[J-159-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 428 CAP
	:	
Appellee	:	
	:	Appeal from the Judgment of Sentence on
	:	10/01/02 in the Court of Common Pleas,
v.	:	Criminal Division of Lackawanna County
	:	at No. 83CR748
	:	
DAVID CHMIEL,	:	
	:	ARGUED: October 19, 2004
Appellant		

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 29, 2005**

I join Parts I and II of the majority opinion, concur in the result with regard to Parts III and IV, and dissent as to penalty.

I respectfully disagree with the majority's analysis, in Part V(A) of its opinion, concerning the range of evidence and argumentation that will implicate a capital defendant's future dangerousness for purposes of determining the requirement of an instruction concerning the meaning of a life sentence under Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187 (1994). In Kelly v. South Carolina, 534 U.S. 246, 122 S. Ct. 726 (2002), the United States Supreme Court set forth the following, straightforward test to determine whether or not future dangerousness is implicated for such purposes:

> Evidence of future dangerousness under Simmons is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely

> because it might support other inferences or be described in other terms.

Id. at 254, 122 S. Ct. at 732.

Rather than acknowledging and applying this test, the majority undertakes to distinguish Kelly on the facts, and proceeds to rely on prior decisions of this Court that are plainly inconsistent with Kelly. Compare Majority Opinion, slip op. at 49-50 (cataloguing Pennsylvania precedent reflecting the proposition that "evidence regarding a defendant's past violent convictions or conduct does not implicate the issue of his or her future dangerousness"), with Kelly, 534 U.S. at 253, 122 S. Ct. at 731 ("A jury hearing evidence of defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior[.]").[1] I am unable to accede to this sort of an approach to a decision of the United States Supreme Court on a federal constitutional issue.

In my view, the brutal circumstances involved in the Lunarios' killings alone arguably meet the United States Supreme Court's prevailing test for implication of future dangerousness as articulated in Kelly.[2] The tendency of this evidence, which was

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[1] The majority also appears to conflate the test for prosecutorial misconduct with the standard governing whether a Simmons request is required upon a capital defendant's request. See Majority Opinion, slip op. at 47-48, 49-50. However, whether or not a Simmons instruction is required to satisfy constitutional due process requirements has little to do with whether or not a prosecutor's commentary or the evidence was proper or improper, or within or outside the range of zealous advocacy or oratorical flair. Rather, the instruction is required on the defendant's request where the proper or improper evidence or argumentation implicates future dangerousness. See Kelly, 534 U.S. at 254, 122 S. Ct. at 732.

[2] Notably, in response to a dissenting opinion asserting that under the Kelly standard the evidence in a substantial proportion, if not all, capital cases will show a defendant likely to be dangerous in the future, the Kelly majority responded, that this "may well be," see Kelly, 534 U.S. at 254 n.4, 122 S. Ct. at 732 n.4, albeit that it declined to respond definitively.

incorporated into the penalty phase of trial, to show Appellant's continuing dangerousness was enhanced by the Commonwealth's presentation of the factual underpinnings of a violent rape in aggravation at the penalty hearing, and the prosecuting deputy attorney general's commentary concerning death as a "solution" to Appellant's status as a killer "beyond the realm," as well as his repeated references to Appellant's "thirst[] after the bliss of the knife" and blood lust. The majority's attempt to direct the focus of this evidence and commentary solely to their backward-looking implications seems to me to be ineffectual in light of Kelly's explicit guidance. See Kelly, 534 U.S. at 253-54, 122 S. Ct. at 731-32 ("A jury's hearing evidence of defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior . . .[; the relevance of evidence to the point of future dangerousness] does not disappear merely because it might support other inferences or be described in other terms."). For these reasons, I believe that a new penalty hearing is due under prevailing United States Supreme Court authority.