SUPREME COURT OF THE UNITED STATES

No. 92–9093

JOHN JOSEPH ROMANO, PETITIONER
v. OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

[June 13, 1994]

JUSTICE GINSBURG, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER join, dissenting.

In *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), this Court overturned a capital sentence as inadequately reliable because of a statement made by the prosecutor, in closing argument at the penalty phase of the trial. The *Caldwell* prosecutor told the jury: "[Y]our [sentencing] decision is not the final decision"; "the decision you render is automatically reviewable by the [state] Supreme Court." *Id.*, at 325–326. Responding to the issue presented in *Caldwell*, this Court observed that capital sentencing jurors, required to determine "whether a specific human being should die at the hands of the State," *id.*, at 329, are "placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice." *Id.*, at 333. Such jurors, the Court noted, might find "highly attractive" the prosecutor's suggestion that persons other than themselves would bear "responsibility for any ultimate determination of death." *Id.*, at 332–333.

The possibility the jury might have embraced the prosecutor's suggestion, the Court concluded, rendered the imposition of the death penalty inconsistent with the Constitution's requirement of individualized and reliable capital sentencing procedures. See *id.*, at 323, 329–330, 340–341. Emphasizing the "`truly awesome responsibility'" imposed upon capital sentencing juries, *id.*, at 329, quoting *McGautha* v. *California*, 402 U. S. 183, 208

(1971), the Court held:

> "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U. S., at 328–329.

In my view, this principle, reiterated throughout the Court's *Caldwell* opinion,[1] covers the present case: The jury's consideration of evidence, at the capital sentencing phase of petitioner Romano's trial, that a prior jury had already sentenced Romano to death, infected the jury's life-or-death deliberations as did the prosecutorial comments condemned in *Caldwell*. Accordingly, I would vacate the death sentence imposed upon Romano and remand for a new sentencing hearing.

At the penalty phase of Romano's trial for the murder of Roger Safarty, the prosecution sought to put before the jury a copy of the "Judgment and Sentence" from an earlier and unrelated prosecution. That document revealed that Romano had been convicted of the first-degree murder of Lloyd

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[1]See 472 U. S., at 323 (sentence constitutionally invalid, because unreliable, if "the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case"); *id.*, at 333 ("[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role."); *id.*, at 341 (because the State's effort "to minimize the jury's sense of responsibility for determining the appropriateness of death" might have affected the sentencing decision, the death sentence must be vacated).

Thompson and that he was to be executed for that crime. Defense counsel offered to stipulate to Romano's conviction for the Thompson murder, but objected to the jury's consideration of the death sentence. The trial court overruled defense counsel's objection and admitted the "Judgment and Sentence" document. That document stated that Romano had given "no good reason why [the] Judgment and Sentence [for the murder of Thompson] should not be pronounced," and commanded the State's Department of Corrections "to put the said JOHN JOSEPH ROMANO to death." App. 6. The jury in the instant, Safarty murder case also sentenced Romano to death.

During the pendency of Romano's appeal from his conviction and sentence for the Safarty murder, the Oklahoma Court of Criminal Appeals vacated his conviction for the Thompson murder. *Romano* v. *State*, 827 P. 2d 1335 (1992). Romano urged on appeal in the Safarty case that, under *Caldwell* v. *Mississippi*, it was impermissible to place before the jury, as relevant to its deliberations whether Romano should live or die, evidence that he was already under sentence of death.

The Oklahoma court rejected that contention and affirmed Romano's conviction and death sentence for the Safarty murder. 847 P. 2d 368, 390 (Okla. Crim. App. 1993). In so ruling, the court acknowledged that "[l]earning that the defendant had previously received a death sentence for another murder could diminish the jury's sense of importance of its role and mitigate the consequences of [its] decision." *Ibid.* The court further recognized that "evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense." *Id.*, at 391. Nevertheless, the court concluded, "when the jury is properly instructed as to its role and responsibility in making such a determination we cannot, on appellate

review, conclude that the jur[ors] in any way shifted the responsibility for their decision or considered their decision any less significant than they would otherwise." *Id.*, at 390.[2] That judgment is now before the Court.[3]

In *Caldwell*, this Court found constitutionally impermissible a prosecutor's statement, at the penalty phase of a capital trial, that the jury's decision was "not the final decision" because it was "automatically reviewable." The prosecutor's assurances were impermissible, the Court ruled, because they created an unacceptable risk that the jury would "minimize the importance of its role," "believ[ing] that the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere." *Caldwell*, 472 U. S., at 333, 329. This belief, the Court explained, is inconsistent with the "heightened `need for reliability'" in capital sentencing. *Id*., at 323, quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion).

The risk of diminished jury responsibility was also grave in Romano's case. Revealing to the jury that Romano was condemned to die for the Thompson murder signaled to the jurors in the Safarty murder case that Romano faced execution regardless of their life-or-death decision in the case before them. Jurors so informed might well believe that Romano's fate had been sealed by the previous jury, and thus was

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[2]The court also observed that, although death sentences attract "heightened" appellate scrutiny, "a presumption of correctness" attends the jury's determination. 847 P. 2d, at 391.

[3]Romano was subsequently reconvicted at his second trial for the Thompson murder and again sentenced to death. See Brief for Petitioner 31, n. 11. The State does not suggest that these events affect the question we consider.

not fully their responsibility. See *People* v. *Hope*, 116 Ill. 2d 265, 274, 508 N. E. 2d 202, 206 (1986) ("`[T]he jury's awareness of defendant's prior death sentence would diminish its sense of responsibility . . . . Assuming that defendant was already going to be executed, the jurors may consider their own decision considerably less significant than they otherwise would.'"), quoting *People* v. *Davis*, 97 Ill. 2d 1, 26, 452 N. E. 2d 525, 537 (1983); *West* v. *State*, 463 So. 2d 1048, 1052–1053 (Miss. 1985) ("[I]f the jury knows that the [defendant] is already under a sentence of death it would tend to relieve them of their separate responsibility to make that determination.").

A juror uncertain whether to vote for death or for life might be swayed by the knowledge that "`another jury had previously resolved the identical issue adversely to defendant.'" *Hope*, *supra*, at 274, 508 N. E. 2d, at 206, quoting *Davis*, *supra*, at 26, 452 N. E. 2d, at 537. Such a juror, although "unconvinced that death is the appropriate punishment, . . . might nevertheless wish to `send a message' of extreme disapproval for the defendant's acts," *Caldwell*, 472 U. S., at 331, reasoning that the defendant was already to be executed in any event. Furthermore, jurors otherwise inclined to hold out for a life sentence might acquiesce in a death penalty they did not truly believe warranted. Cf. *id.*, at 333 ("[O]ne can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.").

Respondent State of Oklahoma correctly observes, however, that evidence of a prior death sentence may not produce a unidirectional bias toward death. Brief for Respondent 23. Some jurors, otherwise inclined to believe the defendant deserved the death penalty for the crime in the case before them, might nonetheless be anxious to avoid any feeling of

responsibility for the defendant's execution. Jurors so minded might vote for a life sentence, relying on the prior jury's determination to secure defendant's death. See *ante*, at 12. The offending prosecutorial comments in *Caldwell*, by contrast, created an apparently unidirectional "bias toward a death sentence," for the appellate review that the *Caldwell* jurors were encouraged to consider could occur only if the jury sentenced the defendant to death, not if it voted for life. 472 U. S., at 331–332. Oklahoma maintains that Romano remains outside the *Caldwell* principle, because he is unable to demonstrate that the evidence of his prior death sentence tilted the jurors toward death.

Romano's prosecutor, at least, seems to have believed that informing the jurors of the prior death sentence would incline them toward death, for otherwise, he probably would not have insisted upon introducing the "Judgment and Sentence" itself, over Romano's objection, and despite Romano's offer to stipulate to the underlying conviction. Most critically, *Caldwell*, as I comprehend that decision, does not require Romano to prove that the prosecutor's hunch was correct, either in Romano's case in particular or in death penalty cases generally.

Caldwell dominantly concerns the capital sentencing jury's awareness and acceptance of its "`awesome responsibility.'" *Id.*, at 341. To assure that acceptance, this Court's Eighth Amendment jurisprudence instructs, capital sentencing procedures must be especially reliable. See *id.*, at 323 (prosecutor's comments were "inconsistent with the Eighth Amendment's heightened `need for reliability in the determination that death is the appropriate punishment in a specific case,'" quoting *Woodson* v. *North Carolina*, *supra*, at 305); 472 U. S., at 341 (death sentence "does not meet the standard of reliability that the Eighth Amendment requires," when it may have been affected by the State's

attempt "to minimize the jury's sense of responsibility for determining the appropriateness of death"). Under *Caldwell*'s reasoning, diminution of jurors' sense of responsibility violates the Eighth Amendment's reliability requirement, whether or not a defendant can demonstrate empirically that the effect of this diminution was to bias the jurors' judgment toward death. According to *Caldwell*, if a reviewing court "cannot say" that an effort "to minimize the jury's sense of responsibility for determining the appropriateness of death . . . had no effect on the sentencing decision, . . . [t]he sentence of death must . . . be vacated" as unreliable. *Ibid.*

The Court today reads *Caldwell* to apply only if the jury has been "affirmatively misled regarding its role in the sentencing process." *Ante*, at 7. According to the Court, because no information, incorrect when conveyed, was given to the jury responsible for sentencing Romano for Safarty's murder, "[t]he infirmity identified in *Caldwell* is simply absent in this case." *Ante*, at 7.

The Court rests its rendition of *Caldwell* on the premise that only a plurality of the Court's members endorsed the principle I regard as pivotal: Diminution of the jury's sense of responsibility "preclude[s] the jury from properly performing its [charge] to make an individualized determination of the appropriateness of the death penalty." See *ante*, at 6–7, citing *Caldwell*, 472 U. S., at 330–331, 341. In fact, however, key portions of *Caldwell* that the Court attributes to a plurality of four were joined by five of the eight Justices who participated in that case. JUSTICE O'CONNOR parted company with the other members of the majority only as to a discrete, three-paragraph section, Part IV–A (*id.*, at 335–336), in which "[t]he Court," in her view, "seem[ed] generally to characterize information regarding appellate

review as `wholly irrelevant to the determination of the appropriate sentence.'" *Id.*, at 342 (opinion concurring in part and concurring in the judgment), quoting *id.*, at 336. JUSTICE O'CONNOR explained that she did not read *California* v. *Ramos*, 463 U. S. 992 (1983), "to imply that the giving of nonmisleading and accurate information regarding the jury's role in the sentencing scheme is irrelevant to the sentencing decision." 472 U. S., at 341 (emphasis omitted). It was in that context that JUSTICE O'CONNOR stated her view, quoted *ante*, at 7, that "the prosecutor's remarks were impermissible," not because they referred to the existence of post-sentence review, but "because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." 472 U. S., at 342.

JUSTICE O'CONNOR's concurring opinion thus appears to rest on "grounds narrower" than those relied upon by the other members of the Court's *Caldwell* majority, see *ante*, at 7, only insofar as her concurrence disavowed any implication that the "giving of accurate instructions regarding postsentencing procedures," 472 U. S., at 342, is irrelevant or unconstitutional. The evidence of Romano's death sentence for the murder of Thompson, however, was not information regarding postsentencing procedures Romano might pursue. Nor, as the Oklahoma Court of Criminal Appeals found, was the "Judgment and Sentence" for Thompson's murder relevant to the Safarty jury's sentencing decision. 847 P. 2d, at 391 ("evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense").[4] Accord-

[4]In its merits brief before this Court, but not in its state court brief or in its brief in opposition to the petition for certiorari, the State of Oklahoma has argued that the evidence of Romano's prior sentence may have been

ingly, I do not read JUSTICE O'CONNOR's concurring opinion as narrowing the Court's *Caldwell* holding with respect to the issue this case presents. Nor, for reasons set out in the margin, do I agree with the Court that several post-*Caldwell* cases, beginning with *Darden* v. *Wainwright*, 477 U. S. 168 (1986), confirm the narrow interpretation of *Caldwell* the Court announces today. See *ante*, at 7.[5]

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relevant. This belated argument does not persuade. The only authority the State cites holding that a prior death sentence may be relevant evidence at sentencing is *Commonwealth* v. *Beasley*, 505 Pa. 279, 288, 479 A. 2d 460, 465 (1984); that case decided, purely as a matter of state statutory construction, that the term "conviction" could be taken to include the sentence imposed for an earlier conviction.

[5]In *Darden*, the Court rejected a *Caldwell* challenge to a prosecutor's comments at the guilt phase of a capital trial. The Court observed that the fact that the prosecutor did not make these comments at the penalty phase "greatly reduc[ed] the chance that they had any effect at all on sentencing." 477 U. S., at 183–184, n. 15. Further, unlike the "Judgment and Sentence" form in Romano's case, the comments made in *Darden* were not evidence, and the trial court told the jury so "several times." Finally, the Court concluded that the prosecutor's comments would have had, "[i]f anything, . . . the tendency to *increase* the jury's perception of its role," not diminish it. *Ibid.*

The Court also relies upon *Dugger* v. *Adams*, 489 U. S. 401, 407 (1989), and *Sawyer* v. *Smith*, 497 U. S. 227, 233 (1990). In *Adams*, the Court stated that "the merit of respondent's *Caldwell* claim is irrelevant to our disposition of the case." 489 U. S., at 408, n. 4. In *Sawyer*, the question the Court considered was not whether a *Caldwell* violation had occurred, but whether "*Caldwell* announced a new rule as defined by *Teague* v. *Lane*, 489 U. S. 288 (1989)," *i.e.*, whether *Caldwell* "was . . . dictated by prior precedent existing at the time the [habeas petitioner's]

Finally, the Court relies, as did the Oklahoma Court of Criminal Appeals, on the trial court's instruction to the jurors that "[t]he importance and worth of the evidence is for you to decide," together with the court's disavowal of any view as to the appropriate punishment. *Ante*, at 3. The Court quotes the Oklahoma court's conclusion that "`[i]t was never conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized.'" *Ante*, at 8, quoting 847 P. 2d, at 390.

Plainly, the trial court's instruction to consider the evidence cannot resolve the *Caldwell* problem in this case: The "Judgment and Sentence" form, bearing Romano's prior death sentence, was part of the evidence the jury was told to consider. Further, once it is acknowledged that evidence of the prior death sentence "could diminish the jury's sense of importance of its role and mitigate the consequences of [its] decision," 847 P. 2d, at 390, it cannot be said that the court or attorneys did not "conve[y] or intimat[e]" that the jury's role was diminished. The prosecution proffered the death-commanding "Judgment and Sentence" as evidence, and the trial court admitted it—over Romano's objection, and despite his offer to stipulate to the conviction. As discussed *supra*, at 4–7, admission of that evidence risked leading jurors to "minimize the importance of [their] role," "believ[ing] that the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere." *Caldwell*, 472 U. S., at 333, 329. This risk was "unacceptable in light of the ease with which [it] could have been minimized." *Turner* v. *Murray*, 476 U. S. 28, 36 (1986) (opinion of White, J.).[6]

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conviction became final." 497 U. S., at 229, 235.

[6]The State argues that any *Caldwell* problems were resolved, because the "Judgment and Sentence" form

Permitting the jury to consider evidence that Romano was already under sentence of death, while that jury determined whether Romano should live or die, threatened to "minimize the jury's sense of responsibility for determining the appropriateness of death." Unable to say that the jury's consideration of Romano's prior death sentence "had no effect on the [instant] sentencing decision," *Caldwell*, 472 U. S., at 341, I would vacate that decision and remand the case for a new sentencing hearing.

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stated that Romano "gave notice of his intention to appeal from the Judgment and Sentence herein pronounced," App. 6, and because the trial judge told the jury, when the form was admitted, that "[Romano] has been convicted but it is on appeal and has not become final," Tr. 45 (May 26, 1987). See Brief for Respondent 19–22. I do not find these general references to appellate review sufficient to salvage the instant death sentence, given the irrelevance of Romano's prior sentence to legitimate sentencing considerations, see 847 P. 2d, at 391, and the ease with which all *Caldwell* difficulty could have been avoided.