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ROMANO v. OKLAHOMA 114 S. Ct. 2004 (1994) United States Supreme Court

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state habeas proceedings in the trial court and on appeal to the Supreme Court of Virginia. The right to counsel at federal habeas proceedings is statutory.²⁶ Additionally, although the right to counsel does exist at most stages of capital litigation, the Sixth Amendment right to effective assistance of counsel does not. That right applies only at trial and on direct appeal, where its basis is constitutional. It does not apply to state or federal habeas corpus proceedings.²⁷

There is no statutory time limit in Virginia to file state or federal habeas proceedings. However, the Commonwealth often petitions courts to set execution dates when it feels the defense is delaying the filing of a state habeas corpus petition too long. After such action, or in lieu of it, the Commonwealth and the defense will usually agree on when the defendant must file the petition. Regarding federal petitions, Justice Blackmun noted for the majority in *McFarland* that federal courts could

exercise their discretion against granting stays if a "dilatatory" capital defendant squandered the time available to obtain counsel to prepare the habeas corpus petition.²⁸

Unlike Texas, Virginia generally does not seek oppressively quick execution dates for capital defendants. But attorneys for capital defendants should take fullest advantage of the time before state habeas proceedings must be instituted to reinvestigate their case. It is also important that defense counsel agree on a deadline for filing a federal habeas petition, so that counsel will have as much time as possible to investigate important issues for appeal. Examples include withholding of exculpatory evidence and ineffective assistance of counsel claims, which require investigation outside the trial record.²⁹

Summary and analysis by:
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²⁶ 28 U.S.C. §§ 2251, 2254, 2255 (1988).

²⁷ *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). See case summary of *Coleman*, Capital Defense Digest, Vol. 4, No. 1, p. 4 (1991).

²⁸ *McFarland v. Scott*, 114 S. Ct. at 2573.

²⁹ See *Hobart, State Habeas in Virginia: A Critical Transition*, Capital Defense Digest, Vol. 3, No. 1, p. 23 (1990).

ROMANO v. OKLAHOMA

114 S. Ct. 2004 (1994)

United States Supreme Court

FACTS

On the morning of July 19, 1986, John Joseph Romano and David Wayne Woodruff brutally murdered and robbed Romano's friend and former gambling boss Lloyd Thompson.¹ Tried as co-defendants, Romano and Woodruff were convicted of first degree murder and sentenced to death. They immediately appealed to the Court of Criminal Appeals requesting relief on the basis of irreconcilable defenses.² While this appeal was pending, Romano stood trial for a separate and earlier capital murder charge arising out of events in October 1985.

On October 16, 1985, Roger Sarfaty was found murdered and robbed in his apartment.³ The State sought the death penalty against Romano, charging murder in the first degree and robbery with a dangerous weapon. Romano was convicted. During the sentencing phase of the trial, the State sought to prove four aggravating circumstances including that the defendant had previously been convicted of a violent felony and would constitute a continuing threat to society. In an attempt to prove the past and future dangerousness of defendant, the State introduced, over the objections of the defense, a copy of the judgment and sentence from the Thompson murder conviction. The document revealed that the defendant had been convicted of capital murder and sentenced to death. It also showed that defendant intended to appeal the outcome.

The jury found the existence of all four aggravating circumstances and recommended death for the murder conviction and one thousand years imprisonment for the robbery conviction. The trial court sentenced accordingly and Romano appealed.⁴ While the appeal in this case was pending, the Court of Criminal Appeals of Oklahoma overturned the conviction for the Thompson murder, holding that Romano's trial should have been severed from that of Woodruff. The Thompson judgment was reversed and remanded for a new trial.⁵

Given this sequence of events, Romano argued on his Sarfaty appeal that the trial court erred when it admitted the documentation of the Thompson conviction and sentence. Romano asserted it was improper to admit the conviction because it was not final at the time of admission and had since been overturned. Furthermore, he argued, the sentence impermissibly reduced the jury's sense of responsibility for its decision under the Eighth Amendment and rendered the sentencing determination so unreliable as to amount to a denial of due process under the Fourteenth Amendment.⁶

The Oklahoma Court of Criminal Appeals affirmed, concluding that although the evidence of the Thompson sentence was irrelevant, the

¹ *Woodruff v. State*, 825 P.2d 273 (Okla. Crim. App. 1992).

² *Id.* at 274.

³ *Romano v. State*, 847 P.2d 368, 373 (Okla. Crim. App. 1993).

⁴ *Id.*

⁵ *Romano v. State*, 827 P.2d 1335, 1336 (Okla. Crim. App. 1992)

(Romano was tried a second time for the 1985 Thompson murder and was again found guilty of first degree murder and robbery and sentenced to death.)

⁶ *Romano v. Oklahoma*, 114 S. Ct. 2004, 2007 (1994).

jury was properly instructed on how to proceed in its deliberations. Accordingly, it could not be said that the sentencing deliberations were undermined in any way. Romano sought and the United States Supreme Court granted certiorari to decide the question of whether "admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine[s] the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments."⁷

HOLDING

In a five to four decision, the Supreme Court held that admission of evidence regarding Romano's prior death sentence did not undermine the jury's sense of responsibility for determining the appropriateness of the death penalty under the Eighth and Fourteenth Amendments.⁸

ANALYSIS/APPLICATION IN VIRGINIA

I. Eighth Amendment Inquiry

The Eighth Amendment's concern that the death penalty not be arbitrarily and capriciously imposed requires states to ensure "that capital sentencing decisions rest on [an] individualized inquiry."⁹ This inquiry must encompass the "character and record of the individual offender and the circumstances of the particular offense."¹⁰ In meeting this end, under the Oklahoma scheme a sentencing jury may not impose death unless it unanimously finds the existence of at least one statutory aggravator beyond a reasonable doubt and that any aggravating circumstances outweigh any evidence in mitigation presented by the defense.¹¹

A capital defendant's constitutional entitlement to an individualized inquiry regarding the appropriateness of death is impermissibly jeopardized if the sentencing jury is led to feel less responsible than it should for its decision.¹² Relying on *Caldwell v. Mississippi*,¹³ Romano contended that the introduction of the Thompson death sentence adversely affected the jury's sense of responsibility for deciding his fate. In *Caldwell*¹⁴ the Court held that the jury must not be misled regarding the role it plays in the capital sentencing decision for to do so would undermine the defendant's right to an individualized sentencing.¹⁵

The majority read *Caldwell* to apply only if the jury had been "affirmatively misled." According to the Court, since the Thompson sentence was not false when held out for the Sarfaty jury's consideration, this evidence was not an affirmative distortion and therefore did not contravene the principle established in *Caldwell*.¹⁶ This narrow interpretation of *Caldwell* altogether failed to explain how verbal directives from the prosecutor to the jury were impermissibly misleading, while the introduction of evidence of a prior death sentence was deemed harmless error unless the defendant proved otherwise. It is settled law that argument is not evidence and is therefore not to carry the same force as evidence.¹⁷ Juries are to decide cases on the evidence and the law as they hear it from the trial judge.¹⁸ It is thus extremely difficult to reconcile the findings of *Caldwell* and *Romano*. The former decision held that improper prosecutorial communications with the jury undermined the defendant's constitutional right to a reliable sentencing while the latter found that the integrity of the jury's deliberations was not compromised by the introduction into evidence of a prior condemnation to death.

Romano also argued that admission of the Thompson judgment violated the Eighth Amendment because it was irrelevant to the determination of the instant offense. Despite the fact that the aggravating evidence was ultimately deemed irrelevant as a matter of Oklahoma law,¹⁹ the majority held that its admission did not constitute federal constitutional error and dismissed the claim. Yet, this position seems to be at odds with prior precedent in which the court has held that "it would be error for a State to attach the 'aggravating' label to, or otherwise authorize the jury to draw adverse inferences from factors that are . . . totally irrelevant to the sentencing process . . ."²⁰

II. Fourteenth Amendment Inquiry

Romano also claimed that admission of the Thompson sentence violated his Fourteenth Amendment right to due process protection against fundamental unfairness. The majority found that the admission of the evidence did not so infect the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process.²¹ This finding rested on two underlying presumptions: first, that the jurors followed the trial court's proper instructions and second, that the instructions sufficiently impressed upon the jury the importance

⁷ *Romano v. Oklahoma*, 114 S. Ct. 380 (1993).

⁸ *Romano v. Oklahoma*, 114 S. Ct. at 2008-09.

⁹ *McCleskey v. Kemp*, 481 U.S. 279, 302 (1987).

¹⁰ *Id.* (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)).

¹¹ Okla. Stat. tit. 21, § 701.12 (1981).

¹² *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986).

¹³ 472 U.S. 320 (1985).

¹⁴ In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the inaccurate and misleading statements of the prosecutor, agreed to by the judge, were found by the U.S. Supreme Court to have minimized the jury's sense of responsibility for making a determination of the appropriateness of death and the death sentence was commuted.

¹⁵ *Caldwell*, 472 U.S. at 336.

¹⁶ In her concurrence, Justice O'Connor emphasizes that the introduction of the Thompson sentence could have risen to the level of a *Caldwell* violation if it had been both inaccurate at the time of offering and had undermined the jury's sentencing responsibility.

¹⁷ The dissent emphasized the distinction between evidence and argument. In *Caldwell*, improper prosecutorial closing argument was deemed to have impermissibly undermined the jury's sense of responsibility for its sentencing decision. The prosecutor stated that the returned

verdict would automatically be subjected to appellate review. In *Romano*, evidence of defendant's earlier condemnation to death was presented to the jury which could have diminished the jury's sense of responsibility for its life-or-death deliberations. *Caldwell* was reversed on the basis of the unknown but potentially impermissible effects of argument on the jury. The decision in *Romano* was affirmed despite the grave risk that the evidence presented could have convinced the jury that Romano's fate had been sealed by the previous jury. See generally 1 Charles E. Friend, *The Law of Evidence in Virginia*, § 1-4 (4th ed. 1993).

¹⁸ See, e.g., 1 Charles E. Friend, *The Law of Evidence in Virginia*, § 1-5 (4th ed. 1993).

¹⁹ *Romano v. State*, 847 P.2d at 391 (Oklahoma Court of Criminal Appeals held that Romano's first death sentence was irrelevant to determining the instant offense).

²⁰ *Tuilaepa v. California*, 114 S. Ct. 2630, 2640 (1994).

²¹ See *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (setting forth the proper analytical framework in which to evaluate Romano's claim; the due process protection test is whether the evidence so infected the proceedings as to render the resulting conviction constitutionally unfair).

the jurors followed the trial court's proper instructions and second, that the instructions sufficiently impressed upon the jury the importance of its role. Accordingly, the majority reasoned that the evidence should have had little to no effect on the jury's deliberations.²² By refusing to address the potential effects of the Thompson death sentence on the jury, the majority effectively shifted to Romano the burden of proving that this evidence infected the jury's deliberations to an unconstitutional degree.²³ Although a subtle shift, the results were nevertheless damning to the defendant while according a windfall to the state.²⁴ In *Caldwell* the Court overturned a capital sentence as unreliable because of the unknown impact of a prosecutor's closing statements on the jury's sense of responsibility. Unable to say whether or not the evidence influenced the jury in *Romano*, the majority refused to engage the issue any further and upheld the conviction thereby signaling satisfaction with the reliability of the jury's discharge of its duties.

Although *Romano* has no direct impact on Virginia practice, it does illustrate the effects of state evidentiary rules on capital deliberations. Not only does the decision call into question the amount of attention paid by the Court to these effects, but it also casts doubt upon the court's commitment to the reliability of capital jury determinations. Admittedly,

²² *Romano v. Oklahoma*, 114 S. Ct. at 2012. Interestingly, in arriving at this conclusion, the court altogether ignored the fact that the instructions explicitly limited the jury's consideration to the four aggravators Oklahoma sought to prove and that the Thompson sentence was the sole support for the past dangerousness aggravator.

²³ *Id.* at 2016. In dissent, Justice Blackmun pointed out that *Caldwell* did not require Romano to prove the prosecutor's belief that introduction of the death sentence would incline the jury towards death.

²⁴ Compare with *Lockhart v. Fretwell*, 113 S. Ct. 838 (1993). *Romano* approved the state's use of a conviction and sentence that were accurate at the time of trial. The later reversal of the conviction and sentence was not held to render their use a "windfall" for the state. In contrast, defense counsel's failure in *Lockhart* to cite to the sentencing

the Eighth Amendment does not establish a federal code of evidence to supersede state evidence rules in capital sentencing proceedings;²⁵ however, the Court's stance in *Green v. Georgia*²⁶ implies that state evidentiary rules must sometimes give way in capital sentencing proceedings.²⁷ It is unclear whether *Romano* signals a trend toward increased deference to states in this area at the expense of reliability.

Romano demonstrates the importance of making every effort to prevent the admission of irrelevant evidence into capital sentencing proceedings. Even though a defendant's prior capital conviction may be relevant to issues of past and future dangerousness, evidence of the imposition of the death penalty by one jury is irrelevant to the capital sentencing determinations of another jury. It is therefore critical for defense attorneys to attempt to block admission of such evidence through motions in limine and timely objections. It is true that Romano eventually lost his claim five to four in the United States Supreme Court. However, had the claim been defaulted, as are so many constitutional claims in Virginia, it would never have received federal review.

Summary and analysis by:
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court a case, valid at that time, that would have prevented his client from being sentenced to death constituted ineffective assistance. However, since the case was later reversed, the United States Supreme Court found Fretwell did not suffer any prejudice at the hands of his counsel and to therefore allow his ineffective assistance of counsel claim to succeed would amount to a "windfall."

²⁵ *Romano v. Oklahoma*, 114 S. Ct. at 2011.

²⁶ 442 U.S. 95 (1979).

²⁷ *Id.* (holding that the exclusion of testimonial evidence suggesting co-defendant was the triggerman was grounds for reversal even though the evidence violated the hearsay rule provided by Georgia's rules of evidence).

TURNER v. WILLIAMS

35 F.3d 872 (4th Cir. 1994)

United States Court of Appeals, Fourth Circuit

FACTS

On the morning of July 12, 1978, Willie Lloyd Turner, armed with a shotgun, entered a jewelry store owned and operated by W. Jack Smith, Jr. In the course of robbing the store, Turner, without any provocation, shot Smith in the head. After a police officer had attempted to negotiate with him, Turner returned to Smith and fired two close-range shots into the left side of Smith's chest. Although Smith had survived the initial wound, these second shots were fatal.¹

¹ *Turner v. Williams*, 35 F.3d 872, 876-877 (4th Cir. 1994).

² *Id.* at 877.

³ *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981).

Turner was convicted and sentenced to death² and the Virginia Supreme Court, on direct appeal, affirmed.³ Turner then filed a petition for a writ of habeas corpus in Virginia, which was denied.⁴ Turner next filed a petition for writ of habeas corpus with the United States District Court for the Eastern District of Virginia, which was also denied.⁵ Turner was granted certiorari by the United States Supreme Court, which

⁴ *Turner v. Williams*, 35 F.3d at 877. The Supreme Court of Virginia affirmed and the United States Supreme Court again denied certiorari. *Turner v. Morris*, 462 U.S. 1112 (1983).

⁵ *Turner v. Williams*, 35 F.3d at 877. This was affirmed by the Court of Appeals. *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985).