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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. 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.

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 “dilatory” capital defendant squandered the time available to obtain counsel to prepare the habeas corpus petition. 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.

Summary and analysis by: Gregory J. Weinig

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ROMANO v. OKLAHOMA

114 S. Ct. 2004 (1994)
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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. 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. 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. 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. 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.

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.

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

2 Id. at 274.
4 Id.
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*. 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. Jurors are to decide cases on the evidence and the law as they hear it from the trial judge. 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, 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 . . .”

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. 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 of determining the appropriateness of death in violation of the Eighth and Fourteenth Amendments."
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. 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. Although a subtle shift, the results were nevertheless damaging to the defendant while according a windfall to the state. 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, the Eighth Amendment does not establish a federal code of evidence to supersede state evidence rules in capital sentencing proceedings; however, the Court’s stance in Green v. Georgia implies that state evidentiary rules must sometimes give way in capital sentencing proceedings. 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:
Jody M. Bieber

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**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.

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