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NOTE

ROMANO V. OKLAHOMA: THE REQUIREMENT OF JURY'S SENSE OF RESPONSIBILITY AND RELIABILITY IN CAPITAL SENTENCING

The Eighth Amendment to the United States Constitution requires that punishments not be "cruel and unusual." In 1972, the landmark case of Furman v. Georgia extended the Eighth Amendment to defendants in death penalty trials by protecting them from "arbitrary and capricious" sentencing. This protection, however, did not abolish capital punishment. In fact, the Supreme Court has affirmed capital punishment repeatedly. Although the death penalty appears to be entrenched for the foreseeable future, the Supreme Court still struggles to determine which sentencing procedures are constitutionally permissible.

1. U.S. CONST. amend. VIII. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Id.
2. 408 U.S. 238 (1972) (per curiam).
3. Id. at 238.
The current death penalty sentencing process provokes a wide range of arguments and opinions from judges, legislators, commentators, and the general public. The public not only supports the death penalty, but often criticizes the length of time it takes to impose this punishment.

The Supreme Court has struggled to define the limits of the death penalty since its reaffirmation of capital punishment in 1976. Since Furman, the Supreme Court has focused on procedural safeguards to avoid arbitrary application of the death penalty and guide the jury process during sentencing. Romano v. Oklahoma, 114 S. Ct. 2004, 2009 (1994); Sawyer v. Whitley, 505 U.S. 333, 341 (1992). Currently, most capital trials consist of two stages. Michael Mello, Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row, 37 AM. U. L. REV. 513, 519 (1988). The first stage is the traditional determination of guilt or innocence. Id. The second stage is the capital sentencing stage, which is essentially a separate proceeding on the issue of sentencing. Id.


7. See Don Aucoin & Peter J. Howe, House Votes Down Death Penalty Bill, BOSTON GLOBE, July 27, 1994, at 1 (demonstrating the differences among Massachusetts legislators as they voted 86 to 70 to not reinstate capital punishment).


9. One faction of the public seeks to abolish the death penalty. See GORECKI, supra note 4, at 87-95 (describing the abolitionist movement). Another faction focuses on procedural fairness to the capital defendant. Id. at 115-17 (explaining the movement to improve the capital sentencing criminal justice system);

Victims’ rights groups, however, routinely push to speed up the death penalty process and view appeals as a “stalling tactic.” Susan Warren, Taking Offense at Death-Row Defense, HOUS. CHRON., Nov. 7, 1993, at 20A; see also Jerry Urban, Killer Put to Death, HOUS. CHRON., Jan. 17, 1995, at 13A, 16A (showing different views of the public regarding the execution of mentally retarded defendants).

10. Ronald Brownstein, Capital Punishment Held Up as Life or Death Campaign Issue, L.A. TIMES, Aug. 30, 1994, at A5. A Gallup Poll revealed that 75% of Americans supported the death penalty for murderers. Id. In addition, if life without parole was an option, 60% still supported the death penalty. Id. Surveys demonstrated that the underlying reason for the public support is the view that the death penalty is “just punishment” for the level of offenses criminals sentenced to death commit. Id. California Governor Pete Wilson endorsed this viewpoint when he declared that voters “regard the death penalty as justice.” Id. Contra Joe Davidson, Death-Penalty Support Found Not Firm, WALL ST. J., Apr. 19, 1993, at B2. The Death Penalty Information Center reported that support for the death penalty softens when an effective alternative to capital punishment is offered. Id. In addition, one commentator contended that as the number of executions increased, the level of public acceptance for the death penalty decreased. Nancy Levit, Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases, 59 UMKC L. REV. 55, 71 (1990).

Another concern of the public is delay in carrying out the death penalty. See infra note 12 and accompanying text (discussing public demand for expedited death sentences). For
This view coincides with the public's fear of rising crime rates and unprovoked violence. As a result, death penalty proponents want to expedite the death sentences of those defendants sentenced to death. Recently, politicians heeded this message and the death penalty ripened into a political symbol. Capital punishment played a prominent role in recent example, the killer of Mark Alan Frederick has been on death row for nineteen years. Tony Mauro, Death Penalty Becoming "Real": Four Could Be Executed this Week, USA TODAY, Dec. 7, 1994, at 3A. Frederick's father complained that for him it is "cruel and unusual punishment to go through 19 years . . . . [t]he laws become a joke if we don't enforce them." Id. (quoting Pat Teer). Another criticism in capital murder cases is the extreme cost involved and the lack of judicial resources. See Charles L. Lindner, Capital Cases are Crippling State Courts, SACRAMENTO BEE, Sept. 5, 1993, at F1 (estimating the cost to be between $3.5 million and $4.5 million for each defendant). One author, while calling for the abolition of the death penalty, reported that the California Supreme Court spends half its time on death penalty cases. Id. In addition, Florida estimated it costs $3.2 million to execute each defendant, while a New York study calculated that each death penalty trial would cost $1.4 million. Robert L. Spangenberg & Elizabeth R. Walsh, Capital Punishment or Life Imprisonment? Some Cost Considerations, 23 L.O.Y. L.A. L. REV. 45, 58 (1994); see Richard Moran & Joseph Ellis, Price of Executions is Just Too High, WALL ST. J., Oct. 15, 1986, at B1 (explaining the high monetary cost of death penalty cases).

11. Washington Wire, WALL ST. J., Jan. 21, 1994, at A1. The Wall Street Journal reported that a Wall Street Journal/NBC News poll indicated that 93% of Americans believed that dealing with crime should be "an absolute priority" for President Clinton and Congress. Id. In addition, that same poll indicated strong support for making more crimes eligible for the death penalty. Id. Another author acknowledged that recent polls showed vast numbers of Americans call crime their greatest concern. Richard Lacayo, Lock 'Em Up, TIME, Feb. 7, 1994, at 50, 52; see also Jill Smolowe, Danger in the Safety Zone: As Violence Spreads into Small Towns, Many Americans Barricade Themselves, TIME, Aug. 23, 1993, at 29.

12. Donald P. Lay, The Writ of Habeas Corpus: A Complex Procedure for a Simple Process, 77 MINN. L. REV. 1015, 1016 (1993). Richard Dieter, a member of the Death Penalty Information Center, a capital punishment opposition group, has emphasized that the public is impatient for more executions. Carol J. Castaneda, Texas Murderer Wins a Reprieve, USA TODAY, Mar. 15, 1995, at 2A. In addition, the public demonstrated this impatience in the last election by voting on candidates who "promised to push the death penalty." Id. (quoting Richard Dieter); see Joseph W. Bellacosa, Ethical Impulses from the Death Penalty: "Old Sparky's" Jolt to the Legal Profession, 14 PACE L. REV. 1, 14 (1994) (acknowledging that the public's attitude "seems to be let's just get on with [the executions] and get them over with"); David A. Kaplan, Catch-22 at the High Court, NEWSWEEK, Apr. 11, 1994, at 68 (explaining the public's exasperation about the high number of death row inmates versus the low number who get executed each year); see also Gaynell Terrell & Bryan Denson, County Executions Deadly Distinction, HOUS. POST, Dec. 11, 1994, at A-43, A-45 (reporting a spokesman for death penalty opponents "fears public passion for revenge has speeded the process").

13. Jason Berry, Is Justice Forgiving?, DALLAS MORNING NEWS, Aug. 15, 1993, at 1J. Judges, governors, and other politicians "fear the soft-on-crime stigma." Id. at 1J. Michael Radelet, a leading authority on capital punishment, explained that commutation of death sentences by state governors is not an element in the modern era of the death-sentencing process. Id. at 1J. He reasoned that the politicians have "an erroneous perception that public opinion would not tolerate commutation. It's the Willie Horton syn-
gubernatorial elections when pro-death penalty politicians rallied in support of capital punishment. Furthermore, decisions by the Supreme Court reflect the current pro-death penalty atmosphere. After initially protecting the rights of capital defendants, the Supreme Court retreated in the early 1980s and began to favor expediting the death penalty.

Despite the current pro-death penalty environment, the defendant on trial facing the death penalty should not be forgotten. Because “death is different,” courts must emphasize reliability and fairness towards the capital defendant. When a state sentences a defendant to death, it is

drome.” Id. Ohio Senator Howard Metzenbaum reported that “[w]e seem almost completely preoccupied with the question of how to speed up the process of capital punishment.” Id. at 11J.


15. The political climate was one factor leading to the Supreme Court’s new attitude toward capital punishment. WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 24 (1991). The rate of executions increased in traditional death penalty states such as Texas, Florida, and Virginia, because of Supreme Court rulings. Lori Montgomery, Reacting to Public Outrage, U.S. BECOMING THE EXECUTIONER, HOUS. CHRON., Apr. 1, 1994, at 10A. As prison officials estimate that Texas will reach 100 executions in 1996, Ron Dusek of the Texas Attorney General’s Office exclaimed that “[t]he U.S. Supreme Court has cleared up a number of issues that have allowed executions to go forward.” Terrell & Denson, supra note 12, at A45.

16. See infra notes 140-47 and accompanying text (showing the Supreme Court’s treatment of the death penalty in the 1980s).


18. Eric D. Scher, Comment, Sawyer v. Whitley: Stretching the Boundaries of a Constitutional Death Penalty, 59 BROOK. L. REV. 237, 257 (1993). Sister Helen Prejean, a well-known capital punishment opponent, emphasized that “when it comes to deciding whether someone’s going to live or die, we’d better be daggone [sic] sure it’s as fair as it can be.”
crucial that the sentencing process be absolutely reliable because a life is at stake.9 A terrible injustice would occur if a jury imposed the death penalty on someone who did not deserve it.20 However, capital sentencing reliability means more than preventing an innocent person from receiving the death penalty.21 Reliability also means that, in each individual case, the death penalty is the appropriate punishment rather than life imprisonment.22

The Supreme Court has asserted that the death penalty must be imposed in a reliable manner to prevent sentencing mistakes.23 Previously, the Supreme Court had recognized that the severity and finality of the death penalty make it different from other criminal penalties, such as

Chris Kaltenbach, *Sister Helen Crusades Passionately to Stop Capital Punishment*, BALT. SUN, Dec. 9, 1994, at 1E, 5E.

19. Michael J. Crowley, Comment, *Jury Coercion in Capital Cases: How Much Risk Are We Willing to Take?*, 57 U. CIN. L. REV. 1073, 1084 (1989). Special procedural steps must be taken to ensure that the death penalty is imposed on a non-arbitrary, individualized basis because of its severity. *Id.*

20. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 22 (1987). Hugo Bedau and Michael Radelet examined 350 cases of people who were convicted of capital or potentially capital crimes and who were later found innocent. *Id.* at 23-24. From first-hand knowledge, Kirk Bloodsworth recently insisted that “[i]f, say, they executed a thousand guilty people and one innocent man . . . it isn’t even close to being worth it.” Jenny Allen & Jack Hayes, *Stolen Lives*, LIFE, Oct. 1, 1994, at 64, 73. Kirk Bloodsworth recently exited death row with a full pardon and $300,000 after being convicted twice wrongfully and sentenced to death. *Id.* DNA testing not available at his original trial exonerated him. *Id.* Furthermore, 53 people have been released from death row because of probable innocence since the death penalty was restored after *Furman*. *Id.* However, some commentators proposed that there is an acceptable level of error for mistakes in capital sentencing. Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 121-22 (1988). Stephen Markham and Paul Cassell responded to the Bedau-Radelet study of wrongful convictions and disputed its conclusions. *Id.*

21. See John Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 576 (1983). Professor Kaplan acknowledges that another serious error in capital punishment sentencing occurs when a defendant is executed despite the fact that his crime was not worse than other similar defendants who did not receive the death penalty. *Id.*


23. *Caldwell*, 472 U.S. at 329-30. The *Caldwell* Court recognized that the Eighth Amendment dictates that the imposition of the death penalty be reliable. *Id.* at 330; see Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (acknowledging that the Supreme Court has striven by extraordinary measures to safeguard the defendant to be sentenced).
prison sentences or fines.24 Because of this finality, sentencing reliability must be emphasized to ensure that the death penalty is the appropriate sentence.25 To ensure reliability, the Supreme Court has focused on procedural safeguards to help avoid arbitrary application of the death penalty and to guide the jury during sentencing.26

One safeguard the Supreme Court assumed is that each capital sentencing juror accepts his or her heavy responsibility to decide whether a defendant shall receive the death penalty.27 The Supreme Court acknowledged that this responsibility acceptance contributes to the reliability of the verdict.28 To satisfy this responsibility requirement, the jury must feel that it is solely responsible for imposing the death penalty.29 Furthermore, to have a sense of responsibility, the jury cannot make a death penalty decision knowing that another party bears the ultimate responsibility for the defendant's fate.30

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24. BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 29-37 (1987). While discussing the goals of the death penalty, the authors stated that "[b]oth retribution and deterrence require that the person executed be one who 'deserved' that punishment." Id.


27. Caldwell, 472 U.S. at 329 (stating "this court's Eighth Amendment jurisprudence has taken as a given that capital sentences would view their task as the serious one of determining whether a specific human being should die at the hands of the State").

28. Id. at 330.

29. Romano, 114 S. Ct. at 2014 (Ginsburg, J., dissenting); Caldwell, 472 U.S. at 329-30; see Ingram v. Zant, 26 F.3d 1047, 1051 (11th Cir. 1994) (denying petitioner's Caldwell claim because the prosecutor did not minimize the jury's role), cert. denied, 115 S. Ct. 1137 (1995); Jeffries v. Blodgett, 988 F.2d 923, 934 (9th Cir. 1993) (noting that the prosecutor's reference to the petitioner's "right to appeal did not indicate to the jury that it was relieved of its responsibility for determining the appropriateness of the death penalty"), cert. denied, 114 S. Ct. 1294 (1994); Zettlemoyer v. Fulcomer, 923 F.2d 284, 304-06 (3d Cir.) (finding no Caldwell error because the jury knew that the defendant would receive the death penalty upon their determination so they did not shift their responsibility to the appellate court), cert. denied, 502 U.S. 902 (1991); Michael Mello, Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury, 30 B.C. L. REV. 283, 297 (1989); see also WILLIAM R. PABST, JURY MANUAL: A GUIDE FOR PROSPECTIVE JURORS 91, 98 (1st ed. 1985) (noting that the jurors' responsibility in a criminal trial is great and should be approached very seriously).

30. Caldwell, 472 U.S. at 328-29 (concluding "it 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").
In examining the impact of a jury’s “sense of responsibility” on the reliability of a capital sentencing decision, the Court has overturned a death sentence because the prosecutor affected the jury’s sense of responsibility in making its death penalty decision. The prosecutor told the jurors that they did not have the final decision, rather, the final decision rested with the appellate court. The Supreme Court determined that a jury needs a sense of responsibility for its decision for the death penalty sentencing procedure to be constitutional under the Eighth Amendment. The Court left unresolved, however, the meaning and scope of a jury’s sense of responsibility, and also whether, because “death is different,” a requirement of reliability in capital sentencing still remained.

In Romano v. Oklahoma, the Supreme Court addressed whether evidence a jury received that the defendant had been sentenced to death in another case violated the Eighth Amendment by impermissibly lessening the jury’s sense of responsibility over its decision to impose the death penalty.

In Romano, an Oklahoma trial court tried John Romano for the murder-robbery of Roger Sarfaty. In a separate previous proceeding, a jury had found Romano guilty of the murder-robbery of Lloyd Thompson and had sentenced him to death. The Sarfaty jury found Romano guilty, which required him to face a separate death penalty sentencing hearing. In the sentencing phase of the Sarfaty trial, the jury received evidence that the Thompson jury had previously sentenced Romano to death.

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31. Id. at 341.
32. Id. at 323.
33. Id. at 341; see Romano, 114 S. Ct. at 2010 (recognizing situations where affecting the jury’s sense of responsibility could be unconstitutional).
34. See Romano, 114 S. Ct. at 2010 (evaluating the petitioner’s Caldwell claim). In fact, in Romano Justice O’Connor concurred solely to explain her earlier controlling position in Caldwell. Id. at 2013 (O’Connor, J., concurring).
36. Id. at 2008-09.
37. Id. at 2007. A jury found John Romano and an accomplice guilty of murdering Roger Sarfaty. Romano v. State, 847 P.2d 368, 373 (Okla. Crim. App. 1993), aff’d, 114 S. Ct. 2004 (1994). Romano and his accomplice had beaten, stabbed, and strangled Roger Sarfaty, a jewelry dealer, while Romano was on a leave pass from the Enid Community Treatment Center. Id. at 378.
40. Id. Oklahoma law at that time required the jury to find unanimously at least one aggravating circumstance, and that the aggravating circumstance or circumstances outweighed all the mitigating factors. Id. (citing OKLA. STAT. tit. 21, § 701.11 (1981)).
After the requisite weighing of aggravating and mitigating factors, the Sarfaty jury also imposed the death penalty on Romano. Romano appealed the decision, asserting that it was improper for the jury to make its death penalty decision while aware of his prior death sentence.

On appeal, the Court of Criminal Appeals of Oklahoma affirmed both the conviction and the sentence of death. Regarding the claim of the jury's lessened sense of responsibility, the appellate court acknowledged that the disputed evidence could have diminished the jury's sense of responsibility. The appellate court, however, determined that the trial court properly instructed the jury as to its role, and thus, there was no reversible error. The Supreme Court granted certiorari to determine whether a jury's sense of responsibility for imposing the death penalty was impermissibly undermined by evidence that the capital defendant had been sentenced to death in another case.

In Romano v. Oklahoma, the Supreme Court affirmed the judgment of the Oklahoma Court of Criminal Appeals. First, the majority opinion examined the petitioner's claim that the Court's decision in Caldwell v. Mississippi made it unconstitutional to receive a death sentence from a jury with a lessened sense of responsibility. The opinion concluded that Oklahoma law contains eight statutory aggravating circumstances which the jury could use to impose the death penalty. At Romano's penalty trial, the State presented four aggravating factors to the jury. The State introduced into evidence a copy of the judgment and sentence from the Thompson murder conviction to prove two of these aggravating factors. The two aggravating factors were "(1) that petitioner had been previously convicted of a violent felony; and (2) that petitioner would constitute a continuing threat to society." The State also introduced other evidence from the Thompson trial, such as testimony from a neighbor concerning the events, Thompson's autopsy report, photographs, and fingerprints. The jury found not only that all four aggravating circumstances existed, but they outweighed the 17 mitigating factors the petitioner presented.


The jury's lessened sense of responsibility for determining the death penalty was impermissibly undermined by evidence that the capital defendant had been sentenced to death in another case. The majority explained "we granted certiorari, limited to the following question: '[D]oes admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?' " at 2008-09.

Romano, 114 S. Ct. at 2008. The majority explained "we granted certiorari, limited to the following question: '[D]oes admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?' " at 2008-09.

Romano, 114 S. Ct. at 2008.
the *Caldwell* decision did not cover the petitioner's claim.\(^5\)  The Court ruled that the petitioner's claim failed because the evidence did not affirmatively mislead the jury regarding its role in the sentencing process.\(^5\)  In addition, the majority did not agree with the petitioner's general claim that the evidence rendered his sentencing proceeding unreliable in violation of the Eighth Amendment.\(^5\)  Lastly, the Court held that the admission of the prior sentencing evidence did not violate the Due Process Clause of the Fourteenth Amendment.\(^5\)

Justice O'Connor concurred, focusing on her *Caldwell* concurrence, which the *Romano* majority adopted as controlling.\(^5\)  Justice O'Connor emphasized that for a *Caldwell* claim\(^5\) to be successful "the evidence must be both inaccurate and tend to undermine the jury's sense of responsibility."\(^5\)  Justice O'Connor maintained that Romano's *Caldwell* claim failed because the evidence of his prior death sentence was accurate.\(^5\)

The dissent argued that the petitioner's claim fell under *Caldwell*'s principle that a capital jury's lessened sense of responsibility violates the Eighth Amendment.\(^5\)  The dissent emphasized that this responsibility re-

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51. Id. at 2010. The majority determined that the jury was not affirmatively misled about its sentencing role so as to minimize its sense of responsibility. Id.

52. Id. The Court maintained that the evidence was not false, and was irrelevant to the jury's role at sentencing. Id.

53. Id. at 2010-11. The Court, however, determined that the Eighth Amendment's protection of capital defendants does not extend to state evidentiary matters. Id.

54. Id. at 2012. The majority agreed with the Oklahoma Court of Criminal Appeals that the petitioner was not deprived of a fair sentencing proceeding by the admission of the evidence. Id.; see infra notes 213-15 and accompanying text (discussing the failure of the petitioner's due process claim).

55. *Romano*, 114 S. Ct. 2010. The majority recognized that Justice O'Connor provided the fifth vote in *Caldwell* and concurred on grounds narrower than the plurality, so her narrower position was controlling. Id.

56. A *Caldwell* claim evaluates whether a capital sentencing jury's sense of responsibility has been diminished by a misleading comment. *Romano*, 114 S. Ct. at 2010; see *Tafero v. Dugger*, 873 F.2d 249, 250 (11th Cir. 1989) (recognizing a *Caldwell* claim prohibits the diminishing of a jury's sense of responsibility in the death penalty sentencing process), cert. denied, 494 U.S. 1090 (1990); *People v. Flores*, 606 N.E.2d 1078, 1089 (Ill. 1992) (explaining that under a *Caldwell* claim "[t]he critical inquiry is whether the objectionable comments improperly diminished the jury's sense of responsibility"), cert. denied, 114 S. Ct. 102 (1993).


58. Id. The judgment and sentence form revealed that Romano was sentenced to death for first degree murder. Id. at 2007. Thus, the judgment and sentence form evidence from the Thompson murder conviction was accurate because Romano was in fact sentenced to death. Id.

59. Id. at 2014 (Ginsburg, J., dissenting). Justice Ginsburg authored the dissenting opinion and concluded that the admission of the judgment and sentence from the Thompson murder diminished the jury's sense of responsibility in violation of *Caldwell*. Id. Jus-
quirement evolved in *Caldwell* because of the need to ensure the reliability of capital sentencing procedures.60 Furthermore, the dissent asserted that Romano's jury was not reliable because it knew others ultimately were responsible for imposing his death sentence.61

This Note examines the development of death penalty sentencing prior to *Romano v. Oklahoma* and how the Court has tried to ensure reliability in capital sentencing procedures. This Note then probes the existence of the requirement of a “jury’s sense of responsibility” in ensuring such reliability. Next, this Note argues that death penalty sentencing reliability dictates that the Supreme Court should have followed Justice Ginsburg’s dissent in *Romano*. This Note then asserts that *Romano* effectively eliminates the requirement that a sentencing jury have a “sense of responsibility” when deciding to impose a death sentence. This Note concludes that the *Romano* decision continues to provide the states with an advantage gained after *Caldwell*, and this will help tilt death penalty sentencing decisions in favor of imposing a death sentence.

I. DEATH PENALTY SENTENCING LAW BEFORE *ROMANO*: PROTECTING THE CAPITAL DEFENDANT BECAUSE “DEATH IS DIFFERENT”

There is no national policy regarding the death penalty, leaving each state to enact its own death penalty legislation.62 In fact, prior to 1972,

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60. *Id.* at 2014 (Ginsburg, J., dissenting). The dissent emphasized that the *Caldwell* Court reasoned that reliability in capital sentencing was a requirement under the Eighth Amendment. *Id.* According to the *Romano* dissent, *Caldwell* concluded that the “diminution of jurors’ sense of responsibility violates the Eighth Amendment’s reliability requirement.” *Id.* at 2016.

61. *Id.* at 2014.

the Supreme Court had yet to decide the constitutionality of the death penalty. However, *Furman v. Georgia,* in 1972, extended the Eighth Amendment's protection against "cruel and unusual" punishment to the death penalty.

**A. Birth of the "Death is Different" Doctrine**

In the landmark case of *Furman v. Georgia,* the Supreme Court de-
declared the prevailing system of capital punishment unconstitutional. In a splintered Court, each majority Justice wrote a separate opinion and no majority Justice joined another. Because of this division, the Court failed to articulate an understandable, clear rule. However, a common theme permeating the opinions recognized that the death penalty statutes were unconstitutional because the sentencing jurors received too

67. Furman, 408 U.S. at 239-40 (per curiam). The per curiam opinion stated "that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Id. The Supreme Court in Furman reviewed the constitutionality of the sentencing statutes of Georgia and Texas. Id. As a direct result of the Furman decision, 633 death row inmates had their death sentences commuted. Introduction and Overview, in Facing the Death Penalty supra note 1, at 4. Furthermore, Furman invalidated more than 40 state capital sentencing statutes. See White, supra note 63, at 21.

68. Furman, 408 U.S. at 240 (per curiam). Justice Stewart expressed a now famous quote when he indicated that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." Id. at 309 (Stewart, J., concurring). Furthermore, he concluded that it was unconstitutional for the legal system to allow the death penalty "to be so wantonly and so freakishly imposed." Id. at 310. Justice White argued "that there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Id. at 313 (White, J., concurring). In fact, Justice Douglas, in a footnote, agreed with Justice Stewart and Justice White regarding arbitrariness and jury discretion. Id. at 248 n.11 (Douglas, J., concurring). Justice Brennan concluded that the death penalty was unconstitutional per se. Id. at 305 (Brennan, J., concurring). In addition, Justice Brennan reasoned that to comport with human dignity, the state cannot arbitrarily impose the death penalty. Id. at 274. Justice Marshall also maintained that the death penalty was unconstitutional per se. Id. at 358-59 (Marshall, J., concurring). Moreover, Justice Marshall strongly condemned capital punishment, reasoning that the imposition of the death penalty is discriminatory against certain classes, innocent people have been executed, and it has a negative effect on the criminal justice system. Id. at 364.

69. Id. at 240 (per curiam). The majority agreed on only a brief per curiam opinion. Id. at 238-39. Each Justice in the majority wrote his own opinion, with no Justice concurring with another. Bedau, supra note 63, at 254. The Furman Court's multiple opinions strayed from the traditional opinion format because of its individualistic format and the "explosion" of words and ideas. Robert A. Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1758 (1987). In fact, the Furman opinion stretched out over 232 pages. Id.

70. See Ronald J. Mann, The Individualized-Consideration Principle and the Death Penalty As Cruel and Unusual Punishment, 29 Hous. L. Rev. 493, 500 (1992) (explaining that Furman is best understood by looking at the opinions of Justices Douglas, Stewart, and White). The Supreme Court had difficulty interpreting Furman as demonstrated by the failure to have a majority opinion in the initial post-Furman cases, including Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion) and Gregg's companion cases. Mann, supra at 506-07.

71. See Nakell & Hardy, supra note 24, at 22. The authors emphasized that the common theme of the majority Justices was arbitrariness. Id.; see White, supra note 15, at 4, 22-23. Welsh White, a well-known death penalty opponent, concluded that the main basis of the majority opinions was that the capricious application of capital punishment violated the Eighth Amendment. Id. at 4.
much discretion.\textsuperscript{72} This high level of discretion resulted in arbitrary and capricious death penalty decisions.\textsuperscript{73} In essence, the Supreme Court held that the death penalty sentencing systems were cruel and unusual because the states used arbitrary and discriminatory methods to select which capital defendants received the death penalty.\textsuperscript{74}

*Furman* signaled the beginning of the "death is different" reasoning in capital sentencing jurisprudence.\textsuperscript{75} The Supreme Court reasoned that the

\textsuperscript{72} See Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). In *Gregg*, the plurality argued that because of the uniqueness and severity of the death penalty, *Furman* mandated that sentencing procedures could not create a risk that states would impose the death penalty in an arbitrary and capricious method. *Id.* at 188. One author proclaimed: 

[In *Furman* the Court condemned the system of capital punishment as arbitrary even though such application of the death penalty was not unmistakably proved. The Court's conclusion was probably based on two intertwined concerns: First, the five justices independently reached the judgment that in some sense the death penalty was in fact being arbitrarily applied—or at least that those who received death sentences were not sufficiently different from others convicted of capital crimes to warrant the difference in punishment. Second, the majority was concerned about the appearance of arbitrariness reflected in the lack of clear differentiation between those capital offenders who did and did not receive the death penalty.]

\textsuperscript{73} \textbf{WHITE}, supra note 15, at 22-23.

An important part of reliability in sentencing is ensuring that the sentencer, either the jury or judge, has the appropriate level of discretion to make the death penalty sentencing decision. See \textbf{BEDAU}, supra note 63, at 12. The proper discretion helps lessen the evil of arbitrary application of the death penalty. See *Gregg*, 428 U.S. at 189 (plurality opinion).

\textsuperscript{74} *Furman*, 408 U.S. at 239-40 (per curiam). Even before *Furman*, there was inconsistent and different sentencing decisions as a result of the jury having too much discretion. Lane, supra note 5, at 327-28; see *Gregg*, 428 U.S. at 188 (plurality opinion) (stating "*Furman* held [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner").

\textsuperscript{75} \textbf{NAKELL} & \textbf{HARDY}, supra note 24, at 29-30. Prior to *Furman*, three *Furman* Justices foreshadowed the "death is different" reasoning. See *Parker* v. North Carolina, 397 U.S. 790, 809-10 (1970) (Brennan, J., dissenting in part and concurring in part). Justice Brennan, in a dissenting and concurring opinion joined by Justices Douglas and Marshall, argued that the severe nature of the death penalty distinguishes it from most plea bargaining. *Id.* at 809. Justice Brennan recognized that the Supreme Court has treated death penalty cases differently from non-death penalty cases. *Id.* at 809-10. In a capital sentencing case dealing with the Due Process Clause, Justice Brennan, in a dissenting opinion joined by Justice Marshall and Justice Douglas, stated:

For we have long recognized that the degree of procedural regularity required by the Due Process Clause increases with the importance of the interests at stake. . . . Yet the Court's opinion turns the law on its head to conclude, apparently, that because a decision to take someone's life is of such tremendous import, those who make such decisions need not be 'inhibit[ed]' by the safeguards otherwise required by due process of law.


In addition, one commentator recognized the early pre-*Furman* development of the "death is different" philosophy of the Supreme Court in capital cases. See \textbf{Burt}, supra note
death penalty must be administered differently from other punishments, such as prison sentences and fines, because of its severity and finality.\textsuperscript{76} In \textit{Furman}, three Justices utilized the “death is different” concept.\textsuperscript{77} Justice Stewart reasoned that “death is different”\textsuperscript{78} and focused on the arbitrariness of the death penalty, arguing that death sentences are “wantonly and so freakishly imposed”.\textsuperscript{79} Furthermore, both Justice Brennan and Justice Marshall used the “death is different” concept in their concurring opinions.\textsuperscript{80} Thus, \textit{Furman} sowed the seeds of the “death is different” doctrine, which has been utilized throughout the Supreme Court’s Eighth Amendment capital sentencing jurisprudence.\textsuperscript{81}

\textbf{B. “Death is Different” Doctrine Matures in Post-Furman Cases}

After \textit{Furman} invalidated existing capital sentencing statutes, many state legislatures quickly enacted new statutes to correct the discretion problem that resulted in arbitrariness.\textsuperscript{82} To eradicate arbitrariness, states either imposed mandatory sentencing or required a weighing of specific

\begin{itemize}
  \item \textsuperscript{69} at 1743. Robert Burt maintained that after 1932, the death penalty was denoted “an inevitably ‘special circumstance’ in constitutional jurisprudence.” \textit{id.}
  \item \textsuperscript{76} Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion); see also \textsc{nakell} & \textsc{hardy}, supra note 24, at 30 (describing how the Supreme Court viewed the death penalty as different from other sentences).
  \item \textsuperscript{77} See \textit{infra} notes 78-80 and accompanying text (noting that Justices Stewart, Brennan, and Marshall utilized the “death is different” concept).
  \item \textsuperscript{78} \textit{Furman}, 408 U.S. at 306 (Stewart, J., concurring). Justice Stewart began his concurring opinion by professing that “[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability.” \textit{id.}
  \item \textsuperscript{79} \textit{id.} at 310. Barry Nakell and Kenneth Hardy contended that the Court and others considered the opinions of Justices Stewart, Douglas, and White to be the law of \textit{Furman}; focusing especially on Justice Stewart’s opinion. \textsc{nakell} & \textsc{hardy}, supra note 24, at 22.
  \item \textsuperscript{80} \textit{Furman}, 408 U.S. at 286 (Brennan, J., concurring). Justice Brennan discussed the uniqueness of the death penalty. \textit{id.} He noted briefly how legislators, juries, and the Supreme Court have dealt with the death penalty. \textit{id.} at 286-87. Justice Marshall stated: “[C]andor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution.” \textit{id.} at 316 (Marshall, J., concurring). While discussing the deterrent value of the death sentence, Justice Marshall acknowledged the differences between a death sentence and life imprisonment. \textit{id.} at 346; see \textsc{nakell} & \textsc{hardy}, supra note 24, at 30-31 (discussing Justice Marshall’s opinion).
  \item \textsuperscript{81} See \textit{supra} notes 75-81 and accompanying text (showing the \textit{Furman} Court’s emphasis on the uniqueness of the death penalty).
  \item \textsuperscript{82} \textsc{zimring} & \textsc{hawkins}, supra note 4, at 38-39. Twenty states enacted new capital sentencing legislation a year after \textit{Furman}. By the second anniversary of \textit{Furman}, 28 states had enacted new capital sentencing statutes. \textit{id.} at 39.
aggravating and mitigating factors. In 1976, the Supreme Court in Gregg v. Georgia and four companion cases tackled the questions left unanswered in Furman: whether the death penalty is per se unconstitutional and whether a death penalty sentencing system could be constitutionally implemented. Thus, in Gregg and its companion cases, the Supreme Court began defining the modern system of capital sentencing.

In Gregg v. Georgia, the Supreme Court held that the death penalty was not per se unconstitutional, and defined procedural parameters that

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87. Gregg, 428 U.S. at 168 (plurality opinion). The Furman decision did not resolve whether the death penalty could be constitutional under a different sentencing system. Id. at 168-69. Justice Stewart explained that until Furman:

[T]he Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution. Although this issue was presented and addressed in Furman, it was not resolved by the Court.

Id.

88. White, supra note 15, at 5; see Gregg, 428 U.S. at 193-95 (plurality opinion) (concluding that Furman’s concerns of arbitrary or capricious sentencing can be met by sentencing statutes that give adequate guidance and information). Justice Stewart recognized that each state’s post-Furman sentencing statute must be examined individually. Id. at 195. One commentator divided the five 1976 cases into two categories: North Carolina’s and Louisiana’s mandatory sentencing statutes; and the “guided-discretion” category with sentencing statutes from Georgia, Florida, and Texas. Scott W. Howe, Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation, 26 Ga. L. Rev. 323, 363-64 (1992). The two mandatory sentencing statutes differed in scope in the categories of murder to which each applied. Id. at 363. The “guided-discretion” statutes differed in the level of guidance and discretion the sentencer received. Id. at 364.

89. Justice Stewart’s opinion declared that “[w]e now hold that the punishment of death does not invariably violate the Constitution.” Id. at 169 (plurality opinion); Howard Shapiro, Comment, First-Degree Murder Statutes and Capital Sentencing Procedures: An
death penalty sentencing statutes must follow.\textsuperscript{90} The Court required the minimizing of the arbitrariness by imposing objective guidelines to narrow the category of those eligible for the death penalty.\textsuperscript{91} In the key plurality opinion,\textsuperscript{92} Justice Stewart reasoned that state statutes must minimize the arbitrariness of the selection of those sentenced to death.\textsuperscript{93} The Supreme Court recognized that these two requirements conflict; minimizing arbitrariness requires objective guidelines, which in turn interferes with individualized sentencing.\textsuperscript{94}

In addition, the "death is different" doctrine emerged in both plurality

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\end{quote}

\textsuperscript{90} \textit{WHITE, supra note 15, at 5} (explaining that "the Court emphasized the need to avoid the arbitrary imposition of capital punishment"). The Supreme Court upheld Georgia's sentencing statute. \textit{Gregg}, 428 U.S. at 198 (plurality opinion). The Georgia legislature provided for a two-part trial in capital murder cases; one part to determine guilt or innocence and the next part to determine the punishment. \textit{id.} at 163. In the "sentencing phase" of the trial, the jury must find at least one of 10 statutorily defined aggravating circumstances present in the crime to impose the death penalty. \textit{id.} at 164. In \textit{Gregg}, the jury found two aggravating circumstances. \textit{id.} at 217-18 (White, J., concurring in judgment). First, the jury found that the murder was committed during the commission of two capital felonies, armed robbery of two people. \textit{id.} Second, the jury found that the defendant committed the murder to gain money and valuables. \textit{id.} The jury rejected a third aggravating circumstance that the crimes were "outrageously or wantonly vile." \textit{id.} at 218.

\textsuperscript{91} \textit{Gregg}, 428 U.S. at 199 (plurality opinion); see \textit{Lewis F. Powell, Jr., Capital Punishment, 102 Harv. L. Rev. 1035, 1036-37 (1989)} (reviewing the requirements of Georgia's constitutional statutory scheme).

\textsuperscript{92} See \textit{Lockett v. Ohio}, 438 U.S. 586, 600-01 (1978) (plurality opinion). The Supreme Court in \textit{Lockett v. Ohio}, two years after \textit{Gregg}, relied on Justice Stewart's plurality opinion in \textit{Gregg}. See \textit{id.} The \textit{Lockett} Court explained that \textit{Gregg} and its companion cases had relied on the plurality opinion of three Justices, Justice Stewart, Justice Powell, and Justice Stevens. \textit{id.} at 601. The \textit{Lockett} Court reasoned that the three-person concurrence provided the deciding votes because the remaining six Justices did not form a majority. \textit{id.} Of the remaining Justices, four Justices believed that all five statutes were constitutional and two Justices believed that all five statutes were unconstitutional. \textit{id.}

\textsuperscript{93} \textit{Gregg}, 428 U.S. at 189 (plurality opinion). Justice Stewart argued that "\textit{Furman} mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." \textit{id.}

\textsuperscript{94} \textit{See Callins v. Collins, 114 S. Ct. 1127, 1129 (1994)} (Blackmun, J., dissenting from denial of certiorari). Justice Blackmun detailed the tension between the goal in \textit{Furman}, which was consistency and fairness, and the goal in the \textit{Lockett} decisions, which was individual sentencing. \textit{id.} at 1133; see also \textit{WHITE, supra note 15, at 6}. Welsh White explained that "the two goals articulated in the 1976 decisions are to some degree in conflict. If the paramount objective is to apply the death penalty even-handedly, the emphasis should be on providing the sentencing authority with clear objective standards that may be applied the same way in case after case." \textit{id.} Furthermore, he contended that "[i]f the paramount objective is to promote individualized sentencing, [then] providing clear standards to be rigorously applied in case after case is impossible." \textit{id.}
opinions. Justice Stewart noted that the Supreme Court has been "particularly sensitive" when a defendant faces the death penalty. Furthermore, Justice Stewart acknowledged the unique severity and irrevocability of the death penalty. Similarly, in the other plurality opinion, Justice White joined by Chief Justice Burger and Justice Rehnquist, also acknowledged the severity and finality of the death penalty.

The Supreme Court held that mandatory sentencing statutes fell outside these new parameters and, consequently, were arbitrary and did not permit particularized consideration of the individual defendant. In \textit{Woodson v. North Carolina} and \textit{Roberts v. Louisiana}, both the

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95. See infra notes 96-99 and accompanying text (describing the emergence of the death is different doctrine). In fact, Justice Rehnquist (now Chief Justice) acknowledged the emergence of the "death is different" doctrine while critiquing Justice Stewart’s plurality opinion. \textit{Woodson}, 428 U.S. at 322 (Rehnquist, J., dissenting). Justice Rehnquist recognized that the plurality relied “upon the indisputable proposition that ‘death is different’” \textit{Id}. Justice Rehnquist, however, did not agree that because death is different individualized sentencing is required. \textit{Id}. at 322-23.

96. \textit{Gregg}, 428 U.S. at 187 (plurality opinion). Justice Stewart emphasized that the Court had been responsive to ensure all safeguards are followed when a person's life is at stake. \textit{Id}; see Hamilton v. Alabama, 368 U.S. 52, 53-55 (1961) (holding that an accused in a capital case has the right to counsel at arraignment); Reid v. Covert, 354 U.S. 1, 77 (1956) (Harlan, J., concurring) (stating, “[s]o far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness”); Williams v. Georgia, 349 U.S. 375, 391 (1955) (asserting that the jury was improperly impaneled because of extraordinary circumstances which included a life at stake); Andres v. United States, 333 U.S. 740, 752 (1948) (recognizing that, when interpreting the United States Code, any ambiguity should be resolved in favor of the accused); Powell v. Alabama, 287 U.S. 45, 69-71 (1932) (holding that an accused in a capital trial requires counsel at every step of the proceedings against him); Diaz v. United States, 223 U.S. 442, 455 (1912) (observing that defendants in a capital proceeding cannot waive their right to be present at their trial); see also Anthony G. Amsterdam, \textit{In Favorem Mortis: The Supreme Court and Capital Punishment}, HUM. RTS., Winter, 1987, at 14.

97. \textit{Gregg}, 428 U.S. at 187 (plurality opinion).

98. \textit{Id}. (declaring, “[t]here is no question that death as a punishment is unique in its severity and irrevocability”).

99. \textit{See id}. at 226 (White, J., concurring). Justice White recognized the awesome responsibility that the death penalty requires for those who impose it in its imposition. \textit{Id}. 100. Mandatory death penalty sentences provided that if the jury convicted a defendant of a particular crime, such as first-degree murder, then the death penalty was imposed automatically. \textit{See Roberts v. Louisiana}, 428 U.S. 325, 331 (1976) (plurality opinion).

101. \textit{Woodson v. North Carolina}, 428 U.S. 280, 304-05 (1976) (plurality opinion) (concluding that mandatory sentencing violates the Eighth Amendment because it does not permit an individualized determination); \textit{Roberts}, 428 U.S. at 334-36 (plurality opinion) (holding that Louisiana's mandatory sentencing statute is unconstitutional because there are no standards to guide the jury); John W. Poulos, \textit{The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment}, 28 ARIZ. L. REV. 143, 229-30 (1986).


North Carolina and Louisiana state legislatures attempted to resolve the arbitrariness problem by removing all discretion from the jury and imposing mandatory sentences in their new post-Furman death penalty statutes.\textsuperscript{104} However, under both the Louisiana and North Carolina mandatory sentencing statutes, juries continued to make unguided arbitrary sentencing decisions.\textsuperscript{105} Under mandatory sentencing, the jury had unfettered discretion because it simply chose to convict the defendant for the appropriate crime which required the mandatory imposition of the death penalty.\textsuperscript{106} If the jury, however, felt the death penalty was not warranted, it would not convict the defendant for the appropriate crime.\textsuperscript{107} Thus, the \textit{Woodson} plurality concluded that mandatory sentencing did

\textsuperscript{104} \textit{Id.} at 328-29 (plurality opinion); \textit{Woodson}, 428 U.S. at 286 (plurality opinion). In \textit{Roberts}, the Court acknowledged that Louisiana answered \textit{Furman} by using a mandatory sentencing statute. \textit{Roberts}, 428 U.S. at 331 (plurality opinion). Furthermore, 10 states enacted mandatory death penalty statutes in the wake of \textit{Furman}. \textit{Woodson}, 428 U.S. at 313 (Rehnquist, J., dissenting). One commentator criticized the states that enacted mandatory sentences, arguing that the legislatures merely sought to restore the death penalty without discussing or examining the death penalty issues. Poulos, \textit{supra} note 101, at 233.

\textsuperscript{105} See \textit{Woodson}, 428 U.S. at 302-03 (plurality opinion) (stating, "it becomes evident that mandatory statutes enacted in response to \textit{Furman} have simply papered over the problem of unguided and unchecked jury discretion"). In \textit{Roberts}, the Court explained:

This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions. \textit{Roberts}, 428 U.S. at 334-35 (plurality opinion).

\textsuperscript{106} \textit{Roberts}, 428 U.S. at 334. In Louisiana, at the time of \textit{Roberts}, the death penalty was mandatory when the jury found the defendant guilty of the newly defined category of first-degree murder. \textit{Id.} (citing \textit{LA. REV. STAT. ANN.} § 14:30 (1974)). In a first-degree murder case, the Louisiana jury had to choose from four categories: guilty, guilty of second-degree murder, guilty of manslaughter, and not guilty. \textit{Id.} at 330. In North Carolina, a first-degree murder charge resulted in a mandatory death sentence. \textit{Woodson}, 428 U.S. at 285 (plurality opinion). First-degree murder was defined as a murder "perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony." \textit{Id.}

not prevent the jury from making arbitrary decisions.\textsuperscript{108}

Furthermore, the \textit{Woodson} plurality recognized the theme of individuality.\textsuperscript{109} The opinion maintained that death penalty sentencing required an individualized inquiry "of the character and record of the individual offender and the circumstances of the particular offense."\textsuperscript{110} The death is different philosophy became the foundation for requiring an individualized inquiry.\textsuperscript{111} The Court recognized that because of the severe, irrevocable nature of the death penalty, an individualized inquiry was necessary to ensure that death is the appropriate punishment.\textsuperscript{112} Thus, an individualized inquiry ensured the reliability of the imposition of a death sentence.\textsuperscript{113}

In \textit{Jurek v. Texas},\textsuperscript{114} the Supreme Court elaborated on what could satisfy an individualized inquiry.\textsuperscript{115} In evaluating an "individualized" inquiry, the Supreme Court was concerned with whether the sentencing procedures for deciding the death penalty adequately guided the jury's consideration of the individual offense and the individual offender.\textsuperscript{116} The Supreme Court upheld the Texas capital sentencing statute\textsuperscript{117} because the statute satisfied the "individualized" inquiry.\textsuperscript{118} The statute, in

\textsuperscript{108} See \textit{Woodson}, 428 U.S. at 305 (Stewart, J., plurality opinion) (holding that the mandatory death sentence statute enacted by North Carolina violated the Eighth and Fourteenth Amendments).

\textsuperscript{109} See \textit{id.} at 304-05 (introducing the theme of individualized sentencing). In individualized sentencing, the sentencer considers the individual characteristics of the offender and the offense. \textit{Id.} at 304. Welsh White emphasized that the \textit{Woodson} Court introduced the promotion of individualized sentencing in death penalty proceedings. \textit{White, supra} note 15, at 5.

\textsuperscript{110} \textit{Woodson}, 428 U.S. at 304 (plurality opinion).

\textsuperscript{111} See \textit{id.} at 305 (explaining "[t]his conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment").

\textsuperscript{112} \textit{Id.} at 304-05. Justice Stewart utilized an analogy, and stated that the difference between a death sentence and life imprisonment is greater than the difference between a 100-year prison term and a short prison term. \textit{Id.} at 305. Justice Stewart recognized that, because of this difference, the death penalty requires greater reliability. \textit{Id.}

\textsuperscript{113} \textit{Id.} at 304-05.

\textsuperscript{114} 428 U.S. 262 (1976).

\textsuperscript{115} \textit{Id.} at 271 (plurality opinion). Justice Stewart explained that a capital sentencing system that only considers aggravating circumstances does not provide an individualized determination as required under the Eighth Amendment. \textit{Id.} The jury must weigh why the death penalty should not be imposed, as well as why it should be imposed. \textit{Id.}

\textsuperscript{116} \textit{Id.} at 273-74. The Court upheld the statute because it allowed the jury to make an individualized inquiry and consider the particular circumstances of the defendant and the offense before making its death penalty decision. \textit{Id.} at 276.

\textsuperscript{117} See \textit{id.} at 269 (citing \textit{Tex. Code Crim. Proc.}, Art. 37.071 (Supp. 1975-76)).

\textsuperscript{118} \textit{Id.} at 276-77. Texas' capital sentencing statute, unlike Georgia's and Florida's statutes, did not require the jury to find an aggravating factor to impose the death penalty. \textit{Id.} at 270. The Texas statute required the jury to answer three questions instead of weighing listed aggravating factors. \textit{Id.} at 269. The aggravating factors in the Georgia and Florida
essence, required the jury to consider both aggravating and mitigating circumstances before it could impose a death sentence. Therefore, the Texas statute passed constitutional scrutiny because it provided for an individualized inquiry.

Similarly, if the judge is the sentencer, he or she must also perform an individualized inquiry. In Proffitt v. Florida, the Supreme Court upheld Florida's post-Furman death penalty sentencing procedure because it enabled the sentencing judge to take into account an individualized inquiry. The Florida sentencing statute instructed the judge to weigh listed aggravating factors and mitigating factors when deciding to impose the death penalty.

Thus, in the 1976 cases, the Supreme Court for the first time held that the death penalty was not per se unconstitutional. Additionally, the Supreme Court, by developing procedural parameters, addressed what type of sentencing systems could constitutionally implement the death penalty. The Court ruled that because death is different, a sentencing statutes, however, guided the sentencer in imposing the death penalty. See Proffitt v. Florida, 428 U.S. 242, 253 (1976) (plurality opinion) (holding Florida's statutory system constitutional because the sentencing statute gives the trial judge specific guidance); Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (plurality opinion) (stating that the aggravating and mitigating factors in the Georgia sentencing statute channels the jury's discretion and prevents the arbitrary application of the death penalty). Justice Stewart asserted that the Texas statute performed a function similar to the statutes that weighed aggravating and mitigating circumstances.

119. Jurek, 428 U.S. at 271-73 (plurality opinion).
120. Id. at 276-77.
121. See Proffitt, 428 U.S. at 253 (plurality opinion) (upholding Florida's sentencing statute, in which the judge is the sentencer, because an individualized inquiry is made).
123. Id. at 251-52, 259-60 (plurality opinion). In Proffitt, the Court divided into two, three-person pluralities, both of which held that the Florida statute was constitutional. Id. at 260-61. Both pluralities agreed that the Florida statute minimized the unlimited discretion and arbitrariness problem. Id. Justice Stewart explained that the trial judge does focus on the individual character of the defendant and the crime because the statute requires the judge to consider aggravating and mitigating factors. Id. at 251. This prevents the imposition of the death penalty in an arbitrary and capricious manner. Id. at 252-53.
124. The trial judge must "weigh the statutory aggravating and mitigating circumstances" to determine whether to impose the death penalty. Id. at 250 (discussing Fla. Stat. Ann. § 921.141(3) (Supp. 1976-77)).
statute must minimize arbitrariness and the sentencer must make an individualized inquiry to be constitutional.\textsuperscript{127} Moreover, the Supreme Court held mandatory death sentences were unconstitutional because the sentencing statutes did not meet these new parameters.\textsuperscript{128}

C. Individualized Scrutiny Becomes Focal Point

In 1978, the Supreme Court reaffirmed the importance of an individualized inquiry in a capital sentencing procedure in \textit{Lockett v. Ohio}.\textsuperscript{129} The \textit{Lockett} Court recognized individualized sentencing as the higher priority between the conflicting requirements of individualized sentencing and objective standards.\textsuperscript{130}

In \textit{Lockett}, a jury found the defendant guilty of murder with aggravating circumstances for her involvement in a robbery during which the victim was shot and killed.\textsuperscript{131} The trial judge sentenced the defendant to death\textsuperscript{132} and the defendant appealed on several grounds,\textsuperscript{133} including that the Ohio sentencing statute did not allow the sentencer to consider relevant mitigating factors.\textsuperscript{134} A plurality held that the sentencer must con-
sider any mitigating factor the defendant puts forth to refute a death sentence.\textsuperscript{135} Again, the plurality based its opinion on the principle that death is different, thereby requiring a death sentence to have a greater degree of reliability.\textsuperscript{136} The plurality explained that the Eighth Amendment requires the sentencer to consider individual circumstances because a death sentence is different from a prison sentence.\textsuperscript{137} Therefore, the opinion concluded that the need for "individualized decision is essential in capital cases."\textsuperscript{138} As a result of Lockett, capital sentencing statutes cannot prohibit the consideration of any mitigating circumstance that the defendant puts forth.\textsuperscript{139}

\textbf{D. Contemporary Departure from Procedural Protections}

These initial post-\textit{Furman} cases established procedural protections for defendants sentenced in capital trials because death is different.\textsuperscript{140} Commentators, however, have acknowledged that a new phase in capital punishment jurisprudence began in the early 1980s.\textsuperscript{141} At this time, the Supreme Court slowly began departing from its emphasis on procedural mitigating circumstances, such as "her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." \textit{Id.}\textsuperscript{135}

\textit{Id.} at 604 (plurality opinion). The plurality concluded:

\begin{quote}
[T]hat the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
\end{quote}

\textit{Id.}\textsuperscript{136}

\textit{Id.} at 604-05. The plurality reasoned that death is qualitatively different than other sentences and, as such, the death sentence requires a greater degree of reliability. \textit{Id.}\textsuperscript{137}

\textit{See id.} at 603-05 (recognizing "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases").

\textit{Id.}\textsuperscript{138}

\textit{Id.} at 605.

\textit{Id.} at 604; Scott E. Sundby, \textit{The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing}, 38 UCLA L. REV. 1147, 1160 (1991).\textsuperscript{140}

\textit{Supra} notes 109-13, 135-38 and accompanying text; \textit{White, supra} note 15, at 8.

\textit{Burt, supra} note 69, at 1741-42. Professor Burt divided the Court's constitutional struggle with capital punishment into three time phases. The first began in 1968 when the Supreme Court disclosed "doubts about the constitutional validity of the death penalty." \textit{Id.} at 1741. The second phase commenced in 1976 when the Supreme Court "attempted to appease those doubts by rationalizing and routinizing the administration of the [death] penalty," \textit{Id.} The last phase began in 1983 when the Supreme Court "signalled its intention to turn away from any continuing scrutiny of the enterprise." \textit{Id.; see} Richard E. Wirick, Comment, \textit{Dark Year on Death Row: Guiding Sentencer Discretion After Zant, Barclay, and Harris}, 17 U. C. DAVIS L. REV. 689, 729 (1984) (concluding that the Supreme Court has deviated from the traditions of \textit{Furman, Gregg}, and \textit{Lockett} by not protecting the defendant).
protections for capital defendants.\textsuperscript{142} In \textit{Zant v. Stephens},\textsuperscript{143} the Court acknowledged the need for greater reliability in capital sentencing because death is different.\textsuperscript{144} The \textit{Zant} Court, however, also recognized that there could be no perfect procedure for deciding who receives the death penalty.\textsuperscript{145} In balancing these two themes, the \textit{Zant} Court stated that not every imperfection will overturn a death sentence; but because death is different it "mandates careful scrutiny in the review of any colorable claim of error."\textsuperscript{146} Consequently, although the death is different doctrine still existed, \textit{Zant} began to erode the doctrine's impact on Eighth Amendment capital sentencing jurisprudence.\textsuperscript{147}

Within this climate diluting procedural protections, the Supreme Court faced a novel question regarding whether the death penalty can be validly imposed when a jury believes the responsibility for imposing the death penalty lies elsewhere.\textsuperscript{148} \textit{Caldwell v. Mississippi}\textsuperscript{149} gave the Supreme Court the opportunity to resolve whether the reliability requirement in death penalty sentencing compels a jury to have a sense of responsibility for its death penalty decision.\textsuperscript{150}

In \textit{Caldwell}, a jury sentenced the defendant to death for robbing and

\textsuperscript{142} See White, supra note 15, at 8-10; Leigh Dingerson, \textit{Reclaiming the Gavel: Making Sense Out of the Death Penalty Debate in State Legislatures}, 18 N.Y.U. REV. L. & SOC. CHANGE 873, 873 (1990-91). In fact, the Rehnquist Court continued this trend throughout the 1980s. See Stanford v. Kentucky, 492 U.S. 361 (1989) (upholding the death penalty for 16 and 17 year olds); Penry v. Lynaugh, 492 U.S. 302 (1989) (upholding the death penalty for mildly retarded adults); McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that statistical evidence of racial discrepancy in the implementation of the death penalty does not indicate arbitrary and capricious sentencing); Lockhart v. McCree, 476 U.S. 162 (1986) (allowing the "death qualification" of a jury prior to the guilt phase of a capital trial); Barclay v. Florida, 463 U.S. 939 (1983) (plurality opinion) (upholding the death sentence where the statute only allowed the defendant's prior record to be used as a mitigating factor but the sentencer used the defendant's prior record as an aggravating factor).

\textsuperscript{143} 472 U.S. 862 (1983).

\textsuperscript{144} Id. at 884-85. The \textit{Zant} Court explained that the severity of the death penalty requires a higher degree of reliability in ensuring that death is the appropriate sentence. Id.

\textsuperscript{145} Id. at 884; \textit{Lockett v. Ohio}, 438 U.S. 586, 605 (1978) (plurality opinion).

\textsuperscript{146} Zant, 462 U.S. at 885.

\textsuperscript{147} See infra notes 263-66 and accompanying text (explaining that the Supreme Court's current trend is expediting the death penalty).

\textsuperscript{148} Caldwell v. Mississippi, 472 U.S. 320, 323 (1985). Writing for the Court, Justice Marshall explained that "[t]his case presents the issue whether a capital sentence is valid when 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. In addition, the Court also examined and rejected a jurisdictional issue. Id. at 326-327.

\textsuperscript{149} 472 U.S. 320 (1985).

\textsuperscript{150} Id. at 323.
killing the owner of a grocery store in Mississippi. The defendant appealed his sentence claiming that the prosecutor's closing remarks violated the Eighth Amendment because the remarks undermined the jury's sense of responsibility, therefore, rendering the proceedings unreliable. In the closing argument, the prosecution had told the jury that responsibility for the final death sentence decision rested with the appellate court. The Supreme Court concluded that the prosecutor's remarks violated the Eighth Amendment because they led the sentencing jury to believe it was not ultimately responsible for imposing the death sentence, a belief which made the sentencing unreliable. Accordingly, Caldwell originated the sense of responsibility requirement under the Eighth Amendment.

151. Id. at 324.
152. See id. at 323 (arguing that the prosecutor's statement violated the Eighth Amendment's heightened reliability requirement).
153. Id. at 325. The disputed statement was as follows:

'ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

'COUNSEL FOR DEFENDANT: Your honor, I'm going to object to this statement. It's out of order.

'ASSISTANT DISTRICT ATTORNEY: Your honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair. 

'THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

'ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they have attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so.'

Id. at 325-26.

154. Id. at 328-29.
155. See id. at 323 (recognizing for the first time that the jury must have a sense of responsibility for imposing a death sentence); Mello, supra note 29, at 305. Professor Mello noted that the Caldwell decision was the first decision to elevate the notion that the jury cannot believe the determination for imposing the death sentence lies elsewhere. In addition, Professor Mello argued that a strong common law background required a capital sentencing jury to have a sense of responsibility toward its sentencing decision and further claimed that "[t]he Supreme Court in Caldwell recognized for the first time the eighth amendment dimensions of these concerns." Id. at 308. While the jury's sense of responsibility requirement was officially established in Caldwell, Justice Marshall recog-
The *Caldwell* Court\textsuperscript{156} reasoned that death is qualitatively different\textsuperscript{157} and, as a result, the Supreme Court placed limits on the imposition of the death penalty.\textsuperscript{158} The foundation of these limits rests upon the assurance that the death sentence is reliable and appropriate.\textsuperscript{159} The Supreme Court recognized that the reliability of a death sentence depends upon the jury taking its role seriously.\textsuperscript{160} Therefore, the *Caldwell* Court ruled that the prosecutor's suggestion that the sentencing jury could shift the ultimate decisionmaking responsibility to an appellate court interfered with the jury's role by detracting from its responsibility, rendering its sentence unreliable and in violation of the Eighth Amendment.\textsuperscript{161}

Justice Marshall, who wrote the majority opinion, articulated four specific reasons why the death sentence would be unreliable when the jury shifts its sense of responsibility for determining the appropriateness of the death sentence to an appellate court.\textsuperscript{162} First, jurors do not understood the potential existence of this requirement two years earlier in his dissent in *California v. Ramos*, 463 U.S. 992, 1017 n.3 (1983) (Marshall, J., dissenting).

\textsuperscript{156} Although, technically a plurality opinion due to Justice O'Connor's concurrence, the Supreme Court and state supreme courts have treated *Caldwell* as a majority opinion. Mello, supra note 29, at 291-92 n.44. Justices Marshall, Brennan, Blackmun, and Stevens composed the plurality. *Caldwell*, 472 U.S. at 322. Justice O'Connor provided the fifth vote, in a narrower concurring opinion. *Id.* at 341-43 (O'Connor, J., concurring in part and in judgment). Justice O'Connor joined the Court in all but Part IV-A of Justice Marshall's opinion. *Id.* at 341-42. The dissent consisted of Justices Rehnquist, White, and Chief Justice Burger. *Id.* at 343 (Rehnquist, J., dissenting). Justice Powell took no part in the decision. *Id.*

\textsuperscript{157} *Id.* at 329. The *Caldwell* Court emphasized that under the Supreme Court's Eighth Amendment jurisprudence the severity of the death penalty warrants a higher degree of scrutiny for the imposition of the death penalty. *Id.* It then explained that many of the Supreme Court's limits on capital punishment "are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Id.*

\textsuperscript{158} *Id.* at 328-29 (concluding that it is unconstitutional to allow a sentencer to render a death sentence with a lessened sense of responsibility).

\textsuperscript{159} *Id.*

\textsuperscript{160} *Id.* at 329-30. The Court reasoned that jurors who take their responsibility seriously allow sentencer discretion to contribute to the reliability of the sentence. *Id.* at 330. The Court asserted that:

> Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion as consistent with—and indeed indispensable to—the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' *Id.* at 330 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)).

\textsuperscript{161} *Id.* at 330.

\textsuperscript{162} *Id.* at 330-33. The Court explained that the death penalty sentencing proceeding becomes unreliable and biased when the state makes suggestions that the sentencing jury can shift its sense of responsibility to an appellate court. *Id.* at 330.
stand the role of an appellate court and this results in bias against the defendant.\textsuperscript{163} Justice Marshall argued that this lack of understanding prejudices the defendant because an appellate court cannot confront the defendant and, therefore, is unsuited to determine the death penalty.\textsuperscript{164} In such a situation the defendant may well forfeit any consideration of those "'compassionate or mitigating factors stemming from the diverse frailties of humankind.'"\textsuperscript{165} Furthermore, an appellate court also uses a presumption of correctness when reviewing a death penalty sentence.\textsuperscript{166}

Second, a juror's inclination to impose the death penalty to send a message that it seriously disapproves of the crime may increase if he or she knows that its decision is not final.\textsuperscript{167} Third, the jurors know that a death sentence, unlike a life sentence, gives them the opportunity to shift sentencing responsibility to someone else because of the death penalty appellate process.\textsuperscript{168} Finally, Justice Marshall argued that, given the severity of the death penalty, an individual juror may find it highly attractive to minimize the importance of his or her role.\textsuperscript{169} As a result, a juror reluctant to impose the death penalty nevertheless may give in and impose it, if he or she thinks the appellate court will make the final decision.\textsuperscript{170}

Justice Marshall rejected the argument that each state should decide the degree to which a capital sentencing jury should know of post-sentencing proceedings.\textsuperscript{171} The Supreme Court dealt with this issue in \textit{Cali}
frica v. Ramos.\(^{172}\) In Ramos, the Court had considered the constitutionality of a California statute that required the court to instruct the jury that the Governor could pardon a defendant sentenced to life without parole.\(^{173}\) In Caldwell, Justice Marshall reasoned that the California statute in Ramos dealt with a jury instruction that "was both accurate and relevant to a legitimate state penological interest."\(^{174}\) The legitimate state interest was the possibility of the defendant's future dangerousness if he ever re-enters society.\(^{175}\) Justice Marshall contrasted this concern with the prosecutor's remarks in Caldwell and concluded that the remarks were neither accurate nor relevant to a valid state penological interest.\(^{176}\)

In a concurring opinion, Justice O'Connor argued that the capital jury can receive accurate and misleading instructions regarding post-sentencing procedures.\(^{177}\) In addition, Justice O'Connor recognized affirmatively

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\(^{173}\) Id. at 995. The instruction was called a "Briggs Instruction." Id. at 995 n.4. The instruction given at the penalty trial was as follows:

'You are instructed that under the State Constitution a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime.

Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.'

Id. at 995-96.

\(^{174}\) Caldwell, 472 U.S. at 335. Justice Marshall explained that Ramos addressed California's statutory requirement that jurors be notified that the governor can commute a sentence of life imprisonment without parole into a lesser sentence. Id. While upholding the California statute, Justice Marshall determined that the instruction was pertinent to the valid state penological interest of minimizing the future dangerousness of the defendant. Id.

Furthermore, Justice Marshall authored the dissenting opinion in Ramos. 463 U.S. at 1015 (Marshall, J., dissenting). Justice Marshall's dissent observed that the Court should have framed the issue as "whether the Briggs Instruction [was] misleading" and not whether to allow a balanced instruction—meaning the judge also instructs the jury that a death sentence can be commuted. Id. at 1016-17. In addition, Justice Marshall stated that the Briggs Instruction was unconstitutional because it was speculative, thus creating an arbitrary and capricious decision, id. at 1020-21, and that the Briggs Instruction introduced an impermissible factor in the death penalty decision, id. at 1021. Finally, Justice Marshall observed that the instruction allowed the jury to believe it could foreclose future clemency relief by electing to use the death penalty. Id. at 1024-25.

\(^{175}\) Caldwell, 472 U.S. at 335; see also Ramos, 463 U.S. at 1005. The Ramos Court reasoned that having the jury focus attention on future dangerousness does not hinder the required individualized inquiry. Id.

\(^{176}\) Caldwell, 472 U.S. at 336. Justice Marshall explained that the prosecutor's statement about the appellate court's review process was misleading and portrayed the jury's role as incompatible with the capital sentencer's role. Id.

\(^{177}\) Id. at 342 (O'Connor, J., concurring in part and in judgment). In Ramos, however, Justice O'Connor implied the requirement that a jury have a sense of responsibility in
the need for a jury's sense of responsibility for making the death penalty decision. The Caldwell Court, however, never resolved what defines a jury's sense of responsibility and how much responsibility is needed to ensure reliability of the death sentence.

Subsequently, post-Caldwell cases did not elaborate on the precise parameters of Caldwell. In Darden v. Wainwright, the Darden majority stated, in a footnote, that Caldwell only concerned comments that mislead the jury as to its role in the sentencing process by allowing the jury to feel less responsible for its sentencing decision. However, the scope of an affected juror's responsibility remained unclear, other than including a reduced role in the sentencing process. Thus, Darden did not resolve what defines a jury's sense of responsibility and how much responsibility is needed to ensure reliability of the death sentence.
not define the limits of *Caldwell*. Prior to *Romano v. Oklahoma*, the jury responsibility issue existed, but the direction of its resolution remained uncertain.

II. ROMANO V. OKLAHOMA: JURY'S SENSE OF RESPONSIBILITY REQUIREMENT VANISHES

In *Romano v. Oklahoma*, the Supreme Court granted certiorari to determine whether evidence that a defendant in a capital sentencing hearing had been sentenced to death in another case, unconstitutionally undermines the sentencing jury's sense of responsibility in determining the appropriateness of the death penalty. In a five-to-four decision, the Court affirmed the Oklahoma Court of Criminal Appeals by holding that a jury's knowledge that the defendant has a prior death sentence does not impermissibly undermine its sense of responsibility. The majority explained that, because the evidence did not affirmatively mislead the jury with regard to its role in the capital sentencing process, the

184. *Id.* In fact, the *Darden* majority distinguished *Caldwell* by contending that the comments were made at the guilt-innocence phase of the trial, and that the trial judge did not endorse the comments. *Id.*


186. After *Caldwell*, the Supreme Court declined to review cases that dealt with prosecutorial argument that minimized the jurors' sense of responsibility for their verdict. *Lipham v. Georgia*, 488 U.S. 873 (1988) (denying certiorari); *Nicks v. Alabama*, 487 U.S. 1241 (1988) (same). In *Lipham v. Georgia*, the prosecutor sought to minimize the jury's sense of responsibility by claiming that he had a part in choosing the death penalty because he brought the charges and then declared that the jury should not "feel like [the decision] is yours and have it weigh too heavily on you because that was my decision." *Lipham*, 488 U.S. at 874 (Marshall, J., dissenting from denial of certiorari). Justice Marshall argued that "[the prosecutor's statement here—admonishing the jurors not to 'feel like it is you[r] [decision]'] and urging them not to 'have it weigh too heavily on you because that was my decision'—is designed for only one reason: to dissipate the jury's sense of personal responsibility for this most awesome of decisions." *Id.* at 875.

In *Nicks v. Alabama*, the prosecutor asserted that the jury's decision was an advisory opinion and that the judge was the final sentencer. 487 U.S. at 1242 (Marshall, J., dissenting from denial of certiorari). Again, Justice Marshall contended that prosecutor's argument violated *Caldwell*. *Id.* Justice Marshall argued that the prosecutor's argument shifted the "jury's sense of responsibility to another decisionmaker" which in turn, affects the reliability of the sentencer's verdict. *Id.*


188. *Id.* The Oklahoma Court of Appeals denied Romano's claim and decided that although the evidence was irrelevant, a jury instruction corrected any shift in responsibility or consideration that its decision was less significant. *Romano v. State*, 847 P.2d 386, 390-91 (Okla. Crim. App. 1993), aff'd, 114 S. Ct. 2004 (1994). In addition, the Oklahoma Court of Appeals rejected a claim of denial of due process. *Id.* at 391.

189. *Romano*, 114 S. Ct. at 2010. Romano claimed the jury's sense of responsibility was unconstitutionally undermined for determining the appropriateness of the death penalty. *Id.* at 2007. He argued that admitting the prior murder trial's judgment and sentence form into evidence allowed the jury to be aware that he was already sentenced to death. *Id.*
jury’s awareness of the petitioner’s prior death sentence did not negate its sense of responsibility in choosing the death penalty.\textsuperscript{190}

The \textit{Romano} Court’s decision clarified and narrowed the parameters \textit{Caldwell v. Mississippi}\textsuperscript{191} set forth regarding a jury’s sense of responsibility for determining the death penalty.\textsuperscript{192} The majority confined \textit{Caldwell} claims to very limited circumstances.\textsuperscript{193} After \textit{Romano}, a \textit{Caldwell} claim does not exist for all situations in which a jury’s sense of responsibility for imposing the death penalty is minimized.\textsuperscript{194} Rather, a defendant can effectively assert a \textit{Caldwell} claim only when untruthful information affects the jury’s sense of responsibility regarding its role in the sentencing process.\textsuperscript{195}

\textbf{A. The Majority Opinion: The Demise of the Jury’s Sense of Responsibility Requirement}

The majority addressed whether a capital jury’s sense of responsibility for implementing the death penalty is impermissibly undermined by its knowledge that the defendant already has been sentenced to death.\textsuperscript{196} Chief Justice Rehnquist, writing for the majority, began by reviewing the Court’s role in determining the constitutionality of capital sentencing under the Eighth Amendment.\textsuperscript{197} The majority explained that the Supreme Court historically has been concerned with the process by which states choose which defendants receive the death penalty and not with substantive information placed before the sentencer.\textsuperscript{198}

The majority opinion asserted that the states must perform two tasks under the Eighth Amendment to impose the death penalty constitutionally.\textsuperscript{199} First, the state must establish criteria that narrow the sentencer’s

\begin{itemize}
  \item \textsuperscript{190} \textit{Id.} at 2010. The majority reasoned that the judgment and sentence form was accurate and did not pertain to the jury’s role in the sentencing process. \textit{Id.}
  \item \textsuperscript{191} 472 U.S. 320 (1985).
  \item \textsuperscript{192} \textit{Romano}, 114 S. Ct. at 2010. The majority asserted that \textit{Caldwell} is relevant for those comments “that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.” \textit{Id.} (quoting \textit{Darden v. Wainwright}, 477 U.S. 168, 184 n.15 (1986)).
  \item \textsuperscript{193} See infra notes 254-57 and accompanying text (explaining how the \textit{Romano} Court narrowed \textit{Caldwell}).
  \item \textsuperscript{194} \textit{Id.}
  \item \textsuperscript{195} \textit{Romano}, 114 S. Ct. at 2010.
  \item \textsuperscript{196} \textit{Id.} at 2008-09.
  \item \textsuperscript{197} \textit{Id.} at 2009. Chief Justice Rehnquist began his analysis with an overview of how the state capital sentencing statutes must ensure that the death sentence is appropriate. \textit{Id.; see infra} notes 199-201 and accompanying text (explaining what the Eighth Amendment requires the state capital sentencing statutes to accomplish).
  \item \textsuperscript{198} \textit{Romano}, 114 S. Ct. at 2009 (citing \textit{California v. Ramos}, 463 U.S. 992, 999 (1983)).
  \item \textsuperscript{199} \textit{Id.} (explaining that the Constitution allows for “traditional latitude” in state sentencing statutes to establish evidentiary rules at sentencing proceedings).
\end{itemize}
discretion over the determination that a particular defendant should receive the death penalty as compared to others similarly convicted of murder.\textsuperscript{200} Next, the majority explained that the state must ensure that the sentencer makes an individualized inquiry into the defendant's character, record and the circumstances of the offense.\textsuperscript{201} After setting forth an overview of the Supreme Court's Eighth Amendment jurisprudence, the majority evaluated the petitioner's claim.\textsuperscript{202}

The majority examined the petitioner's argument under three different rationales: whether the petitioner could make a \textit{Caldwell} claim; whether the petitioner could establish a general Eighth Amendment claim; and whether the petitioner could claim a due process violation.\textsuperscript{203} The majority rejected the petitioner's \textit{Caldwell} claim\textsuperscript{204} by interpreting \textit{Caldwell} narrowly in holding that a jury loses its sense of responsibility only when it is affirmatively misled as to its role by inaccurate or untruthful information.\textsuperscript{205} Therefore, the majority reasoned that, according to the facts, Romano's jury was not given inaccurate information because he was in fact previously sentenced to death.\textsuperscript{206} Furthermore, the majority asserted that the evidence of Romano's prior death sentence did not pertain to the jury's role in the sentencing process.\textsuperscript{207}

Next, the majority rejected the petitioner's claim that the introduction of inaccurate and irrelevant evidence rendered the sentencing proceeding so unreliable that it violated the Eighth Amendment.\textsuperscript{208} The \textit{Romano} Court reasoned that no constitutional error occurred if the admitted evidence is irrelevant as a matter of state law.\textsuperscript{209} Moreover, the majority characterized the petitioner's claim as an invitation to establish federal

\begin{itemize}
\item \textsuperscript{200} \textit{Id.}
\item \textsuperscript{201} \textit{See id.} (mandating a minimum threshold beneath which the death penalty could not be imposed).
\item \textsuperscript{202} \textit{Id.} Furthermore, the majority maintained that the states cannot limit any consideration of mitigating circumstances. \textit{Id.}
\item \textsuperscript{203} \textit{Id.} at 2010-13.
\item \textsuperscript{204} \textit{Id.} at 2010-12. Besides the \textit{Caldwell} claim, Romano argued that evidence of his prior capital conviction rendered his death sentence unreliable and as such, in violation of the Eighth Amendment. \textit{Id.} at 2010. In addition, Romano asserted that the introduction of his prior death sentence violated the Due Process Clause. \textit{Id.} at 2012.
\item \textsuperscript{205} \textit{Id.} at 2010.
\item \textsuperscript{206} \textit{Id.} The majority argued that "[t]he infirmity identified in \textit{Caldwell} is simply absent in this case: Here, the jury was not affirmatively misled regarding its role in the sentencing process. The evidence at issue was neither false at the time it was admitted, nor did it even pertain to the jury's role in the sentencing process." \textit{Id.}
\item \textsuperscript{207} The judgment and sentence form indicated that Romano was found guilty and sentenced to death for the murder of Lloyd Thompson. \textit{Id.} at 2007.
\item \textsuperscript{208} \textit{Id.} at 2010.
\item \textsuperscript{209} \textit{Id.} at 2010-11. The Court opined that evidence that is irrelevant under state law does not automatically violate the Constitution if admitted. \textit{Id.} at 2011.
\end{itemize}
evidentiary rules for state death penalty sentencing proceedings. The majority stressed that the Supreme Court would not fashion general evidentiary rules for capital sentencing proceedings while interpreting the Eighth Amendment. As long as the state sentencing statutes fell within the constitutional limits, then the state was free to prescribe its own evidentiary rules for sentencing proceedings.

Lastly, the majority found that the introduction of Romano's prior death sentence did not violate his right to due process. The majority examined whether the admission of Romano's prior death sentence “so infected the sentencing proceeding as to violate due process.” The majority found no violation because the trial judge had instructed the jury properly, and because other relevant evidence existed that justified the death sentence.

B. Justice O'Connor's Concurring Opinion: Closing the Door on Caldwell Claims

Justice O'Connor concurred with the majority opinion, writing to focus on why the petitioner’s Caldwell claim failed. Justice O'Connor declared that a successful Caldwell claim “must be both inaccurate and tend to undermine the jury's sense of responsibility.” She reiterated her position in Caldwell that it was the inaccuracy of the prosecutor's argument to the jury that made it unconstitutional. Justice O'Connor reasoned that the accuracy of the information presented to the jury is critical, not the effect such information has on the jury's sense of responsibility. Therefore, Justice O'Connor found no Caldwell violation because the jury heard accurate information—that Romano in fact was sentenced to death.

210. Id. at 2011.
211. Id.
212. Id.
213. Id. at 2012-13.
214. Id. at 2012. The majority considered whether the evidence of Romano's prior death sentence injected such unfairness into the sentencing proceeding “as to render the jury's imposition of the death penalty a denial of due process.” Id.
215. Id. The Court presumed that the jury followed the trial court's instructions. Id. The majority argued that the trial instructions properly portrayed the jurors' important role in determining Romano's sentence. Id. Furthermore, the majority contended that the existence of three aggravating factors was sufficient for the jury to sentence Romano to death. Id.
216. Id. at 2013 (O'Connor, J., concurring). Justice O'Connor wrote separately to emphasize her interpretation of Caldwell. Id.
217. Id.
218. Id.
219. Id. Justice O'Connor maintained that it was not unconstitutional for accurate information to minimize a jury's sense of responsibility. Id.
death in the first trial.\textsuperscript{220}

\textbf{C. The Dissent: The Eighth Amendment Requires a Capital Jury to Maintain a Sense of Responsibility}

Justice Ginsburg authored the dissenting opinion and presented a different, broader version of the \textit{Caldwell} principle.\textsuperscript{221} The dissent argued that a successful \textit{Caldwell} claim occurred whenever a capital sentencer believed the responsibility for determining the appropriateness of the defendant's death sentence lay elsewhere.\textsuperscript{222} The dissent reasoned that \textit{Caldwell} held that a jury's lessened sense of responsibility unconstitutionally affected the reliability of the capital sentencing procedure.\textsuperscript{223} Accordingly, the dissent focused on whether the jury's sense of responsibility actually was minimized and, consequently, affected the reliability of the death sentence.\textsuperscript{224}

As a result, the dissent maintained that the knowledge of Romano's prior death sentence resulted in the jury having a diminished sense of responsibility.\textsuperscript{225} The dissent reasoned that jurors who already know that the defendant will die for another crime would place less significance on their decision and would be relieved of their separate sense of responsibility.\textsuperscript{226} The dissent maintained that a juror inclined to hold out for a different sentence may acquiesce in imposing the death sentence because that juror knows the defendant previously has been sentenced to death.\textsuperscript{227} Furthermore, the dissent contended that an uncertain juror may be swayed to vote for the death sentence because a previous jury

\begin{itemize}
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id. at 2013-14 (Ginsburg, J., dissenting). Justice Ginsburg was joined in dissent by Justice Blackmun, Justice Stevens, and Justice Souter. Id.
\item \textsuperscript{222} Id. at 2015.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id. at 2015-16. In fact, Justice Ginsburg emphasized several examples from \textit{Caldwell} of how a juror with a lessened sense of responsibility could affect the reliability of the sentence. Id. Moreover, Justice Ginsburg argued that a holdout juror who does not believe the death penalty should be imposed could acquiesce in a death penalty verdict because the juror knows the final verdict is not the jury's responsibility. Id.
\item \textsuperscript{225} See id. at 2014. The majority, on the other hand, focused on whether the jury received accurate information. Id. at 2010. For example, in \textit{Caldwell}, Justice O'Connor emphasized that the prosecutor's statement to the jury concerning appellate review was inaccurate. \textit{Caldwell}, 472 U.S. at 342 (O'Connor, J., concurring in part and in judgment). The prosecutor indicated that the jury was not responsible for making the final decision of whether the defendant will receive the death penalty, because the appellate court would make the final determination. Id. at 342-43. The prosecutor's information was inaccurate because in Mississippi there is a presumption of correctness for the jury's decision; therefore, the Mississippi appellate courts do not make the final decision. Id. at 343.
\item \textsuperscript{226} Romano, 114 S. Ct. at 2015 (Ginsburg, J., dissenting).
\item \textsuperscript{227} Id. at 2015-16.
\end{itemize}
already has done so.²²⁸ Lastly, the dissent argued that a jury panel that knows they are not responsible for the final determination of the death penalty may vote for the death sentence to send a message of disapproval for the defendant's conduct.²²⁹

Next, the dissent disagreed with the majority's interpretation of Justice O'Connor's position in *Caldwell*.²³⁰ The dissent recognized that Justice O'Connor's concurring position in *Caldwell* provided the fifth vote for certain sections of the opinion.²³¹ The dissent contended that Justice O'Connor, in her *Caldwell* concurrence, limited her disagreement to information presented to the sentencer regarding post-sentencing review.²³² Thus, the dissent reasoned that because Romano's claim was not about post-sentencing procedures, it did not fall under Justice O'Connor's narrowed view of *Caldwell*.²³³

The dissent next rejected the majority's contention that post-*Caldwell* cases confirmed a narrow view of *Caldwell*.²³⁴ The dissent observed that in *Darden v. Wainwright*,²³⁵ the disputed comments were not in evidence and did not occur in the sentencing phase.²³⁶ Furthermore, the dissent asserted that *Sawyer v. Smith*²³⁷ was concerned with whether the *Caldwell* decision could be applied retroactively.²³⁸ The dissent argued that the *Sawyer* Court did not consider whether a *Caldwell* violation occurred.²³⁹ Moreover, the dissent maintained that in *Dugger v. Adams*,²⁴⁰ the Court acknowledged that the petitioner's *Caldwell* claim was irrele-

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²²⁸ Id. at 2015.
²²⁹ Id.
²³⁰ See id. at 2016-18 (arguing that the majority interpreted Justice O'Connor's position in *Caldwell* incorrectly).
²³¹ See id. at 2017.
²³² Id. The dissent argued that Justice O'Connor disagreed with only a three-paragraph section of the opinion, Part IV-A. Id. Because Justice O'Connor only disagreed with Section IV-A, the dissent contended that the rest of the *Caldwell* opinion actually received five votes. See id.
²³³ Id.
²³⁶ *Romano*, 114 S. Ct. at 2017 n.5 (Ginsburg, J., dissenting).
²³⁸ *Romano*, 114 S. Ct. at 2017-18 n.5 (Ginsburg, J., dissenting).
²³⁹ Id. at 2017 n.5. In fact, the *Sawyer* Court stated it did not need to address the merits of the *Caldwell* claim, and would address only whether the petitioner could bring a *Caldwell* claim in a habeas corpus action. *Sawyer*, 497 U.S. at 229, 234. Therefore, the *Sawyer* Court never directly addressed the merits of the petitioner's *Caldwell* claim. See id.
vant to deciding the case.\textsuperscript{241}

After rejecting the post-\textit{Caldwell} cases, the dissent pointed out the inadequacy of the trial judge’s instructions in correcting the jury’s diminished sense of responsibility.\textsuperscript{242} The dissent claimed that once the jury’s sense of responsibility erodes, the trial court’s instructions are inadequate to correct the situation.\textsuperscript{243} Lastly, Justice Blackmun, in a separate dissent, wrote to emphasize his view that the death penalty cannot be imposed fairly within the constraints of the Constitution.\textsuperscript{244} Justice Blackmun also reasoned that the admission of Romano’s prior death sentence was unconstitutional, like the prosecutor’s statements in \textit{Caldwell},\textsuperscript{245} because of the unacceptable risk of jurors minimizing the importance of their roles.\textsuperscript{246}

III. JURY SENSE OF RESPONSIBILITY AND RELIABILITY IN DEATH PENALTY SENTENCING

In death penalty sentencing, a jury is required to have a sense of responsibility, meaning that the jury must feel responsible for making the death penalty decision.\textsuperscript{247} The jury cannot believe the decision for imposing the death penalty lies elsewhere.\textsuperscript{248} \textit{Caldwell} established and Ro-
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_Catholic University Law Review_ affirmed that a jury must have some sense of responsibility for its death penalty sentencing decision. The significant question is not whether the requirement exists after Romano, but rather, what is the scope of this requirement post-Romano?

### A. Demise of the Jury's Sense of Responsibility Requirement

In _Romano_, the major issue the Court faced was whether a capital defendant deserved to be sentenced by a jury that had a lessened sense of responsibility for its decision. The Court could have utilized _Romano_ as a vehicle to establish the principle that juries are required to have an unaltered sense of responsibility for making the difficult death penalty decision. However, the majority rejected an expansive interpretation of _Caldwell_ and instead limited _Caldwell_ claims to situations in which the jury is affirmatively misled.

The _Romano_ Court narrowed the Eighth Amendment claim of a jury's lessened sense of responsibility because it refused to include every situation when a capital jury actually has a diminished responsibility for its sentencing decision within such claim. Thus, there will be situations in which the jury does in fact have a diminished sense of responsibility for imposing the death penalty, but a defendant will not be able to claim an Eighth Amendment violation. As a result, _Romano_ eliminated many legitimate claims that could be brought but for the fact that the information presented to the jury was accurate. Therefore, in situations where

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249. See _supra_ notes 196-215 and accompanying text.

250. See _Caldwell_, 472 U.S. at 328-29. A jury's sense of responsibility becomes diminished when the jury believes another party is responsible for the determination of imposing the death penalty. See _id_. (stating a sentencing decision made by a sentencer who believes that the responsibility for determining the appropriateness of the death penalty lies elsewhere is impermissible).

251. _Romano_, 114 S. Ct. at 2008-09.

252. See _id_. at 2014 (Ginsburg, J., dissenting). Justice Ginsburg in her dissenting opinion emphasized that the _Caldwell_ principle of not allowing a capital sentencing jury to believe the determination for a death sentence lies with someone else does in fact cover Romano's case. _Id_.

253. _Id_. at 2010. The _Romano_ Court held that a jury must be "affirmatively misled . . . regarding its role in the sentencing process so as to diminish its sense of responsibility" to contravene the _Caldwell_ principle. _Id_.

254. See _id_. (limiting the _Caldwell_ claims to only those occasions when the jury is affirmatively misled).

255. See _id_. (disallowing a claim that the jury has a diminished sense of responsibility because the jury was not affirmatively misled).

256. See _id_. Justice Ginsburg in her _Romano_ dissent discusses how the jury's sense of responsibility is affected whenever there is a violation of the _Caldwell_ principle. _Id_. at 2015-16 (Ginsburg, J., dissenting).
accurate information lessens the jury’s sense of responsibility, the only protection available to a defendant is the Due Process Clause.\textsuperscript{257}

The Romano majority narrowed Caldwell for several reasons.\textsuperscript{258} First, the majority did not want the Court to intrude into decisions the states should make.\textsuperscript{259} Therefore, the majority refused to develop federal rules of evidence applicable to state court capital-sentencing proceedings.\textsuperscript{260}

\textsuperscript{257} See id. at 2012 (applying the Due Process Clause to the review of a sentencing phase of a death penalty trial); see also Linda E. Carter, \textit{A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness}, 52 OHIO ST. L.J. 195, 202-03 (1991) (illustrating that the Due Process Clause is an independent inquiry during the penalty phase of capital trials). It should be noted, however, that the due process inquiry failed to help Romano, and, as such, will be unlikely to help future defendants who claim the jury’s sense of responsibility was minimized. See Romano, 114 S. Ct. at 2012-13.

For the majority, however, at a minimum there is protection against fundamental unfairness by the Due Process Clause, so it was not necessary to extend Caldwell in further regulating the state’s sentencing proceedings. See id. at 2012 (stating “‘[t]he Caldwell rule was . . . added to [Donnelly’s] existing guarantee of due process protection against fundamental unfairness’”) (quoting Sawyer v. Smith, 497 U.S. 227, 244 (1990)). The test for a due process violation in a capital sentencing proceeding is whether the evidence “so infected the sentencing proceeding with unfairness as to render the jury’s imposition of the death penalty a denial of due process.” Id.; Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1974); see Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Darden v. Wainwright, 477 U.S. 168, 181 (1986).

\textsuperscript{258} Id. at 2012; see Bedsau, supra note 63, at 19 (discussing judicial deference to the legislature regarding the types of punishment that attach to offenses).


One concern of a centralized government power in capital sentencing, is that the federal government would be burdened with the responsibility of ensuring the accuracy of the death sentencing convictions. Eric M. Freedman, \textit{Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases}, 18 N.Y.U. REV. L. & SOC. CHANGE 315, 319-20 (1990-91). This centralization would not best protect individual liberty. Id. at 320. In addition, one problem of federalism is that it “is often ill-defined and unevenly applied.” Robson & Mello, supra note 84, at 91.

\textsuperscript{259} See Romano, 114 S. Ct. at 2009-10.

\textsuperscript{260} Id. at 2012; see Bedsau, supra note 63, at 19 (discussing judicial deference to the legislature regarding the types of punishment that attach to offenses).

In his dissenting opinion in Caldwell, then-Justice Rehnquist also alluded to his reluctance to develop an independent Eighth Amendment analysis for capital sentencing pro-
The *Romano* Court reasoned that under the Eighth Amendment the Court has imposed procedural limits on the states for death penalty sentencing.\(^{261}\) Thus, the majority approached *Romano*'s issue as strictly a substantive problem that the states are entitled to decide.\(^{262}\)

In addition, the *Romano* majority followed the current trend of expediting the death penalty process and not emphasizing the individual defendant's protection.\(^{263}\) The Court departed from the individualized sentencing requirement emphasized in the *Lockett* era.\(^{264}\) One reason for


262. See *id.* at 211 (disallowing the claim because the Court will not fashion evidentiary rules).


264. See, e.g., Payne v. Tennessee, 501 U.S. 808, 818 (1991). The Court declared that other factors having some bearing on the defendant's guilt and his personal responsibility may be considered in addition to the defendant's character and aspects of the crime. *Id.*
this trend can be attributed to the immense pressure both federal and state courts are experiencing to expedite the death penalty process.\textsuperscript{265} Consequently, defendants have less avenues available for successful appeals.\textsuperscript{266}

The Supreme Court has, in effect, created a difficult wall for defendants to surmount when challenging their death penalty verdicts beyond the trial level.\textsuperscript{267} The Romano Court closed an avenue for making a Caldwell claim because of federalism concerns and the current trend of eliminating protections of capital defendants.\textsuperscript{268} As a result, the Eighth Amendment is unlikely to protect a capital defendant when sentenced by a jury with a lessened sense of responsibility.\textsuperscript{269}

B. The Expansive Approach Advocated by the Dissent is Preferred

The proper approach to Caldwell claims dictates that the courts find an Eighth Amendment violation anytime the jury believed the responsibility for imposing the death penalty rested elsewhere.\textsuperscript{270} Otherwise, if a sentencing jury lacked a sense of responsibility the defendant's death sentence will not be reliable.\textsuperscript{271} Furthermore, the sentencing proceeding

One commentator argued that the Supreme Court has curtailed the impact of its earlier decisions and "even ... reverse[d] [its] earlier 'death-is-different' rulings." Richard J. Bonnie, Preserving Justice in Capital Cases While Streamlining the Process of Collateral Review, 23 U. Tol. L. Rev. 99, 103 (1991). Another commentator predicted the collapse of the "Gregg system" of eliminating arbitrariness because of the conservative majority on the Supreme Court. Gey, supra note 259, at 89.

265. Foley, supra note 263, at 211. Virginia Attorney General James S. Gilmore recently introduced legislation to accelerate the death penalty process. Virginia Death Penalty Appeals, WASH. POST, Jan. 24, 1995, at B7. The legislation even proposed to cut off funding to the Virginia Capital Representation Resource Center, which supplies legal services for death row inmates. Id. With respect to the death penalty being carried out, a University of Iowa law professor contended that "[t]he pressure is on for governors, judges, everyone to speed things up a lot." Tony Mauro & Mark Potok, Death Penalty Becoming "Real", USA TODAY, Dec. 7, 1994, at 3A (quoting David Baldus).

266. See Christopher E. Smith & Avis Alexandria Jones, The Rehnquist Court's Activism and the Risk of Injustice, 26 Conn. L. Rev. 53, 64-66 (1993) (explaining how the Rehnquist Court, through its denial to habeas corpus petitions, restricted access to federal courts).


269. See Welsh S. White, Prosecutors' Closing Arguments at the Penalty Trial, 18 N.Y.U. Rev. L. & Soc. Change 297, 306 (1990-91). Professor Welsh White argued that "improper prosecutorial arguments which do not violate Caldwell generally will not result in reversal of a defendant's death sentence unless the defendant can show that the argument poses some special danger to his constitutional rights." Id.


271. See infra notes 280-84 and accompanying text (explaining why the imposition of a death sentence would be unreliable).
would be balanced in favor of a death determination.272

1. A Diminished Sense of Responsibility Makes a Jury's Death Sentence Unreliable

Under traditional Eighth Amendment analysis, the Supreme Court provided a defendant facing the death penalty special considerations because death is different.273 One such consideration was the emphasis that the imposition of the death sentence be reliable. Both the Supreme Court and commentators have acknowledged that, under the Eighth Amendment, death penalty sentencing proceedings must be reliable.274 Thus, reliability is significant because the Court developed the reliability doctrine to ensure the constitutional imposition of the death penalty under the Eighth Amendment.275

In Romano, the dissent recognized the reliability requirement in evaluating the scope of what violates a capital jury’s sense of responsibility.276 On the other hand, the majority failed to consider that the irrevocable, final nature of the death penalty demands a greater degree of reliabil-

272. See infra notes 287-97 (illustrating how a capital sentencing proceeding would be balanced in favor of a death determination).

273. See supra notes 109-13, 136-38. As the Supreme Court pointed out, death is final and unique in that there is no rehabilitation and no opportunity for courts to correct mistakes in sentencing once the sentence has been carried out. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). Justice Stewart concluded that death is different from imprisonment and, as such, requires greater reliability. Id.; see also Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (finding that the death penalty is unique); Caldwell, 472 U.S. at 341 (vacating sentence because of the lack of reliability).

274. Justice Ginsburg emphasized that the need for reliability is the reason the diminution of the jury’s responsibility violates the Eighth Amendment. Romano, 114 S. Ct. at 2016 (Ginsburg, J., dissenting). Justice Ginsburg argued that Caldwell reasoned that the Eighth Amendment’s reliability requirement is violated by a diminished jury’s sense of responsibility. Id. The Caldwell Court reasoned that many capital sentencing limits are based on a concern that the imposition of the death penalty be reliable. Caldwell, 472 U.S. at 329. The Caldwell opinion cited many decisions that reflected and supported this viewpoint. Id.; see Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (finding that the Oklahoma statute violated the Eighth Amendment by not allowing the defendant to introduce mitigating factors); Lockett v. Ohio, 438 U.S. 586, 605-07 (1978) (plurality opinion) (finding the Ohio statute impermissibly prohibited evidence of certain mitigating factors); Woodson, 428 U.S. at 302-04 (plurality opinion) (holding that a mandatory death penalty statute violated the Eighth Amendment); Mello, supra note 29, at 304 (noting that “a capital sentencing scheme must meet the eighth amendment’s need for heightened reliability in the determination that death is the appropriate punishment in a specific case”); Jordan Steiker, The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty, 71 Tex. L. Rev. 1131, 1138 (1993) (suggesting that the Court recognized a principle of heightened reliability); see also William W. Hood, III, Note, The Meaning of “Life” for Virginia Jurors and its Effect on Reliability in Capital Sentencing, 75 Va. L. Rev. 1605, 1610-11 (1989) (discussing the reliability requirement).

275. Romano, 114 S. Ct. at 2015; Caldwell, 472 U.S. at 329.

ity.\textsuperscript{277} Sentencing reliability is highly significant because \textit{Caldwell}, based its holding on the assurance that the reliability requirement of the Eighth Amendment was followed.\textsuperscript{278} Furthermore, in \textit{Romano}, by evading the reliability requirement, the majority avoided questions about the detrimental practical effect of a jury's minimized sense of responsibility for its sentencing decision.\textsuperscript{279}

A jury with a diminished sense of responsibility cannot make a fair and reliable determination to impose the death penalty.\textsuperscript{280} The dissent illus-

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\textsuperscript{277} See id. at 2008-10.
\textsuperscript{278} \textit{Caldwell}, 472 U.S. at 341. In addition, it is important to note that Justice O'Connor, in her concurring opinion, disagreed with the part of the majority's opinion that dealt with the interpretation of \textit{California v. Ramos} and whether a jury has to be affirmatively misled regarding its role so as to diminish its responsibility. \textit{Id.} at 341-43 (O'Connor, J., concurring in part and in judgment). This point is significant because sections in the opinion contending that Eighth Amendment death penalty jurisprudence requires reliability is, in fact, joined by five justices. \textit{See id.} at 323-34 (stating that Justice Marshall was delivering the opinion for the Court, except for one part).

In \textit{Caldwell}, Justice Marshall's opinion pointed out that "many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." \textit{Id.} at 329. Justice Marshall linked the reliability requirement to the jury's sense of responsibility by first establishing that the courts have recognized that jurors treat their responsibility to determine the life or death of the defendant as an "awesome responsibility". \textit{Id.} at 329-30. Next, the belief that jurors in fact recognize their awesome responsibility allows the courts to view their capital sentencing decisions as consistent with the Eighth Amendment reliability need. \textit{Id.} at 330. Therefore, when the jurors' beliefs in their responsibility are affected in some way, the reliability of their sentencing decision is affected. \textit{See id.}

\textsuperscript{279} Chief Justice Rehnquist established a patterned unwillingness to examine the "modes of carrying out capital statutes not in violation of any constitutional provision." \textit{Bigel, supra} note 260, at 753. In fact, then-Chief Justice Rehnquist, dissenting in \textit{Caldwell}, did not agree that the Eighth Amendment required procedures that ensured the death sentence is the correct sentencing decision. \textit{Caldwell}, 472 U.S. at 349-51 (Rehnquist, J., dissenting). While evaluating the Eighth Amendment argument in \textit{Caldwell}, he argued that the emphasis that the Eighth Amendment demands reliability was merely dicta. \textit{Id.} at 350.

Contrast this approach with \textit{Caldwell}. In \textit{Caldwell}, using reliability as a basis, the Court provided four examples of how a jury's sense of responsibility could be affected in the determination of imposing the death penalty. \textit{Caldwell}, 472 U.S. at 330-33. Likewise, Justice Ginsburg, dissenting in \textit{Romano}, used examples of how the jury's lessened sense of responsibility could have affected their decision to impose the death penalty because the jury knew Romano already was sentenced to death. \textit{Romano}, 114 S. Ct. at 2015-16 (Ginsburg, J., dissenting).

\textsuperscript{280} In \textit{Caldwell}, Justice Marshall gave four specific reasons of how a jury with a diminished sense of responsibility could produce an unreliable death penalty decision. \textit{Caldwell}, 472 U.S. at 330-33. First, the appellate court is limited in what it may review and cannot confront and examine the defendant individually. \textit{Id.} at 330. Second, Justice Marshall acknowledged that a jury may "wish to 'send a message' of extreme disapproval for the defendant's acts." \textit{Id.} at 331. Here, if the jury wanted to send a message, the defendant would be sentenced to death, but its decision was not based on whether death was the appropriate sentence. \textit{Id.} at 331-32. Third, if the jury knows that the life sentence will be
trated examples of how a jury's death penalty decision would be adversely affected if the jury believed the death penalty decision lies elsewhere. The dissent argued that a jury knowing in advance that another jury had imposed the death penalty might be inclined to send a message and mete out the harshest sentence—the death penalty. Furthermore, the dissent observed that a juror who normally would hold out for a life sentence would be inclined to give in and vote for the death penalty. In addition, empirical studies suggest responsibility does influence decision-making. Under the Eighth Amendment, the impact of the jury's sense of responsibility on the reliability of a capital sentence should be considered. The dissent's position protected the defendant not be appealed, but the death sentence would be then the jury may chose to vote for the death sentence. Id. at 332. Lastly, because of the unfamiliar situation and difficult choice of making a death sentence determination, it is highly attractive for jurors to believe that the sense of responsibility for this difficult choice lies elsewhere. Id. at 332-33. Justice Marshall emphasized that it is easy to imagine that a divided jury could be persuaded by the presence of appellate review to impose the death penalty. Id. at 333.

In addition, the dissent in Romano offered examples of how a jury with a diminished sense of responsibility is impacted. Romano, 114 S. Ct. at 2015 (Ginsburg, J., dissenting). Justice Ginsburg cited several state cases that declared a jury may be swayed by the knowledge that “another jury had previously resolved the identical issue adversely to defendant.” Id. (quoting People v. Hope, 508 N.E.2d 202, 206 (Ill. 1986)). The Romano dissent also acknowledged two arguments Justice Marshall put forth in Caldwell, that of sending a message and reluctant jurors giving in when they believe that the appellate court is the actual decision-maker. Id. at 2015-16.

281. Romano, 114 S. Ct. at 2015-16 (Ginsburg, J., dissenting).

282. Id.

283. Id. One author reported that efforts are made to persuade a holdout juror to change his or her vote. Reid Hastie et al, Inside the Jury 232 (1983). The persuaders pay little attention to relevant case material, rather, extralegal issues are used to convince the holdout. Id.

284. Mello, supra note 29, at 321-22. Professor Michael Mello contends that “[t]wo studies support the conclusion that responsibility indeed influences decisionmaking” and affects deliberations. Id. These studies, however, are not uncontradicted. A different study indicates responsibility for the decision does not play a significant role. Id. at 324. Professor Michael Mello explains the impact of this study saying “[w]here the situation is a high stress one, however, like a capital sentencing decision, this experimental jury data gathered under distinctly different conditions of reality and gravity may be inapplicable.” Id. The Supreme Court, however, has shown an aversion toward the use of social studies that demonstrate serious flaws in capital sentencing decisions. William S. Geimer & Jonathan Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J. Crim. L. 1, 4 (1987-88). Furthermore, the Supreme Court may be skeptical and cautious in dealing with empirical data. See Paul S. Appelbaum, The Empirical Jurisprudence of the United States Supreme Court, 13 Am. J.L. & Med. 335, 346-47 (1987).

by ensuring a more reliable sentencing proceeding.  

2. The Scales Are Unfairly Tipped in Favor of a Death Sentence

A presumption in favor of death can handicap a defendant facing a death penalty sentencing hearing. Furthermore, a defendant sentenced by a jury with a lessened sense of responsibility has the scales unfairly tilted in favor of a death sentence. A defendant cannot correct this imbalance because of his or her inability to make a successful

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286. The majority failed to protect the defendant from the negative impact of a jury with a diminished sense of responsibility and the unreliability of the verdict. See Romano, 114 S. Ct. at 2015-16 (Ginsburg, J., dissenting). One death penalty lawyer, Sara Determan, exclaimed “[a]ny system which sacrifices the rights of persons who may be put to death at the altar of speed for speed’s sake is not a system of justice.” Gibbons, supra note 259, at 64-65 (quoting Sara-Ann Determan, Chairman, ABA’s Post-conviction Death Penalty Representation Project).

287. One study of Florida death penalty sentencing trials recognized that a significant number of jurors studied presumed that the death penalty was mandatory unless the defendant could persuade otherwise. Geimar & Amsterdam, supra note 284, at 40-42, 44-46. One juror, who was a member of a jury that sentenced a defendant to death, claimed the jury had no option but to vote for death. Id. at 45. The juror further stated: “Of course he got death. That’s what we were there for.” Id. at 46. Moreover, one commentator recognized that the “playing field” in death penalty sentencing cases is not level. See James E. Coleman, Jr., Litigating at the Speed Of Light: Postconviction Proceedings Under a Death Warrant, LITIG., Summer 1990, at 14. An argument has been made that in the reality of a capital sentencing proceeding, the defendant bears the burden of proving life, and furthermore, has both the burden of production and of persuasion. Geimer, supra note 267, at 287; cf. Amy Singer & Pat Maloney, Trials and Deliberations: Inside the Jury Room 230 (1992) (maintaining that in drug cases the burden of proof is actually on the defendant, and that the jurors wrestle with their own gut reactions and eventually forget the law).

Furthermore, poverty is an additional handicap for a capital defendant. See Richard Cohen, Sentenced to Die Because He Is Poor, WASH. POST, May 19, 1992, at A19 (stating, “[t]he aggravating circumstance that most contributes to the death penalty is what it has always been: poverty”) Id. Richard Cohen reasoned that Roger Coleman was sentenced to die because he could not afford a rich man’s lawyer who may have succeeded in mitigating his sentence. Id. In addition, Maryland State Senator Decatur W. Trotter acknowledged that “[t]here’s no question that the death penalty weighs heavily on the poor, the disadvantaged and black. This is acknowledged in every report that we read.” Sheridan Lyons, Death Row Cases Raise Questions of Bias, BALT. SUN, June 5, 1994, at B1.

Furthermore, Richard Burr, the litigation director for the federally financed Texas Resource Center, which handles appeals of capital cases, contended that the system of appointing counsel contributed to the imposition of the death penalty because court-appointed counsel is often inadequate. Texas County in Forefront in Executions, N.Y. TIMES, Aug. 7, 1994, at 31. Furthermore, the economic advantage of the government may thwart a fair jury trial. PABST, supra note 29, at 99.

288. See Romano, 114 S. Ct. at 2015-16 (Ginsburg, J., dissenting) (listing the ways a jury’s diminished sense of responsibility could affect the sentencing in a death penalty decision); see also Stephen P. Garvey, Note, Politicizing Who Dies, 101 YALE L.J. 187, 187 (1991) (finding that the responsibility for deciding whether to impose capital punishment is fragmented). The current system of capital sentencing encourages those at the front end,
Moreover, Romano allows the prosecutor to present irrelevant information to the jury which could affect its sense of responsibility. While prosecutors may attempt to utilize every possible advantage, allowing them to affect a jury's sense of responsibility should not be tolerated. In Romano, the dissent illustrated that the problem of prosecutors un-

The capital jury's role is important because, historically, the capital jury's authority has been "integationally connected to its basic role of safeguarding a criminal defendant from government oppression." Welsh S. White, Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial, 65 Notre Dame L. Rev. 1, 30 (1989). Some prosecutors, however, endeavor to minimize the jury's sense of responsibility by highlighting the role of others in the death penalty process. Steiker, supra note 274, at 1154. The widespread adoption of mandatory appellate review makes it easier for the prosecutor to "deflect 'ultimate' responsibility for a death verdict to the appellate courts." Id.

As an example of prosecutorial misconduct, in a recent case, an accused defendant brought a civil suit for damages against prosecutors for allegedly fabricating evidence in a highly publicized rape and murder trial. Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2610 (1993). In Buckley, the defendant accused the prosecutors of fabricating evidence because three independent studies failed to match the defendants boots and with the bootprints found so they brought in another expert "who was allegedly well known for her willingness to fabricate unreliable expert testimony." Id.
fairly influencing the jury is a legitimate concern. The Romano prosecutor refused to accept the defendant's stipulation and wanted the jury to know the petitioner was going to die for a previous crime. The jury did not need to know the petitioner received the death penalty because the defendant's stipulation would have shown the aggravating factor the prosecutor was trying to prove.

Thus, a jury's lessened sense of responsibility grants the prosecutor an advantage and tilts the defendant's sentence toward the imposition of the death penalty. The unfair advantage occurs because a jury's lessened sense of responsibility impacts the likelihood that the jury will impose the death penalty. This advantage nullifies the idea that capital sentencing proceedings are supposed to be extra reliable. The dissent's position would ensure a more fair, reliable process by which capital defendants are sentenced. Under the dissent's approach, the Eighth Amendment would protect the defendant whenever the jury's sense of responsibility is diminished.

3. The Bedrock Crumbles: The Demise of the Death is Different Doctrine

Historically, the principles of the death is different doctrine has guided
the evaluation of the death penalty. The death is different doctrine protected the capital defendant by demanding sentencing reliability. The Court, however, has begun to reverse the impact of earlier death is different rulings. In fact, in Romano, the Supreme Court failed to even acknowledge the severity of the death penalty and the higher scrutiny death penalty appeals should receive. The Supreme Court continues to weaken the death is different doctrine by failing to adhere to the requirement of higher scrutiny and the emphasis on reliability.

IV. Conclusion

After Romano v. Oklahoma, no workable sense of responsibility requirement exists under the Eighth Amendment for capital defendants. The Romano Court deviated from the death is different doctrine which previously ensured capital sentencing reliability. As a result, the Romano Court has unfairly tipped the scales against a defendant facing the death penalty. The Court has continued its trend in failing to provide the capital defendant with adequate protection by granting the States too much discretion in capital sentencing proceedings. In future capital appeals, the Court should emphasize the reliability of the sentence.

Kevin Michael Miller