aggravating factor and a reason to impose a death sentence.<sup>93</sup> However, the Court has also required that the sentencer not be precluded from considering evidence in mitigation of future dangerousness.<sup>94</sup> Nevertheless, the underlying constitutional basis for considering future dangerousness and parole ineligibility has been inconsistent. Initially, the Court reasoned that the Eighth Amendment's individualized sentencing requirement allowed a capital defendant to introduce mitigating evidence in defense of arguments concerning future dangerousness.<sup>95</sup> Later, the Court reasoned that the Due Process Clause allowed a capital defendant to inform the jury of parole ineligibility as a means of rebutting arguments of future dangerousness.<sup>96</sup> Since its decision in *Simmons*, the Court has relied

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90. *Id.* at 364.

91. *Id.*

92. *See, e.g.*, *Jurek v. Texas*, 428 U.S. 262, 272 (1976) (examining a Texas capital sentencing statute that required the jury to predict whether the defendant would commit future criminal acts or be a threat to society).

93. *See id.* at 275 (noting that the "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system").

94. *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1981).

95. *See Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (explaining that evidence presented by the defendant that suggests he would not pose a future danger if sentenced to imprisonment rather than death is potentially mitigating and cannot be excluded from jury consideration under *Eddings*).

96. *See Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (holding that due process requires that the defendant be allowed to present information regarding parole ineligibility to the jury when the prosecution argues future dangerousness).

exclusively on the Fourteenth Amendment to address the issue of future dangerousness and parole ineligibility in capital sentencing.

1. *Future Dangerousness Under the Eighth Amendment's Individualized Sentencing Standard.*—In *Jurek v. Texas*,<sup>97</sup> the defendant challenged a Texas statute that required the jury to predict the future behavior of the defendant in considering whether to impose the death penalty.<sup>98</sup> The Texas law posed three questions to the jury: (1) whether the act was committed intentionally with the expectation that death would result, (2) whether the defendant's propensity for future violence would pose a threat to society, and (3) whether the act was committed as an unreasonable response to provocation.<sup>99</sup> If the jury answered each of these questions affirmatively, believing that the state proved each beyond a reasonable doubt, then the defendant would receive the death sentence.<sup>100</sup> The Court upheld the question predicting the defendant's future behavior because it allowed the jury to consider all relevant information.<sup>101</sup> The Court further explained that allowing the jury to consider aggravating circumstances alone would violate the individualized sentencing requirement of the Eighth Amendment.<sup>102</sup> To meet the requirements of the Eighth Amendment, a statutory sentencing scheme must allow the jury to consider not only why the sentence should be imposed, but also why it should not be imposed.<sup>103</sup> A consideration of whether a defendant poses a future danger to society is relevant in many sentencing determinations and in this case assured that the jury had all relevant information about the defendant before making a sentencing determination.<sup>104</sup>

In *California v. Ramos*,<sup>105</sup> the Supreme Court considered whether informing a jury that a sentence of life imprisonment may be commuted by the Governor of California was unconstitutional under the

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97. 428 U.S. 262 (1976) (plurality).

98. *Id.* at 274. The Court, as a preliminary matter, rejected the petitioner's argument that the death penalty was *per se* unconstitutional because it constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Id.* at 268.

99. *Id.* at 269 (citing TEX. CRIM. PROC., art. 37.071(b) (Supp. 1975-1976)).

100. *Id.*

101. *Id.* at 276.

102. *Id.* at 271.

103. *Id.* The Court also noted that allowing the jury to consider both aggravating and mitigating circumstances ensured that the jury would have adequate guidance in sentencing and ensured that death sentences are not "wantonly" or "freakishly" imposed. *Id.* at 276 (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972)).

104. *Id.* at 275-76.

105. 463 U.S. 992 (1983).

Eighth and Fourteenth Amendments.<sup>106</sup> The Court held that the instruction did not preclude an individualized sentencing determination or hinder the ability of the jury to consider mitigating factors.<sup>107</sup> The Court reasoned that the instruction simply allowed the jury to consider whether the defendant would pose a future danger if released from prison.<sup>108</sup> The Court explained that the California capital sentencing scheme ensured an individualized consideration of the defendant's characteristics.<sup>109</sup> Furthermore, the instruction simply gave the jury accurate information upon which to base its sentencing decision.<sup>110</sup>

2. *The Court's Increased Reliance on the Due Process Clause to Evaluate Capital Sentencing Procedures.*—*Skipper v. South Carolina*<sup>111</sup> marked the first time the Court recognized that similar results would be compelled by both the individualized sentencing requirement under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.<sup>112</sup> In *Skipper*, the Court was presented with the issue of whether the exclusion of evidence regarding the defendant's good behavior in prison violated the individualized sentencing standard set forth in *Lockett* and *Eddings*.<sup>113</sup> The Court held that such evidence must be considered potentially mitigating and, therefore, could not be withheld from consideration.<sup>114</sup> The exclusion of mitigating evidence compromised the jury's ability to consider the character of the defendant, and thus failed to create an individualized sentencing determination.<sup>115</sup> The Court noted that if the prosecution argued that the defendant would be a future danger, not only would the Eighth Amendment under *Lockett* and *Eddings* require the consideration of such mitigating evidence, but due process would also require that the defendant have an opportunity to deny or explain the evidence

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106. *Id.* at 994. The defendant argued that permitting a capital sentencing jury to consider commutation was unconstitutional and would mislead the jury. *Id.* at 998.

107. *Id.* at 1013.

108. *Id.* at 1005. In reaching this conclusion, the Court dismissed the argument that an instruction regarding possible commutation of the sentence would mislead the jury toward predicting what a future governor might do. *Id.*

109. *Id.* at 1005-06.

110. *Id.* at 1009. The Court explained that it would be inaccurate to describe a life sentence as being without the possibility of parole when a governor, in fact, would have the power to commute a sentence of life imprisonment to a sentence with the possibility of parole. *Id.*

111. 476 U.S. 1 (1986).

112. *Id.* at 5 n.1 (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality)).

113. *Id.* at 3-4.

114. *Id.* at 5.

115. *Id.* at 8.

presented against him.<sup>116</sup> The Court explained that when the state seeks the death penalty based on a prediction of future dangerousness, the individualized sentencing determination rule of *Lockett* requires that the defendant be allowed to introduce evidence on the issue of future dangerousness. The Court also noted that due process would compel the same result because due process requires that a capital defendant be afforded the opportunity to deny or explain the evidence used by the prosecution in seeking the death penalty.<sup>117</sup>

In *Simmons v. South Carolina*,<sup>118</sup> the Court reached its holding by exclusively relying on the Fourteenth Amendment, thus abandoning the Eighth Amendment's individualized sentencing analysis used by the Court in *Skipper*.<sup>119</sup> In *Simmons*, the trial judge prohibited the defendant from informing the jury of his parole ineligibility as a mitigating factor, despite the prosecution's argument that the defendant would pose a future danger to society.<sup>120</sup> The defendant cited a public opinion survey at trial explaining that the general public misunderstood the meaning of a sentence of life imprisonment and argued that a jury would choose a death sentence because they would mistakenly believe that the defendant would be released from prison on parole.<sup>121</sup> After deliberating for some time, the jury inquired into whether the defendant would be eligible for parole if sentenced to life imprisonment.<sup>122</sup> The trial judge informed the jury that parole was not a proper issue for their consideration and that the terms "life imprisonment" and "death" were to be understood in their ordinary meaning.<sup>123</sup> The jury subsequently returned with a verdict of death.<sup>124</sup> The Court in *Simmons* recognized that the *Skipper* Court expressly noted that both the Eighth Amendment and the Due Process Clause required the introduction of mitigating evidence when the prosecution relied upon future dangerousness as a reason to impose a

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116. *Id.* at 5 n.1 (citing *Gardner*, 430 U.S. at 362).

117. *Id.*

118. 512 U.S. 154 (1994) (plurality).

119. *Id.* at 162 n.4 (stating that the Court refused to consider whether the Eighth Amendment would compel a similar result).

120. *Id.* at 159-60. Under South Carolina law, the only sentencing alternatives available to the jury were life imprisonment or death. *Id.* at 178 (O'Connor, J., concurring).

121. *Id.* at 159.

122. *Id.* at 160.

123. *Id.* Specifically, the trial judge's response to the jury stated: "You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain [sic] and ordinary meaning." *Id.*

124. *Id.*

death sentence.<sup>125</sup> Despite recognizing the dual basis for the decision in *Skipper*, the Court chose not to address the Eighth Amendment rationale.<sup>126</sup> Instead, the Court found only that the defendant's due process rights under the Fourteenth Amendment were violated.<sup>127</sup> Accordingly, the Court held that if the prosecution argues the defendant's future dangerousness as reason to impose the death penalty, due process requires informing the jury of the defendant's parole ineligibility.<sup>128</sup>

Justice Souter, in a concurring opinion, recognized that the Eighth Amendment would have compelled the same decision.<sup>129</sup> Justice Souter argued that the Eighth Amendment "entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed."<sup>130</sup> Justice Souter explained that a reasoned moral choice can only be made when the jury is properly informed as to the meaning of the legal terms describing possible sentencing alternatives.<sup>131</sup> Justice Souter concluded that regardless of whether future dangerousness was argued by the prosecution, the jury in *Simmons* had misunderstood what a sentence of life imprisonment meant.<sup>132</sup> Therefore, the decision to impose the death sentence was unreliable and violated the Eighth Amendment.<sup>133</sup>

In contrast, Justice O'Connor's concurring opinion reinforced the due process rationale of the plurality opinion.<sup>134</sup> Justice O'Connor acknowledged that future dangerousness was a proper factor for jury consideration when the state seeks the death penalty.<sup>135</sup> However, Justice O'Connor distinguished *Skipper* from *Simmons* arguing that in *Skipper* the defendant sought to introduce evidence to disprove the contention that he would be a future danger.<sup>136</sup> Conversely, in *Simmons*, the defendant sought to use the operation of the law to disprove the contention that he would be a future danger, arguing that if sentenced to life imprisonment then he could not pose

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125. *Id.* at 164; see also *supra* text accompanying notes 111-117 (explaining the grounds for the Court's decision in *Skipper*).

126. *Simmons*, 512 U.S. at 162 n.4.

127. *Id.* at 162.

128. *Id.* at 168-69.

129. *Id.* at 172 (Souter, J., concurring).

130. *Id.*

131. *Id.*

132. *Id.* at 172-73.

133. *Id.* at 174.

134. *Id.* at 177 (O'Connor, J., concurring).

135. *Id.*

136. *Id.* at 176.



a future danger because he would never be released from prison.<sup>137</sup> To accomplish this, Simmons needed the jury to be informed of his parole ineligibility.<sup>138</sup> Justice O'Connor explained that as a general matter, states are free to decide whether to inform a jury of parole ineligibility.<sup>139</sup> However, when future dangerousness is argued by the prosecution, informing the jury of parole ineligibility may be the only way the defendant can rebut the prosecution's argument.<sup>140</sup> Therefore, informing the jury of Simmons's parole ineligibility was necessary to rebut the State's argument that he would pose a future danger to society.<sup>141</sup>

In *Shafer v. South Carolina*,<sup>142</sup> the Supreme Court further solidified its reliance on the due process rationale of *Skipper* and *Simmons*.<sup>143</sup> In *Shafer*, the trial judge denied the defendant a jury instruction on parole ineligibility after the prosecution had introduced evidence raising the defendant's propensity for future violence.<sup>144</sup> In his instruction to the jury, the trial judge informed the jury that the term "life imprisonment" means until the death of the defendant.<sup>145</sup> During deliberation, the jury inquired about the defendant's parole ineligibility, but the trial judge instructed the jury not to consider this in their sentencing determination.<sup>146</sup> Shortly thereafter, the jury returned with a recommendation of death.<sup>147</sup>

On appeal, the South Carolina Supreme Court held that *Simmons* did not apply to the statutory sentencing scheme because the jury had a third alternative to death and life imprisonment.<sup>148</sup> The court de-

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137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 177.

141. *Id.*

142. 532 U.S. 36 (2001).

143. *Id.* at 51.

144. *Id.* at 41. Specifically, the prosecutor introduced evidence regarding the defendant's prior criminal record, prior violent behavior, his misconduct in prison and previous probation violations. *Id.* Additionally, in closing, the prosecution stated, "they [referring to the defendant and his two accomplices] might come back." *Id.* at 43. The trial judge expressed concern as to whether this constituted an argument about future dangerousness, but determined that it did not. *Id.*

145. *Id.*

146. *Id.* at 44-45. The jury asked two specific questions: "1) Is there any remote chance for someone convicted of murder to become elig[i]ble for parole? [and] 2) Under what conditions would someone convicted for murder be elig[i]ble?" *Id.* at 44. In response, the trial judge informed the jury that under South Carolina law "life imprisonment means until the death of the offender" and that "[p]arole eligibility is not for your consideration." *Id.* at 45.

147. *Id.* at 45-46.

148. *Id.* at 49-50.

terminated that under the statute, if the jury found no aggravating factors, then the jury would not make a sentencing recommendation and the trial judge would then choose between sentencing the defendant to a minimum term of thirty years or life imprisonment.<sup>149</sup> Thus, the defendant had three possible sentencing alternatives, death, life imprisonment, or a minimum prison term of thirty years.<sup>150</sup> The United States Supreme Court, reversing the South Carolina Supreme Court's ruling, determined that a jury making a sentencing recommendation only has the option to choose between death or life imprisonment.<sup>151</sup> The Court explained that under South Carolina law, it is only when the jury finds an aggravating circumstance that their sentencing discretion is limited to death and life imprisonment.<sup>152</sup> The *Simmons* due process concerns became apparent in this situation because only at this point would informing the jury of parole ineligibility correct any misunderstandings the jury may have about whether sentencing the defendant to life imprisonment means imprisonment for the life of the defendant.<sup>153</sup> Therefore, the Court held that if future dangerousness is at issue, then due process requires that the jury be informed that life imprisonment means no parole.<sup>154</sup>

### III. THE COURT'S REASONING

In *Kelly v. South Carolina*, the Supreme Court held that the *Simmons* holding was applicable to the South Carolina capital sentencing scheme in place at the time of Kelly's trial.<sup>155</sup> The Court further held that Kelly was entitled to an opportunity to inform the jury of his parole ineligibility because the prosecution placed future dangerousness at issue.<sup>156</sup> Writing for the majority,<sup>157</sup> Justice Souter began by dismissing the state supreme court's holding that the South Carolina sentencing scheme creates two possible alternatives to a death sentence, life imprisonment and a mandatory thirty-year sentence, thus render-

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149. *Id.*

150. *Id.*

151. *Id.* at 50.

152. *Id.* Under South Carolina law, the third alternative would occur if the jury did not find an aggravating circumstance, in which case the trial judge becomes the sentencer and must sentence the defendant to either life imprisonment or a mandatory thirty-year sentence. S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. 2001).

153. *Shafer*, 532 U.S. at 51.

154. *Id.*

155. *Kelly v. South Carolina*, 534 U.S. 246, 252 (2002).

156. *Id.* (stating that the state supreme court's determination that Kelly's future dangerousness was not at issue was "unsupportable on the record").

157. Justice Souter was joined by Justices Stevens, O'Connor, Ginsburg, and Breyer in the majority opinion. *Id.* at 247.

ing *Simmons* inapposite.<sup>158</sup> The Court referred to its reasoning in *Shafer v. South Carolina*, decided less than one year earlier.<sup>159</sup> In reviewing *Shafer*, the Court reiterated that under South Carolina law, a jury makes a sentencing recommendation only upon the finding of an aggravating circumstance.<sup>160</sup> If the jury finds an aggravating factor, their sentencing recommendation is automatically limited to life imprisonment or death.<sup>161</sup> Therefore, the Court held the South Carolina Supreme Court's determination that *Simmons* did not apply was in error.<sup>162</sup>

The Court then discussed the state supreme court's conclusion that Kelly's future dangerousness was not at issue.<sup>163</sup> The Court found that evidence presented by the prosecution regarding Kelly's behavior in prison raised the issue of future dangerousness.<sup>164</sup> The Court explained that evidence of Kelly's propensity for violence in prison was a generalized argument of future dangerousness.<sup>165</sup> Accordingly, a jury hearing such evidence could reasonably infer that Kelly posed a future danger regardless of whether he was in prison or set free.<sup>166</sup>

The Court highlighted the "fallacy" in the state court's attempt to misconstrue the evidence presented at trial as simply evidence of Kelly's inability to adapt to prison life and not evidence suggesting future dangerousness.<sup>167</sup> The Court explained that evidence of future dangerousness, is any evidence which has a "tendency to prove dangerousness in the future."<sup>168</sup> Such evidence remains relevant regardless of whether it raises other inferences or is described in different terms.<sup>169</sup> Similarly, while the prosecution's characterization of Kelly as a "butcher" and the statement that "murderers will be murderers" may have related to retribution, they also implied that Kelly would

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158. *Id.* at 251-52.

159. *Id.* at 252.

160. *Id.*; S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. 2001) (providing in relevant part: "If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation").

161. *Kelly*, 534 U.S. at 252; S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. 2001) (stating that "if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment").

162. *Kelly*, 534 U.S. at 252.

163. *Id.*

164. *Id.*

165. *Id.* at 253.

166. *Id.* at 253-54.

167. *Id.* at 254.

168. *Id.*

169. *Id.* More specifically, the Court dismissed the notion that a *Simmons* instruction is only required when evidence with "no other possible inference" but future dangerousness is presented. *Id.*

pose a future danger.<sup>170</sup> Because future dangerousness was inferred, Kelly was entitled to his requested jury instruction.<sup>171</sup>

South Carolina also argued that there was no need for the parole ineligibility instruction because the jury did not inquire about the issue.<sup>172</sup> The Court explained that simply because the jury did not seem concerned with Kelly's future release, there is no indication the jury was informed that a life sentence carried no possibility of parole.<sup>173</sup> In addition, the Court found the trial court's instruction, that a sentence of death and a sentence of life imprisonment be understood by their plain meaning, insufficient to convey a clear understanding of Kelly's parole status.<sup>174</sup> Thus, the Court held that Kelly was entitled to a jury instruction regarding his parole ineligibility.<sup>175</sup>

Chief Justice Rehnquist, in his dissent, argued that the majority opinion had no connection to the due process reasoning in *Simmons*.<sup>176</sup> The Court's decision in *Simmons* rested on the notion that when the state argues future dangerousness, the defendant is entitled in rebuttal to inform the jury that he is ineligible for parole.<sup>177</sup> Chief Justice Rehnquist believed that unlike the prosecution in *Simmons*, the prosecution at Kelly's trial did not place future dangerousness at issue "in any meaningful sense of that term."<sup>178</sup> Chief Justice Rehnquist argued that evidence with a tendency to show future dangerousness, or from which the jury could infer future dangerousness, would certainly be presented by the prosecution in most capital sentencing hearings.<sup>179</sup> For example, evidence with a tendency to prove future dangerousness could easily be inferred from evidence describing any brutal crime to a jury.<sup>180</sup> Consequently, there will rarely be a case when a parole ineligibility instruction would not be required.<sup>181</sup>

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170. *Id.* at 255.

171. *Id.* at 256.

172. *Id.*

173. *Id.*

174. *Id.* at 257.

175. *Id.*

176. *Id.* at 258-59 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argued that the Court purported to apply *Simmons*, but instead created a "truth in sentencing" doctrine, which has no basis in due process. *Id.* Justice Kennedy joined in Chief Justice Rehnquist's dissent. *Id.* at 258; see also *supra* notes 125-128 and accompanying text (discussing the Supreme Court's holding in *Simmons*).

177. *Simmons v. South Carolina*, 512 U.S. 154, 168-69 (1994).

178. *Kelly*, 534 U.S. at 260 (Rehnquist, C.J., dissenting).

179. *Id.* at 261.

180. *Id.*

181. *Id.*

Chief Justice Rehnquist also argued that the majority's holding in *Kelly* departed from *Simmons* on the distinction between evidence of danger in prison and evidence of danger to society at large.<sup>182</sup> Chief Justice Rehnquist argued that pursuant to *Simmons*, the state could argue future dangerousness in prison as a basis for the death penalty.<sup>183</sup> A jury instruction regarding parole ineligibility does not rebut the argument that a defendant has a propensity for violence in prison.<sup>184</sup> Therefore, Chief Justice Rehnquist argued that *Kelly*'s right to due process was not violated by the trial court's failure to grant his requested instruction.<sup>185</sup>

Justice Thomas wrote a separate dissenting opinion, in which he argued that there never was a basis for the proposition that due process entitles a capital defendant to inform the jury of his parole ineligibility when future dangerousness has been raised by the prosecution.<sup>186</sup> Justice Thomas believed the *Simmons* decision should have been limited in application to a narrow class of cases specifically because it requires a factual inquiry as to whether future dangerousness is at issue.<sup>187</sup> Justice Thomas argued that the *Simmons* decision created an "imprecise standard," which led to the "entirely foreseeable" result in *Kelly* of a broadening of the circumstances in which *Simmons* applies.<sup>188</sup> Justice Thomas reiterated Chief Justice Rehnquist's concern that the Court's decision will not only require a parole ineligibility instruction in nearly all capital cases, but will also allow the Court to further "micromanage" state sentencing procedures "under the guise" of the Constitution.<sup>189</sup> Acknowledging that requiring a *Simmons* instruction might be a better policy choice, Justice Thomas nevertheless felt that sentencing procedures are a matter for the state to decide.<sup>190</sup>

#### IV. ANALYSIS

In *Kelly*, the Supreme Court relied on its decision in *Simmons* to hold that evidence and arguments presented by the prosecution at

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182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 262-63.

186. *Id.* at 262 (Thomas, J., dissenting).

187. *Id.*

188. *Id.* at 263 (noting that "it is not at all surprising that the Court today easily fits the State's argument during *Kelly*'s proceeding into the universe of arguments that trigger the *Simmons* requirement").

189. *Id.* at 264-65.

190. *Id.* at 265.

trial placed Kelly's future dangerousness at issue.<sup>191</sup> In addition, the Court relied on its earlier decision in *Shafer* to reiterate that South Carolina's capital sentencing scheme limited the jury's sentencing alternatives to death and life imprisonment.<sup>192</sup> Because future dangerousness was raised and the only sentencing alternatives available to the jury were death and life imprisonment, the Court reversed the South Carolina Supreme Court's ruling prohibiting Kelly from informing the jury that he was ineligible for parole.<sup>193</sup> The Court's application of *Simmons* and *Shafer* to the facts of *Kelly* reinforced the Court's reliance on the Due Process Clause of the Fourteenth Amendment to require that capital defendants be afforded an opportunity to introduce evidence of parole ineligibility when the prosecution argues future dangerousness as a reason to impose a sentence of death over a sentence of life imprisonment.<sup>194</sup> While the Court reached the correct result, its reliance on the Due Process Clause perpetuates an imprecise standard for determining when a capital jury should be informed of a defendant's parole status when making a sentencing determination.<sup>195</sup> The Court should have resolved this question by utilizing the individualized sentencing standard under the Eighth Amendment to require a parole ineligibility instruction in all cases where the jury's sentencing alternatives are limited to death or life imprisonment.

The Court's implicit reliance on the Due Process Clause in *Kelly* is problematic for three reasons. First, informing the jury of parole ineligibility, pursuant to the *Simmons* due process rationale, fails to adequately deny or explain arguments of future dangerousness. Second, by requiring a jury to be informed of a defendant's parole ineligibility only in those cases where the prosecution argues future dangerousness and the jury's sentencing alternatives are between life imprisonment and death, the due process rationale compromises the ability of capital sentencing juries to make informed sentencing determinations. Finally, by informing the jury of parole ineligibility when evidence presented by the prosecution has a tendency to show future

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191. *Kelly*, 534 U.S. at 252.

192. *Id.*

193. *Id.* at 258.

194. See *Simmons v. South Carolina*, 752 U.S. 154, 171 (1994) (plurality) (holding that due process entitles a capital defendant to inform the jury of his parole ineligibility when future dangerousness is at issue and the only sentencing alternatives are death and life in prison).

195. See *Kelly*, 534 U.S. at 263 (Thomas, J., dissenting) (discussing how the *Kelly* decision extended the standard created in *Simmons* for determining when future dangerousness is at issue).

dangerousness, the due process rationale fails to provide a precise standard for determining when future dangerousness is at issue. The Court in *Kelly* could have avoided the consequences of the due process rationale by instead relying on individualized sentencing standards developed by the Court's prior Eighth Amendment jurisprudence.

A. *The Simmons Due Process Rationale Fails to Address Why a Capital Jury Should Be Informed of Parole Ineligibility*

The Court's reliance on the due process rationale in *Kelly* is problematic because the rationale, as originally applied by the Supreme Court in *Gardner* and *Skipper*, used the Due Process Clause to address different concerns than those presented in *Simmons* and *Kelly*.<sup>196</sup> The due process rationale derives from cases invalidating state capital sentencing procedures that did not allow defendants an opportunity to respond to evidence used by the prosecution to impose the death penalty.<sup>197</sup> For instance, in *Gardner*, the trial judge rejected the jury's advisory verdict of life imprisonment and sentenced the defendant to death after reviewing a presentence investigation report, relevant portions of which were not disclosed to the defendant.<sup>198</sup> The Court determined that this procedure violated the Due Process Clause because the defendant was not given an opportunity to deny or explain the evidence in the report.<sup>199</sup> The Due Process Clause was invoked in *Gardner* because the secrecy of the report prohibited the defendant from being able to respond to evidence presented against him.<sup>200</sup>

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196. Compare *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986) (citing *Gardner*, the Court explained that the introduction of evidence of the defendant's good behavior in prison was required by due process when the prosecution argues future dangerousness as a reason to impose the death penalty), with *Kelly*, 534 U.S. at 248 (reiterating the Court's holding in *Simmons* that the introduction of the defendant's parole ineligibility is required by due process when the future dangerousness of the defendant is at issue and the jury's sentencing alternatives are limited to death and life imprisonment).

197. See *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality) (holding a capital defendant was denied due process of law when not given the opportunity to explain or deny evidence presented against him during sentencing).

198. *Id.* at 352-53.

199. *Id.* at 362.

200. *Id.* at 356. The Court reasoned that there was no opportunity for the defendant to challenge the "accuracy or materiality" of the information contained in the report. *Id.* at 356. The Court contrasted *Gardner* with its decision in *Williams v. New York*, noting that unlike the defendant in *Williams*, *Gardner* was not given the opportunity to challenge the evidence considered by the trial judge. 337 U.S. 241 (1949). The Court also noted that had the report been disclosed and had the defendant been given an opportunity to explain the evidence contained within, the trial judge may have been compelled to accept the jury's advisory verdict. *Gardner*, 430 U.S. at 362.

Therefore, in *Gardner*, due process provided the proper analytical rationale to address the concern that a defendant facing the death penalty should be able to rebut evidence presented against him.

In the context of future dangerousness, the Court correctly realized in *Skipper* that there was an equal propensity for a violation of a capital defendant's due process rights when the state argues that the defendant will pose a future danger and the defendant is prevented from introducing evidence of his past good behavior in prison.<sup>201</sup> In *Skipper*, the Court explained that if the prosecution argued the defendant posed a future danger, due process would require that the defendant have the opportunity to rebut this contention through evidence of good behavior in prison.<sup>202</sup> The due process rationale in *Skipper* was correct because the introduction of evidence of good behavior in prison directly sought to disprove the prosecution's argument by suggesting that the defendant no longer posed a threat to those in prison or society at large.<sup>203</sup>

However, allowing a capital defendant to inform the jury of his parole status when the prosecution argues future dangerousness, as in *Simmons* and *Kelly*, does not deny or explain evidence and arguments of future dangerousness in a manner that is consistent with the due process reasoning in *Gardner* and *Skipper*. Unlike the concerns raised in *Skipper* and *Gardner*, informing the jury of parole ineligibility does not directly confront the argument that the defendant will be a future danger. This is evidenced by the fact that in both *Simmons* and *Kelly* the jury could have simultaneously believed the state's evidence that the defendants posed a future danger while at the same time accepting that they were both parole ineligible.<sup>204</sup> Thus, informing the jury of parole ineligibility did not deny or explain evidence that the defendants posed a future danger. Rather, the defendants merely offered the jury a reason to impose any sentence other than death. Nevertheless, the plurality in *Simmons* and majority in *Kelly* relied solely on

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201. *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1985).

202. *Id.*

203. *See id.* at 10-11 (Powell, J., concurring). Justice Powell argued that evidence of good behavior in prison would have confronted the prosecutor's arguments regarding the future dangerousness of the defendant. *Id.* Justice Powell explained that the majority had correctly noted that excluding such evidence violated the defendant's due process rights. *Id.*

204. *See Simmons v. South Carolina*, 512 U.S. 154, 168-69 (1994) (acknowledging that the jury may consider a defendant who is parole eligible as a greater future threat than a defendant that is parole ineligible). *Id.* at 168. However, the effect of informing a jury of parole ineligibility, even assuming the truth of the Court's assertion, does not directly deny that the defendant will pose a future danger, only that he may be less of a danger to the general public because he will be incarcerated.



the Due Process Clause to hold that the defendant's rights were violated, concluding that the parole ineligibility instruction would have offered the defendant the opportunity to rebut the argument that he posed a future danger to society.<sup>205</sup>

Evidence of the defendant's propensity for violence in prison creates an equally problematic concern under the due process rationale because an instruction regarding parole ineligibility does not deny or explain the argument that a defendant would pose a danger in prison.<sup>206</sup> In *Kelly*, the prosecution made several references to the defendant's behavior while incarcerated, presenting testimony that Kelly made a shank and spoke of taking a corrections officer hostage.<sup>207</sup> The Court reasoned that this evidence raised the implication of future dangerousness.<sup>208</sup> At that point, the Court held due process required that the jury be informed of Kelly's parole ineligibility.<sup>209</sup> However, informing the jury that Kelly would never be released from prison does not rebut the evidence or the argument that Kelly will be dangerous in prison.<sup>210</sup> Indeed, it may suggest to the jury an alternative reason to sentence the defendant to death. Therefore, the due process reasoning fails to address whether it was proper to inform the jury of Kelly's parole status.

The Eighth Amendment's individualized sentencing standard would have provided a better constitutional basis for the Court's decision in *Kelly*. The individualized sentencing standard provides an independent justification for informing a sentencing jury of a capital defendant's parole ineligibility. This standard would require that such information be presented to the jury as a potentially mitigating factor, because parole ineligibility is a circumstance upon which the jury may choose to impose a sentence less than death.<sup>211</sup> The Supreme Court has developed the individualized sentencing standard

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205. *Simmons*, 512 U.S. at 171; *Kelly*, 534 U.S. at 257.

206. *See Kelly*, 534 U.S. at 261 (Rehnquist, C.J., dissenting) (explaining that if the state were to argue that the defendant posed a danger to those in prison, it would be "no answer" to inform the jury that the defendant is ineligible for parole).

207. *Id.* at 248.

208. *Id.*

209. *Id.*

210. *Id.* at 261 (Rehnquist, C.J., dissenting). The Court acknowledged this possibility, noting that the prosecution was free to argue that the defendant would be a future danger in prison, but stated that the prosecution may not mislead the jury by refusing to inform them of the defendant's parole ineligibility. *Id.* at 254 n.3.

211. *See Skipper v. South Carolina*, 476 U.S. 1, 45 (1986) (explaining that favorable inferences that a jury may draw from evidence "would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death'" (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1977))).

from the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>212</sup> In *Woodson*, the Court reasoned that a "fundamental respect for humanity under[ies] the Eighth Amendment," which requires an individualized sentencing determination in capital sentencing cases.<sup>213</sup> In *Lockett*, the Court expanded this mandate, explaining that the risk of imposing a death sentence when a lesser sentence may be compelled is simply too great to withhold evidence of mitigating factors from the sentencer.<sup>214</sup> In *Eddings*, the Court further explained the notion of individualized sentencing as not only requiring that a state capital sentencing procedure not preclude any mitigating factor from the consideration of the sentencer, but also the sentencer may not refuse to consider all relevant mitigating evidence.<sup>215</sup> Thus, the individualized sentencing determination requires that the procedure by which states select defendants for capital punishment take into account the "character and record of the individual offender" in each specific case.<sup>216</sup> As a result, an individualized sentencing determination provides a better basis for the decision in *Kelly* by allowing a jury to consider all relevant mitigating evidence a defendant can proffer for imposing a sentence less than death, ensuring that the punishment chosen by the jury is an appropriate punishment in each case.<sup>217</sup>

Under the Eighth Amendment, a capital defendant would be able to inform the jury of parole ineligibility as a potentially mitigating factor. Utilizing the Eighth Amendment's individualized sentencing standard, a sentencing jury must be informed of a capital defendant's parole ineligibility because such information goes to the defendant's character, record, and the circumstances of the offense.<sup>218</sup> Additionally, a capital defendant's parole status is a potentially mitigating factor, which the sentencer is required to consider.<sup>219</sup> In capital cases, parole ineligibility would be considered potentially mitigating because

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212. *Gardner v. Florida*, 430 U.S. 349, 364 (1977) (White, J., concurring) (explaining the grounds for the Court's decision in *Woodson*).

213. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

214. *Lockett*, 438 U.S. at 604-05.

215. *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982).

216. *Gardner*, 430 U.S. at 364 (White, J., concurring) (quoting *Woodson*, 428 U.S. at 305).

217. *Woodson*, 428 U.S. at 305.

218. *See id.* (holding that the Eighth Amendment requires a sentencer to consider the character, record, and circumstances of the particular offense as a "constitutionally indispensable part of the process").

219. *See Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (stating "[e]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such knowledge may not be excluded from the sentencer's consideration.").

it is a circumstance upon which the jury could determine that a defendant deserves a sentence less than death.<sup>220</sup> Accordingly, an individualized sentencing determination provides a better rationale for explaining why a parole ineligibility instruction would be required when a capital defendant's future dangerousness is at issue because the availability of the instruction would not hinge on whether it rebutted the prosecutor's arguments and evidence. A parole ineligibility instruction would be given as a matter of course to ensure that the jury had before it all the relevant information about the defendant prior to making a sentencing determination.

*B. The Due Process Rationale Fails to Ensure an Informed Sentencing Determination*

The Court's reliance on the Due Process Clause to inform a jury of a defendant's parole ineligibility only when future dangerousness is at issue also fails to ensure that the sentencing jury will be fully informed in every capital sentencing proceeding. The Court has repeatedly expressed the concern that capital sentencing juries are poorly informed about the meaning of sentencing alternatives.<sup>221</sup> The purpose of requiring juries to be informed of the defendant's parole status when future dangerousness is at issue is to prevent the state from misleading the jury into thinking the defendant will be a future danger, while simultaneously preventing the jury from learning that the defendant is not eligible for parole.<sup>222</sup> For instance, in *Simmons*, the Court felt that the jury was misled by arguments that the defendant would present a future danger because they were not informed that a sentence of "life imprisonment" carried no possibility of parole.<sup>223</sup> The Court in *Simmons* regarded the parole status of the defendant as "crucial" information for the jury to consider in order to make a proper sentencing determination.<sup>224</sup> Similarly, in *Kelly*, the Court noted that the jury was not properly informed as to the meaning of the only sentencing alternative to the death penalty, life imprisonment.<sup>225</sup>

The due process rationale allowing capital defendants to inform the jury of parole ineligibility only corrects the potential jury misun-

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220. *See id.* at 4-5.

221. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (stating that "it can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States").

222. *Id.* at 171.

223. *Id.* at 162.

224. *Id.* at 164.

225. *Kelly v. South Carolina*, 534 U.S. 246, 257 (2002).

derstanding when future dangerousness has been raised.<sup>226</sup> Furthermore, informing a jury of a defendant's parole status only when the prosecution raises future dangerousness ignores the fact that the defendant would be parole ineligible regardless of the arguments made by the prosecution.<sup>227</sup> Certainly, the jury would not be equally, or more, confused if their sentencing alternatives were properly defined in each case regardless of whether future dangerousness is at issue. Indeed, the Supreme Court noted in *Simmons* that the trial judge only added to the jury's misperception of the sentencing alternatives by refusing to give accurate information regarding parole ineligibility.<sup>228</sup> Thus, there is no apparent justification for not informing the jury of a defendant's ineligibility for parole in those cases where the defendant is in fact parole ineligible.<sup>229</sup>

An individualized sentencing determination would create a better informed jury, which is necessary to ensure reliable sentences. The Eighth Amendment's individualized sentencing standard is predicated upon the underlying principle that a jury must be able to make a "reasoned moral judgment" concerning the decision whether to impose a sentence of death or some lesser sentence.<sup>230</sup> While this principle rests on the qualitative difference between a sentence of imprisonment and a sentence of death,<sup>231</sup> it also rests firmly on the notion that a sentencer should have all available information in order

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226. *Simmons*, 512 U.S. at 168-69 (explaining that informing the jury of parole ineligibility when their only sentencing alternative to death is life imprisonment is required by due process because it rebuts the argument of future dangerousness); see also *id.* at 178 (O'Connor, J., concurring) (explaining that due process requires the court to inform the jury of parole ineligibility when future dangerousness is at issue and when the jury's only sentencing alternatives are death and life imprisonment) (emphasis added).

227. The converse is also true. The fact that a defendant is eligible for parole also exists regardless of the arguments made at trial. The Constitution does not prohibit the prosecution from arguing true information regarding a defendant's ineligibility for parole. *Simmons*, 512 U.S. at 168. However, a state may choose not to inform the jury that a capital defendant is eligible for parole, commutation, or a pardon in order to provide more protection to capital defendants under the state's criminal justice system than would be required by the Constitution. *Id.* at 168.

228. *Id.* at 161-62.

229. In her concurring opinion in *Simmons*, Justice O'Connor explained that a state may properly choose to not inform the jury of a defendant's parole ineligibility when the prosecution does not argue future dangerousness and the only sentencing alternatives available to the jury are death and life imprisonment. *Id.* at 176-77 (O'Connor, J., concurring). However, such a conclusion ignores the fact that future dangerousness will most always be considered by the jury even when the prosecution does not make an argument concerning future dangerousness. Lynn Thompson Reid, *Blind Justice: Excluding Relevant Mitigating Evidence During Capital Sentencing*, 3 J. GENDER RACE & JUST. 343, 358-59 (1999).

230. *Simmons*, 512 U.S. at 172 (Souter, J., concurring).

231. See *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (noting that the death sentence is qualitatively different from any other capital sentencing alternative).

to make an informed, reliable decision.<sup>232</sup> As a result, the need for reliability in sentencing necessitates that the jury be instructed on the meaning of legal terms and sentences whenever there is the reasonable probability that the jury might misunderstand an instruction.<sup>233</sup>

A common manifestation of a jury's confusion surrounding the precise meanings of sentences occurs when the jury asks the trial judge for clarification about sentences during their deliberations. For example, in *Simmons*, the jury inquired if a life sentence carried the possibility of parole, to which the trial judge responded that "life imprisonment" and "death" were defined by their ordinary meaning.<sup>234</sup> The Court in *Simmons* explained that juries lack accurate information regarding the meaning of a life imprisonment sentence and commonly mistake prison terms for being shorter than stated.<sup>235</sup> Unlike the due process rationale, the individualized sentencing standard would simply require the judge to inform the jury of the defendant's parole ineligibility thereby instructing the jury as to the meanings of legal terms used to define sentencing alternatives.<sup>236</sup> In utilizing an individualized sentencing standard, a capital sentencing jury will not be misled and, therefore, will be capable of providing a well-reasoned sentencing determination.

*C. The Due Process Rationale Creates an Imprecise Standard for Determining When Future Dangerousness is at Issue*

A final limitation of the due process rationale is that it creates an imprecise standard for determining when future dangerousness is at issue. The Court's decision in *Simmons* required a parole ineligibility instruction when the prosecution makes generalized arguments of future dangerousness and when the only sentencing alternatives are death or life imprisonment.<sup>237</sup> In applying *Simmons* to the facts in *Kelly*, the Court broadened the circumstances of when future dangerousness is at issue to include the introduction of evidence with a "tendency to prove dangerousness in the future."<sup>238</sup> In doing so, the Court created a subjective standard which complicates the inquiry necessary to determine whether future dangerousness is at issue. As a result, in future cases the court must stringently review evidence and

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232. *Id.* at 305.

233. *Simmons*, 512 U.S. at 172 (Souter, J., concurring).

234. *Simmons*, 512 U.S. at 160.

235. *Id.* at 169.

236. *Id.* at 172 (Souter, J., concurring).

237. *Simmons*, 512 U.S. at 171.

238. *Kelly*, 534 U.S. 246, 263 (2002) (Thomas, J., dissenting) (noting that the factual inquiry as to future dangerousness required by *Simmons* is now a more expansive inquiry).

arguments made by the prosecution to determine whether the future dangerousness of the defendant was shown, argued, or placed at issue.<sup>239</sup>

The likely result of the case-by-case inquiry required under the *Kelly* standard is that a jury instruction on the defendant's parole status will be required in almost all capital cases.<sup>240</sup> As Justice Rehnquist points out in his dissent, a jury may well infer future dangerousness from evidence of the brutality of a crime or evidence used to prove elements of the crime.<sup>241</sup> Therefore, under *Kelly*, future dangerousness need not actually be argued by the prosecution; it must simply be suggested by the evidence presented.<sup>242</sup>

In contrast, the individualized sentencing standard would provide a bright-line rule, making the factual inquiry into whether future dangerousness was raised irrelevant.<sup>243</sup> An instruction as to parole ineligibility would be required in all cases where a jury's sentencing alternatives were limited to death or life in prison. Requiring a jury instruction on parole ineligibility under the Eighth Amendment would also allow for judicial efficiency by relieving courts from the burden of reviewing state sentencing procedures under the detailed factual inquiry required by *Kelly*. As Justice Thomas's dissent noted in *Kelly*, the due process rationale will further require the Court's intervention because deciding whether future dangerousness was raised requires a factual determination in every capital case.<sup>244</sup> Under the individualized sentencing standard, juries would be instructed on parole ineligibility in all capital cases regardless of the prosecution's arguments, thus, avoiding any factual inquiry. Accordingly, the individualized sentencing standard, pursuant to the Eighth Amendment, provides a more precise standard than the due process rationale for determining when future dangerousness is at issue.

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239. *Id.* (Thomas, J., dissenting). Justice Thomas argued that after the Court's decision in *Kelly*, the due process violation will depend on the outcome of a factual inquiry designed to determine "whether the State somehow showed the defendant's future dangerousness, argued future dangerousness, or put . . . future dangerousness in issue." *Id.* at 176-77.

240. *Id.* at 261 (Rehnquist, C.J., dissenting).

241. *Id.* at 261-62.

242. *Id.* at 261 (stating "[t]he test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society. It is difficult to envision a capital sentencing hearing where the state presents no evidence from which a juror might make such an inference").

243. *See Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring) (arguing that the Eighth Amendment provides an independent rationale for informing the jury of the defendant's parole ineligibility, which does not require an inquiry into the issue of future dangerousness).

244. *Kelly*, 234 U.S. at 263 (Thomas, J., dissenting).

## V. CONCLUSION

In *Kelly*, the Court's application of *Simmons* further diluted the underlying due process reasoning for requiring a parole ineligibility instruction in capital sentencing cases.<sup>245</sup> Despite reaching the correct result, the Court failed to adequately connect this case to the Fourteenth Amendment's due process requirement. A similar result could have been more appropriately reached by utilizing the individualized sentencing standard the Court has recognized under the Eighth Amendment. The Court should have resolved *Kelly*, by holding that the individualized sentencing standard requires a parole ineligibility instruction in all cases where the jury's sentencing alternatives are death or life in prison. This would have allowed the Court to reach the same result, but in a manner that properly addresses the issues raised, allows capital sentencing juries to make more informed and reliable sentencing determinations, and eliminates confusion.

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245. *Id.* at 258-59 (Rehnquist, C.J., dissenting) (arguing that the majority decision has no "connection to the due process rationale of *Simmons*").