

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOHN JOSEPH ROMANO, Petitioner v. OKLAHOMA

CASE NO: No. 92-9093

PLACE: Washington, D.C.

DATE: Tuesday, March 22, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN JOSEPH ROMANO, :
4 Petitioner :
5 v. : No. 92-9093
6 OKLAHOMA :

7 - - - - -X
8 Washington, D.C.

9 Tuesday, March 22, 1994

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:05 a.m.

13 APPEARANCES:

14 LEE ANN JONES PETERS, ESQ., Oklahoma City, Oklahoma; on
15 behalf of the Petitioner.

16 ANDRE' DIANE BLALOCK, ESQ., Assistant Attorney General
17 of Oklahoma, Oklahoma City, Oklahoma; on behalf of
18 the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	LEE ANN JONES PETERS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ANDRE' DIANE BLALOCK, ESQ.	
7	On behalf of the Respondent	20
8	REBUTTAL ARGUMENT OF	
9	LEE ANN JONES PETERS, ESQ.	
10	On behalf of the Petitioner	37
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 92-9093, Joseph Romano v. Oklahoma.

5 Mrs. Peters.

6 ORAL ARGUMENT OF LEE ANN JONES PETERS

7 ON BEHALF OF THE PETITIONER

8 MS. PETERS: Mr. Chief Justice, and may it
9 please the Court:

10 In this capital case, the State succeeded in
11 introducing evidence, over the defendant's objection, that
12 the defendant had already been sentenced to die by another
13 jury in an unrelated case.

14 The issue before this Court is whether that
15 evidence undermined the jury's sense of responsibility in
16 violation of the Eighth and Fourteenth Amendments.

17 Capital juries are asked to decide on behalf of
18 the community whether a defendant should live or die at
19 the hands of the State. This is a most agonizing
20 decision, and one that this Court has recognized jurors
21 may seek to avoid. How relieved the jurors must have been
22 in this case to discover that the decision had already
23 been made, that the community had already decided that
24 John Romano should die.

25 QUESTION: Do you think, Mrs. Peters, that would

1 make the jury in this case more likely or less likely to
2 itself impose the death sentence?

3 MS. PETERS: I think that it would make it more
4 likely. I think that there is a possibility, as the State
5 has argued, that one jury may give life because it felt
6 that its decision did not matter, a man can only be killed
7 one time. If a jury -- if one jury gives life because of
8 the factor that he's already been sentenced to death, and
9 other juries give death because of that same factor, that
10 shows how arbitrary factor this is. That's not a --

11 QUESTION: You're not saying that the jury was
12 more likely to convict because of this second -- you're
13 saying it might have been more likely to convict, it might
14 have been less likely -- it was just kind of an aberrant
15 factor?

16 MS. PETERS: To sentence to death, I think it
17 was more likely that it would affect its judgment to
18 sentence him to death. It would be more likely to do what
19 the other jury had done.

20 QUESTION: Well, why wouldn't it be just as
21 logical to say, if, as you say, juries shy away from this
22 responsibility, to say well, he's already been sentenced
23 to death? He's going to be executed anyway, we'll just
24 give him life.

25 MS. PETERS: Regardless of which the jury is

1 likely to do, it is not a principled distinction --
2 principled guiding factor to determine when death is
3 appropriate in a case and when it is not, whether the jury
4 returned life, or whether the jury returned death. Either
5 way, it's an unreliable verdict, because it was based on
6 an arbitrary factor rather than a determination that death
7 was appropriate for this case.

8 Although the jury was not explicitly told in
9 this case that their decision did not matter, that message
10 was clearly communicated by the piece of evidence that
11 showed that he had already been sentenced to die. Leading
12 the jury to believe that its decision does not matter
13 falsely deflates the solemnity of the decision-making
14 process and reduces the proceeding to a mere formality
15 both as to the defendant's eligibility for death as well
16 as the appropriateness of that decision.

17 QUESTION: Ms. Peters, may I ask you the state
18 of the law in Oklahoma in this situation? As a matter of
19 Oklahoma law, is the sentence in a previous case relevant
20 for the jury in the subsequent proceeding to be aware of?

21 MS. PETERS: It is not, and the Court of
22 Criminal Appeals --

23 QUESTION: Is the fact of conviction in the
24 earlier case relevant under Oklahoma law?

25 MS. PETERS: Certainly.

1 QUESTION: And the Oklahoma courts in this case
2 acknowledge that it wasn't relevant as a matter of State
3 law --

4 MS. PETERS: That is correct.

5 QUESTION: -- the sentence?

6 MS. PETERS: That is correct.

7 QUESTION: But nevertheless felt it was not a
8 constitutional violation that the error was not harmful in
9 a constitutional sense?

10 MS. PETERS: The Court of Criminal Appeals
11 recognized that it might have undermined the jury's sense
12 of responsibility, but then went on to say that it was
13 highly unlikely that it did so. There were several
14 problems with the Court of Criminal Appeals' analysis in
15 this case. First of all, they relied on an instruction as
16 curing this evidence that was not in fact given. They
17 said that the jury was instructed that it was not to
18 surrender its judgment to any item of evidence. That
19 instruction simply is not in the record.

20 They also presumed the jury's verdict to be
21 correct, and they applied the wrong standard. They said
22 that it was highly unlikely that it affected the jury's
23 verdict, that it was highly unlikely --

24 QUESTION: Ms. Peters, may I interrupt you on
25 that point? As I understand, your position is -- strike

1 that.

2 As I understand your reading of the Oklahoma, it
3 is that they found there was error, but that there was not
4 Federal constitutional error, is that correct?

5 In other words, the information shouldn't have
6 been conveyed, but it simply was not a due process
7 violation.

8 MS. PETERS: I think that the court looked at it
9 as an Eighth Amendment error initially --

10 QUESTION: It did.

11 MS. PETERS: -- and said that it might undermine
12 the jury's sense of responsibility, and then analyzed it
13 in the Fourteenth Amendment instead. They said that they
14 had to review it with a heightened sense of scrutiny,
15 which is, of course, Eighth Amendment language, and then
16 they said that it did not deny him due process, which is
17 Fourth Amendment, so I'm not really clear what it was the
18 court --

19 QUESTION: Do you -- but you also view their
20 opinion as not engaging in harmless error analysis in the
21 strict sense, at least with respect to the Eighth
22 Amendment violation.

23 MS. PETERS: That's correct. They did not say
24 that they were applying a harmless error analysis, and
25 they certainly did not use language that would indicate

1 that they did. They said that it was highly unlikely that
2 it affected the verdict. Highly unlikely does not exclude
3 the possibility that it did affect the jury's verdict.

4 QUESTION: What case or cases from our Court are
5 you relying on for your submission, Ms. Peters?

6 MS. PETERS: Several cases. Of course, all the
7 cases on reliability of evidence in this Court,
8 principally Caldwell, because --

9 QUESTION: Caldwell requires, though, doesn't
10 it, if one takes the concurring opinion which made the
11 Court -- that the information be misleading or false?

12 MS. PETERS: In this case, I believe the
13 information was misleading and inaccurate.

14 QUESTION: The person had not previously been
15 sentenced to death?

16 MS. PETERS: He had been previously sentenced to
17 death, and as a historical fact it was correct.

18 QUESTION: Then what was false about it?

19 MS. PETERS: What was false about it was that it
20 was an invalid conviction. At the time that this sentence
21 of death was presented to the jury, the State had only
22 recently obtained the conviction and it had not yet been
23 subjected to appellate review.

24 When it was, the Court of Criminal Appeals held
25 that the sentence and the conviction and sentence was a

1 violation of a fair trial, result of an unfair trial, and
2 that both had to vacated, and it was remanded for a new
3 trial, so the sentence of death that they heard about,
4 although it was true as a historical fact, it was not a
5 valid conviction.

6 QUESTION: Well, what if it had been a valid --
7 what if the sentence had been upheld on appeal, would you
8 still be making the same arguments here?

9 MS. PETERS: I would, because I also believe
10 that the evidence was misleading. It led the jury to
11 believe -- to view its role in a way that is fundamentally
12 at odds --

13 QUESTION: But that really converts Caldwell
14 into something that a majority of the Court never
15 subscribed to. You're saying it's not limited to being
16 factually misleading, but if it tends to diminish the
17 jury's sense of responsibility. I don't think a majority
18 of the Court subscribed to that view.

19 This evidence I believe is misleading for two
20 reasons. One is that it led the jury to view its role in
21 a way that was fundamentally at odds with the Eighth
22 Amendment but also because of language in the offending
23 document itself.

24 Not only did it say that the defendant had been
25 sentenced to die, but that the defendant was asked in open

1 court if he could state good cause why the jury's verdict
2 should not be imposed, that he could not, nor could the
3 court find any. I think a juror could have read this
4 language to be a concession on the part of the defendant
5 or an independent determination by the trial judge that he
6 was in fact deserving of death, and I think this
7 document --

8 QUESTION: You don't challenge the factual
9 accuracy of that transcript, do you?

10 MS. PETERS: The factual accuracy of that
11 document?

12 QUESTION: Yeah. Did it purport to be a
13 recitation of something that had happened at the
14 sentencing proceeding?

15 MS. PETERS: I think it was mere formal language
16 in the document.

17 QUESTION: It didn't purport to be a recitation,
18 then?

19 MS. PETERS: No. Even if the evidence was not
20 misleading or inaccurate, which I believe it was both, it
21 still was irrelevant to any State valid penalogical
22 concern that the defendant had --

23 QUESTION: So you're saying that a State could
24 not conclude that the sentencing process is enhanced by
25 having this information, that as a matter of law it can

1 never be enhanced by the jury having this information?

2 MS. PETERS: I think it would have the opposite
3 effect. I think that it would --

4 QUESTION: So you're saying that as a matter of
5 law a State may not conclude that under any circumstances?

6 MS. PETERS: Yes, unless the State can show a
7 valid State penalogical interest. I cannot think of one.

8 QUESTION: Unless the State -- I didn't hear
9 that last remark.

10 MS. PETERS: Unless the State can show that
11 there's a valid State penalogical interest in showing the
12 death penalty, that I cannot think of one at the moment.

13 QUESTION: So you are really arguing for a clear
14 position that the jury may not be informed of an
15 outstanding death sentence.

16 MS. PETERS: That is correct.

17 QUESTION: Well, can't a jury be informed in the
18 sentencing proceeding of a prior conviction?

19 MS. PETERS: Certainly. Prior convictions are
20 relevant to a concern of the jury, whether he is a threat
21 to society, for example, but --

22 QUESTION: But you're saying that then the jury
23 could have been informed if this sentence had not -- had
24 been upheld, it could have been informed that he had been
25 convicted, but he couldn't have been informed of the

1 sentence which was imposed on him?

2 MS. PETERS: That is correct.

3 QUESTION: What if the crime had been convicted
4 after the prior sentence had been imposed, and it was
5 relevant under the law of, say, an aggravating factor, or
6 what-not, that the individual had committed the later
7 felony following receipt of a sentence of death? Could
8 the fact of the sentence be introduced under those
9 circumstances?

10 MS. PETERS: I think that would certainly
11 present a much closer question that we have here.

12 QUESTION: What would the answer be?

13 MS. PETERS: I'm not sure what the answer would
14 be. There would be competing interests there, because
15 that would -- the State would have an arguably valid State
16 penalogical interest. I think the important thing --

17 QUESTION: I thought your position in answer to
18 my question was, your theory is it will give the jury a
19 diminished sense of responsibility in every case to know
20 that another jury has already returned a death sentence,
21 and that there are no circumstances in which it would be
22 proper?

23 MS. PETERS: I said that I could think of none,
24 and maybe this would present a circumstance that would be
25 proper, but there would be the competing interest of

1 which -- is it more probative, or is it more prejudicial,
2 and that I think is a much closer question than we have
3 presented in this case.

4 QUESTION: How would that affect your earlier
5 argument that a jury is going to have a diminished sense
6 of responsibility?

7 MS. PETERS: That's the prejudicial impact of
8 that evidence, is that it would diminish the jury's sense
9 of responsibility. They would believe that their decision
10 did not matter. A man can only be killed one time, so
11 they would believe --

12 QUESTION: Why is your answer different in
13 response to Justice Souter's hypothetical? What
14 difference does it make what order the crimes -- the order
15 in which the crimes were committed?

16 MS. PETERS: What I was about to say in this
17 case the crime that he got the death penalty for was
18 committed 9 months or so after the crime that he was on
19 trial for at this time.

20 If a defendant kills in prison, that, I think,
21 is the heart of that aggravating circumstance if the State
22 elected to have one, that he killed while in prison or
23 under a sentence of death. The important thing there is
24 that society cannot be protected by the man. He has been
25 incarcerated, and he is still committing crimes.

1 I think there is certainly a way to get that
2 concern before the jury without the prejudicial impact of
3 undermining their sense of responsibility by telling them
4 that he's already been sentenced to death.

5 QUESTION: Ms. Peters, in Caldwell, as I recall,
6 it wasn't only inaccurate, what was told to the jury, but
7 it was intentionally inaccurate. I mean, it was
8 misleading. It was a misleading statement by the
9 prosecutor, isn't that right?

10 MS. PETERS: That's correct.

11 QUESTION: And there's no contention of any
12 misleading in this trial, is there?

13 MS. PETERS: I believe it was misleading,
14 because it --

15 QUESTION: Well, you say it turned out that the
16 perfectly accurate statement later became inaccurate,
17 because the conviction was set aside, but at the time it
18 was said it was perfectly accurate.

19 MS. PETERS: Accurate, but misleading, because
20 it led the jury to believe that its decision did not
21 matter.

22 QUESTION: Well, let's talk about that. Suppose
23 evidence comes out during a trial that is misleading. Is
24 that a basis for reversing even the conviction, never mind
25 the sentence?

1 MS. PETERS: If it --

2 QUESTION: Where the prosecutor hasn't been
3 responsible for it, but the defendant can come in and
4 show, what this witness testified to was misleading, and
5 indeed it was misleading, is that a basis for setting
6 aside a conviction?

7 MS. PETERS: If it did not mislead the -- I
8 mean, if it did not undermine the sense of responsibility,
9 possibly not, but if we have both of those factors, yes, I
10 believe it is.

11 QUESTION: Never mind the sense of
12 responsibility for what the sentence is, it could have
13 misled the jury as to the conviction, as to whether the
14 person's guilty or not, but if the prosecutor has not been
15 responsible for that, is that a basis for reversing the
16 conviction?

17 MS. PETERS: If it renders the verdict
18 unreliable, yes, it would be, even --

19 QUESTION: Do you have a case for that? That's
20 extraordinary. We would have many more appeals up here
21 than we do now, if any misleading evidence is a basis for
22 overturning a conviction.

23 MS. PETERS: Not if any misleading, but if
24 there's a reasonable likelihood that the verdict was so
25 infected that it's unreliable, I think that it would be.

1 QUESTION: What case supports that proposition?

2 QUESTION: Well --

3 MS. PETERS: I do not have a case on that.

4 QUESTION: I don't think it's true. We would
5 have endless appeals if that were the case, and if that's
6 not the case with respect to guilt or innocence, I find it
7 hard to understand why perfectly innocent misleading
8 should provide an automatic appeal with respect to the
9 sentence, either.

10 MS. PETERS: In this case, I do not think it was
11 perfectly innocent on the part of the prosecutor. The
12 prosecutor did need to show the jury that John Romano had
13 been previously convicted of a murder, that defense
14 counsel stipulated to that fact.

15 To get the document in was of no help. Once it
16 was stipulated to, there was no question for the jury.
17 The only reason that the State introduced the document as
18 well would be to get this inflammatory information before
19 the jury.

20 The Court of Criminal Appeals held that the
21 sentence of death was not relevant to the jury's
22 consideration, and all lower courts that have considered
23 this have agreed, with one exception, that being
24 Pennsylvania, interpreting their own State law. Even the
25 State has not seriously argued that this evidence is

1 relevant to a State concern. The most that the State has
2 argued in their brief is that it is arguably relevant to
3 show the seriousness of the crime.

4 QUESTION: Ms. Peters, the way misleading
5 evidence is usually entered in these other contexts, in
6 the context of a trial, is that counsel is supposed to be
7 able to counteract it. If it's misleading, he tells the
8 jury, this is misleading. I assume counsel here could
9 have said that. Did counsel try to tell the jury, yes,
10 there is a conviction -- the jury was told it was on
11 appeal, wasn't it?

12 MS. PETERS: That's correct.

13 QUESTION: The jury knew that. Counsel was free
14 to say, as you've been told, it's on appeal. It may be
15 reversed on appeal, so you should not assume that this
16 individual will be put to death.

17 MS. PETERS: If counsel had done that, I think
18 he would have been precisely within the confines of
19 Caldwell, because he would have told the jury that not
20 only was that jury's verdict subject to appeal, but so was
21 this jury's verdict, and that also might have lessened
22 their responsibility. I think that there was not a way to
23 undo what was done by the admission of this evidence.

24 What evidence of a death sentence really does is
25 to create an image in the minds of the jury that their

1 decision is unimportant, and that is not a valid State
2 penalogical goal.

3 Adding to the prejudice in this case was the way
4 that the evidence came in -- the way that the information
5 came before the jury. It came in the form of evidence
6 rather than as an argument. Jurors are routinely told
7 that arguments are not evidence, and that jurors are to
8 base their decision on the evidence.

9 The jury was told that in this case. They were
10 invited to rely the -- base their verdict on this evidence
11 and to assign whatever weight they chose to it, therefore
12 the instructions in this case actually compounded the
13 prejudicial effect.

14 The other thing that makes this evidence
15 especially prejudicial is because it's not information --

16 QUESTION: Excuse me, how did they compound the
17 prejudicial effect? I just didn't follow that.

18 MS. PETERS: By the instructions. In Caldwell,
19 for example, it was an argument by the prosecutor that
20 caused the jury's sense of responsibility --

21 QUESTION: Oh -- oh, I see, the fact that the
22 information came from the court compounded the error.

23 MS. PETERS: The fact that it was evidence, and
24 juries are told not to base their decision on argument of
25 counsel. They're routinely admonished in that regard, and

1 they were in this case, they were in Caldwell, but the
2 court did not feel that that admonition was sufficient to
3 cure the prejudice. In this case, the instructions did
4 not mitigate against the harmful information, but actually
5 compounded it, because the jury was told to base their
6 decision on evidence, and that this exhibit was an item of
7 evidence.

8 Also, the information this jury received is not
9 evidence that is generally already known to the jury such
10 as the ability -- the availability of appellate review or
11 powers of commutation, but information that was specific
12 to this case and to this defendant.

13 A jury that fully understands and appreciates
14 the gravity of its task is vital to the American scheme of
15 criminal procedure. It is indispensable to the Eighth
16 Amendment's need for reliability in the determination that
17 death is the appropriate punishment in a specific case.

18 Were we not lawyers trained to question and
19 dissect the obvious, we would see the obvious, and that is
20 that evidence that a capital defendant has already been
21 sentenced to die by another jury in an unrelated case
22 injects an arbitrary factor that undermines the jury's
23 sense of responsibility and renders the verdict
24 unreliable.

25 If there are no further questions, I'll reserve

1 my time for rebuttal, Mr. Chief Justice.

2 QUESTION: Thank you, Ms. Peters.

3 Ms. Blalock -- Mrs. Peters.

4 ORAL ARGUMENT OF ANDRE' DIANE BLALOCK

5 ON BEHALF OF THE RESPONDENT

6 MS. BLALOCK: Thank you, Mr. Chief Justice, may
7 it please the Court:

8 The Court of Criminal Appeals, in deciding this
9 case, answered the questions that this Court has asked us
10 to discuss, and that is whether or not there was any
11 Eighth or Fourteenth Amendment violation in the
12 introduction of this evidence.

13 The Court of Criminal Appeals recognized this
14 Court's holdings in Caldwell, recognized the standards
15 that were to be applied in determining whether or not
16 there is a Federal constitutional violation, and they
17 determined that there was none.

18 They first engaged in the --

19 QUESTION: Ms. Blalock, may I ask you a
20 preliminary question? Was the prior sentence relevant as
21 a matter of State law?

22 MS. BLALOCK: The Court of Criminal Appeals held
23 that it was not relevant, that it was irrelevant.

24 QUESTION: And you don't argue that it was?

25 MS. BLALOCK: No, Your Honor, I only -- my only

1 disagreement with the Court of Criminal Appeals decision
2 is that perhaps it erred on the side of conservatism in
3 analyzing this evidence. I think that other States --

4 QUESTION: But in any event, you are not telling
5 us that it was relevant as a matter of State law --

6 MS. BLALOCK: No, ma'am.

7 QUESTION: -- and the defendant had stipulated
8 to instruct the jury that there had been the prior
9 conviction of murder?

10 MS. BLALOCK: Yes, he had.

11 QUESTION: And why is it, then, that the State
12 insisted on entering this piece of evidence that showed
13 the sentence?

14 MS. BLALOCK: The State is always entitled to
15 prove its case, regardless of the defendant's
16 stipulations. The State introduced, as is common
17 practice, the judgment and sentence.

18 QUESTION: Well, I mean, it's just curious,
19 since it was irrelevant as a matter of State law, and
20 there had been a stipulation. I just wondered why it was
21 that the State insisted on putting this before the jury.

22 MS. BLALOCK: The prosecutor did not know at
23 that time that it was irrelevant. He didn't have the
24 benefit of the Court of Criminal Appeals decision, and
25 it's standard procedure when proving a prior conviction in

1 Oklahoma in a capital case under an aggravating
2 circumstance, or under -- or noncapital felony cases that
3 are enhanced by former convictions. Prosecutors prove the
4 prior convictions by introducing the judgment and
5 sentence.

6 QUESTION: Well, do you think that another State
7 court could find that this is relevant?

8 MS. BLALOCK: Yes, Your Honor, I do.

9 QUESTION: Well, on what theory?

10 MS. BLALOCK: I believe that this -- the fact of
11 the prior sentence, as well as the prior conviction, could
12 be considered relevant. I think that --

13 QUESTION: How does it help the jury's decision?

14 MS. BLALOCK: It prevents the arbitrary factor,
15 and the capriciousness that this Court has attempted to
16 avoid in its capital cases.

17 For example, in Oklahoma at this time there were
18 only two possible punishments for first degree murder, and
19 that was life imprisonment, or a death sentence. Giving
20 the jury the additional piece of information about the
21 prior sentence, what had been imposed in the prior first
22 degree murder conviction, prevented them from speculating
23 on what that prior sentence was.

24 QUESTION: So the Oklahoma court was wrong in
25 saying that it's not relevant, then?

1 MS. BLALOCK: I don't think the -- I think --

2 QUESTION: It's either relevant or it isn't, and
3 you say the Oklahoma court is right, but some other court
4 would be right in reaching a conclusion that's 180 degrees
5 opposite from that --

6 MS. BLALOCK: I think --

7 QUESTION: -- and I'm having trouble deciding
8 which is right.

9 MS. BLALOCK: I think the Oklahoma Court of
10 Criminal Appeals could have properly decided it was
11 relevant evidence. I think that another court could
12 properly decide that it was relevant evidence under State
13 law, and satisfied some legitimate State interest. I
14 think --

15 QUESTION: And that legitimate State interest is
16 what, again?

17 MS. BLALOCK: To prevent the jury's speculation
18 about what the prior sentence was that prevents them from
19 oversentencing on the second case, thinking perhaps this
20 defendant received a life sentence on the prior first
21 degree murder conviction, so we will make up for it.

22 QUESTION: Well, you're assuming that they're
23 not following your instructions, and your whole argument
24 assumes that they're not going to play it straight when
25 the judge instructs them on their choices and the basis

1 for their choices in the case before them.

2 MS. BLALOCK: I think that's exactly what
3 petitioner does, is assume that they're not following --

4 QUESTION: Well, but that -- isn't that exactly
5 what you're doing?

6 QUESTION: At this moment, that's what you're
7 doing, because your brief says, we accept that the
8 information was irrelevant and further that it could
9 diminish the jury's sense of responsibility, but there
10 were all these other instructions.

11 MS. BLALOCK: I do accept that the Court of
12 Criminal Appeals held that it was irrelevant, and I don't
13 have any quarrel with that.

14 QUESTION: No, but your --

15 MS. BLALOCK: I just --

16 QUESTION: Maybe we misunderstood. I thought
17 your answer to Justice Kennedy was that a legitimate
18 argument -- i.e., a sound argument could be made that it
19 was not irrelevant, and wasn't that your answer to him?

20 MS. BLALOCK: I believe that another State court
21 could very well find that it was relevant evidence, and I
22 believe the Court of Criminal Appeals could have found
23 that it was relevant evidence.

24 QUESTION: So that it would have been a sound
25 conclusion if they had so found.

1 MS. BLALOCK: Yes, exactly.

2 QUESTION: And doesn't your argument for the
3 soundness of that conclusion rest on the assumption that
4 the jury in fact will not follow its instructions in the
5 case before them?

6 MS. BLALOCK: I don't believe so. I believe
7 that the additional piece --

8 QUESTION: Well, how is it relevant if they
9 follow the instructions in the case before them that
10 another jury in another case for another crime sentenced
11 to life or sentenced to death? What's that got to do with
12 it?

13 MS. BLALOCK: It gives them an additional piece
14 of evidence about what -- about that former crime.
15 There's no question that --

16 QUESTION: Why do they need to know anything
17 about the former crime? He's -- the defendant is on trial
18 for this crime, not that crime.

19 MS. BLALOCK: Absolutely, and were we talking
20 about the guilt phase, that would certainly be true, but
21 in the sentencing phase, the fact of the prior conviction
22 is certainly relevant evidence. That's not at issue.

23 QUESTION: Under what criterion of law?

24 MS. BLALOCK: In the sentencing phase of the
25 capital case -- here there were alleged two aggravating

1 circumstances.

2 QUESTION: Does Oklahoma define one criterion
3 for -- or, strike that.

4 Does Oklahoma provide that one criterion for
5 imposing the death penalty is that a prior death penalty
6 has been imposed?

7 MS. BLALOCK: No --

8 QUESTION: Is that the law?

9 MS. BLALOCK: -- absolutely not.

10 QUESTION: Then I just don't see the relevance
11 of it at all.

12 QUESTION: I assume your point is that the death
13 penalty would not have been imposed unless it was a
14 particularly serious, heinous kind of a murder, and that
15 the jury who knows someone has not only committed a
16 murder, but committed a murder that a prior jury thought
17 was so horrible that it should be punished by death,
18 that's likely to have been a worse murder, is that what
19 you're saying? If you're not saying that, I don't know
20 what you're saying.

21 MS. BLALOCK: I'm saying that --

22 QUESTION: Because you have to acknowledge that
23 the mere fact that the person was sentenced one way or
24 another is irrelevant to the determination, isn't it?

25 MS. BLALOCK: In the second case --

1 QUESTION: Unless it indicates something about
2 the nature of the person's character, and the only way it
3 can do that is that one presumes that a prior jury doesn't
4 give death unless it was a really horrible crime.

5 MS. BLALOCK: It can give the jury additional
6 evidence about the fact of the prior crime, that it was a
7 particularly horrible crime. We all know that first
8 degree murders are not all the same. It could say
9 something about the defendant's character, the reason for
10 the death sentence was imposed --

11 QUESTION: May I ask this question about -- in
12 Oklahoma, the jury does the sentencing even in noncapital
13 cases, isn't that correct?

14 MS. BLALOCK: Yes, Your Honor.

15 QUESTION: And in -- when the prosecutor in the
16 sentencing hearing calls the attention of the jury to, say
17 a prior armed robbery conviction, is it the practice to
18 give the details of the armed robbery conviction, or just
19 the statutory crime and the fact that he was found guilty?

20 MS. BLALOCK: In a noncapital case, the only
21 thing that's relevant is the fact of the prior conviction,
22 so the prosecutor merely introduces the judgment and
23 sentence showing there was a prior conviction, showing it
24 was final --

25 QUESTION: And he's not permitted to go into the

1 gruesome details of the prior one to show this was really
2 a serious armed robbery.

3 MS. BLALOCK: Not in a noncapital case.

4 QUESTION: Then is there any reason why there
5 should be a different rule in capital cases?

6 MS. BLALOCK: Well, yes, because the aggravating
7 circumstance is that this evidence was used to prove --
8 there were two different ones, and one was that there was
9 a probability the defendant would pose a continuing threat
10 to society. In order to prove that, the State has to go
11 behind the fact of the mere conviction and show the facts
12 of the crime.

13 QUESTION: Well, is the State permitted to --
14 beyond putting in the death -- the fact that he was
15 sentenced to death, is it permitted to put in all the
16 details of the prior conviction?

17 MS. BLALOCK: As to the continuing threat
18 aggravating circumstance, the State has to put forth that
19 evidence about the prior crime, and it may not even be an
20 adjudicated crime under Oklahoma law.

21 QUESTION: Was that done here? I mean, the
22 nature of the prior murder for which the conviction was
23 made?

24 MS. BLALOCK: Yes, Your Honor, it was. The fact
25 of the Thompson murder, and that was the prior conviction

1 and sentence that we're talking about --

2 QUESTION: I mean, all the nature and the
3 circumstances. Well, then I don't understand why the
4 death penalty in the earlier case was relevant any more,
5 because if in fact the jury knows first-hand that it was a
6 horrible crime, it doesn't have to know that second-hand
7 from finding out that the death penalty was imposed.

8 MS. BLALOCK: There was also an aggravating
9 circumstance of prior violent felony conviction. In order
10 to prove that, the State had to introduce the judgment and
11 sentence showing --

12 QUESTION: Well, one thing is the judgment and
13 sentence --

14 MS. BLALOCK: -- the prior conviction.

15 QUESTION: -- but that doesn't tell the details
16 of the crime. Would you tell us what's in this record
17 about the prior conviction? There's the conviction, and
18 the death sentence, and what else was this jury told about
19 the prior murder?

20 MS. BLALOCK: In the second stage the State put
21 on --

22 QUESTION: I thought it was all based on a
23 stipulation, and the only question was whether the
24 judgment that showed the death sentence would go as well.

25 MS. BLALOCK: No, ma'am, that's not correct.

1 The State also put on live witnesses who testified as to
2 the facts of the Thompson murder, and that was to show the
3 continuing threat aggravating circumstance.

4 That's part of our argument, that in this case,
5 this additional piece of accurate evidence could not have
6 possibly influenced the jury's verdict. Not only had they
7 already convicted this defendant of first degree murder --

8 QUESTION: You're arguing against the decision
9 that you're defending again, because didn't the Oklahoma
10 Court of Criminal Appeals say, this could diminish the
11 jury's sense of responsibility. It said two things. It
12 was not relevant -- the imposition of a death penalty by
13 another jury is not relevant, and it said, learning the
14 defendant had previously received a death sentence could
15 diminish the jury's sense of the importance of its role.

16 MS. BLALOCK: The Court of Criminal Appeals
17 recognized that there was a possibility, or at least the
18 issue had been raised that this was a Caldwell-type
19 violation. Then they went through that analysis and held
20 that it was not in this case.

21 They also held that the introduction of this
22 evidence did not infect the sentencing procedure so as to
23 constitute a due process violation, therefore engaging in
24 the Fourteenth Amendment analysis. After that, they held
25 that this piece of evidence was irrelevant and should not

1 have been admitted under State law.

2 They then considered the fact of the admission
3 of this irrelevant evidence under State law in the entire
4 context of the proceedings, and held that it could not
5 have possibly affected the jury's verdict.

6 QUESTION: Ms. Blalock, what exactly was it that
7 the Oklahoma Court of Criminal Appeals held was
8 irrelevant, the admission of the sentence?

9 MS. BLALOCK: That's all, Your Honor, the fact
10 that the judgment and sentence was not redacted, was not
11 edited to delete that portion that reflected what the
12 defendant had received on the prior first degree murder
13 conviction. That's the only portion of the evidence that
14 the Court of Criminal Appeals found was irrelevant.

15 QUESTION: Ms. Blalock, in view of the fact that
16 the court of appeals found there was error here, did it
17 have to conduct harmless error analysis, in your view?

18 MS. BLALOCK: It did not find that there was
19 constitutional error, and what the petitioner presupposes
20 is that the Court of Criminal Appeals engaged in the wrong
21 standard set down by this Court when there's Federal
22 constitutional error. The Court of Criminal Appeals did
23 not ever find that.

24 They didn't find that there was a Federal
25 constitutional error, nor did they find that there was a

1 State constitutional error, they just found that the
2 admission of this evidence was irrelevant, and then, in
3 the context of all the other evidence which was presented
4 in the sentencing stage, decided whether or not it could
5 have affected the jury's verdict, and they held that it
6 did not.

7 QUESTION: What was the standard that the court
8 applied to determine that though there was error, it
9 wasn't fatal?

10 MS. BLALOCK: They found that, when viewed in
11 the entirety of the evidence, and in the instructions that
12 were given to the jury, that it was highly unlikely that
13 this evidence could have influenced the jury's verdict.

14 We quoted in our brief -- there are two
15 different analysis, or two different --

16 QUESTION: The court seemed to think there was
17 some constitutional component to what it was doing,
18 because it said, we must review this under a heightened
19 standard because the qualitative difference of death from
20 all other punishments requires a correspondingly greater
21 degree of scrutiny, so I'm not -- what do all those words
22 add up to? Heightened standard, greater degree of
23 scrutiny -- what was the standard that the Oklahoma
24 criminal --

25 MS. BLALOCK: I believe in that context -- and

1 that quotation from the court is at page 58 of the
2 Joint --

3 QUESTION: Yes.

4 MS. BLALOCK: -- Appendix. The court recognizes
5 that capital sentencing procedures and capital trials
6 require greater degree of scrutiny, and recognizes this
7 Court's decision in California v. Ramos. They then go
8 into their analysis, and make the due process
9 determination whether or not the introduction of this
10 evidence infected the sentencing procedure to the degree
11 that it was unreliable and constituted a due process
12 violation. It then held that it did not.

13 QUESTION: Was this heightened standard, was
14 that a harmless error standard, and I believe Justice
15 O'Connor asked you that question earlier.

16 MS. BLALOCK: They did not find constitutional
17 error and then engage in a harmless error analysis under
18 this Court's decisions of what standard applies in
19 constitutional violations, so no, they didn't do that.
20 They just recognized that the evidence was irrelevant, and
21 determined that it couldn't have affected the jury's
22 verdict.

23 QUESTION: Well, their reasoning, as I
24 understood it, was that there's no Caldwell error unless
25 the alleged defect in the proceedings gave the jury the

1 impression that someone other than the jury would be doing
2 the sentencing.

3 MS. BLALOCK: That was --

4 QUESTION: That's the way they reasoned.

5 MS. BLALOCK: That was exactly their reasoning
6 as to the Eighth Amendment, the Caldwell violation.

7 QUESTION: It's a fairly narrow reading of
8 Caldwell.

9 MS. BLALOCK: Well, in this case I believe that
10 they were correct in holding that Caldwell didn't apply.
11 The jury -- no one ever indicated or hinted to the jury
12 that they were not the final decisionmakers as to the
13 defendant's death sentence in this case. The prosecutor
14 never told them that, the trial court certainly never told
15 them that, in fact they did the opposite.

16 The jury instructions emphasized to the jury
17 that the decision was up to them, there was certainly no
18 prosecutorial misconduct or any bad faith action on behalf
19 of the State or the trial court in seeking to undermine
20 the jury's responsibility in rendering a sentence in this
21 case.

22 Although I believe that the Court of Criminal
23 Appeals was certainly correct in their analysis under the
24 Eighth and Fourteenth Amendment and held that this was not
25 a Federal constitutional violation, going back to my

1 earlier point, I don't think that they had to determine
2 that the evidence was irrelevant, I think that they could
3 have determined that the evidence was relevant. I think
4 that another State could find under their evidentiary
5 rules that this sort of evidence was relevant.

6 QUESTION: Is there any -- do you have any cases
7 that have found this kind of evidence relevant?

8 MS. BLALOCK: The ones that we've cited in our
9 brief, and I believe there is -- the primary one is out of
10 Pennsylvania. Most of the cases that have dealt with this
11 type of evidence have been cases in which the jury not
12 through the admission of evidence but through the
13 newspapers, the media, or through their own common
14 knowledge had some knowledge that the defendant had a
15 prior death sentence. Some of them knew that the
16 defendant had a prior death sentence that had been vacated
17 or had a valid outstanding prior death sentence.

18 QUESTION: I was going to ask about that. I
19 take it that under the petitioner's submission, if a juror
20 had such knowledge that would be a ground to excuse for
21 cause? I would take it that would have to be the
22 petitioner's position.

23 MS. BLALOCK: Yes, I would think so. Accepting
24 petitioner's argument at face value, I don't think I'm
25 stretching petitioner's argument in saying that any time a

1 juror has knowledge defendant has a prior death sentence,
2 then a fair trial is not possible and a reversal will have
3 to result.

4 QUESTION: Of course, here the instruction came
5 from the court, which gives it added importance, I
6 suppose, and added -- courts don't usually instruct on
7 irrelevant matters.

8 MS. BLALOCK: The evidence came in the -- the
9 knowledge of the prior death sentence came in the form of
10 evidence in the judgment and sentence. The trial court
11 didn't refer to it except to emphasize to the jury that it
12 was not final and that it was on appeal. Pardon me.

13 If there are no further questions, then in
14 conclusion, I would like to reiterate to this Court our
15 position that the Court of Criminal Appeals was correct in
16 their determination of whether or not there is a Federal
17 constitutional violation, and they were correct in their
18 analysis of the effect of the prior death sentence in the
19 context of this case.

20 I would also like to remind you that in this
21 particular case, I realize that what we're primarily
22 concerned with is setting down guidelines or determining
23 for future cases what the effect of this evidence is, or
24 if this evidence should be admitted at all, but in this
25 case, the Court of Criminal Appeals had to engage in a

1 reweighing analysis because the prior violent felony
2 conviction aggravating circumstance fell.

3 They then considered, as this Court has held
4 that they may, the remaining aggravating circumstances,
5 and considered all the mitigating evidence that was
6 presented on behalf of the defendant and held that the
7 best sentence was still the appropriate sentence. Their
8 decision is on page 66 of the Joint Appendix.

9 So certainly in this case there's absolutely no
10 question that that judgment and sentence that reflected
11 that the defendant already had a death sentence could have
12 affected his verdict, could have affected the sentence of
13 death in this case at all, based on what the Court of
14 Criminal Appeals had to do.

15 Thank you.

16 QUESTION: Thank you, Ms. Blalock.

17 Ms. Peters, do you have rebuttal? You have
18 10 minutes remaining.

19 REBUTTAL ARGUMENT OF LEE ANN JONES PETERS

20 ON BEHALF OF THE PETITIONER

21 MS. PETERS: May it please the Court:

22 Mrs. Blalock has argued that -- said that the
23 jury was never told that the verdict was not up to them.
24 I would submit that this piece of evidence, like a
25 picture, was worth a thousand words. They did not need to

1 be explicitly told that their decision did not matter.

2 There's reason in this record, as well as the
3 other records in Romano's cases, to believe that this jury
4 did in fact approach its duty with less care than it was
5 required to. He has now been tried by three juries
6 because the first trial was vacated and he was retried on
7 that. In all three of those cases, the juries were given
8 identical information going to whether he presents a
9 continuing threat to society. The only difference in any
10 of those cases was in this case, with the jury having the
11 added knowledge that he had already been sentenced to die.

12 The other two juries found that the State did
13 not prove that he presents a continuing threat to society.
14 Only the jury with the knowledge that he had already been
15 sentenced to die made that finding. The problem with what
16 the court of --

17 QUESTION: If prior verdicts are irrelevant, why
18 are you telling us this?

19 MS. PETERS: If prior verdicts are irrelevant?

20 QUESTION: Your whole point is that it's
21 irrelevant and we shouldn't know --

22 MS. PETERS: Prior death sentences are
23 irrelevant.

24 QUESTION: -- what prior sentences are. Now
25 you're telling us about those.

1 MS. PETERS: Only what impact this might have
2 had on the jury as an illustration.

3 QUESTION: You're saying --

4 QUESTION: Well, that makes me --

5 QUESTION: -- they're not relevant but they're
6 highly prejudicial, that's what you're --

7 MS. PETERS: I'm saying that the death sentence
8 was highly prejudicial, and that that evidences what might
9 have happened in this case. The Court of Criminal
10 Appeals --

11 QUESTION: Of course, that third conviction
12 might have been the only one that was on a Tuesday, too.
13 That might have been the reason.

14 MS. PETERS: Also, on --

15 QUESTION: You really don't know. You're just
16 saying that post hoc, therefore, right, that was the
17 reason. You don't know that that's the reason. Maybe.
18 Maybe not.

19 MS. PETERS: Certainly, but we know that the
20 only difference in what the jury heard was evidence of the
21 death sentence.

22 When the Court of Criminal Appeals reviewed this
23 case and reweighed, as I said before, they relied on an
24 instruction that was not given, and they presumed the
25 jury's verdict to be correct, so they gave -- they relied

1 on findings made by this jury, but if this jury's
2 sentencing responsibility was undermined, its findings of
3 aggravating factors were also affected and could not be
4 relied upon by the jury.

5 It's difficult to imagine what evidence could be
6 more prejudicial to a capital defendant than the fact that
7 he's already been sentenced to die.

8 Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Peters.

10 The case is submitted.

11 (Whereupon, at 11:47 a.m., the case in the
12 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

JOHN JOSEPH ROMANO, Petitioner v. OKLAHOMA

CASE NO.: 92-9093

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)

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