PROSECUTORS' CLOSING ARGUMENTS AT THE PENALTY TRIAL

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INTRODUCTION

In death penalty cases, a defendant who has been convicted of a capital offense must also face a penalty trial where the court considers evidence both for and against imposition of the death penalty. During the penalty trial, both prosecution and defense introduce evidence of the aggravating or mitigating circumstances[1] surrounding the conduct of the defendant which led to his conviction. After the evidence has been presented, both prosecution and defense counsel are permitted to present argument to the jury. Despite the interests at stake, only recently have the courts begun to closely scrutinize the closing arguments of prosecutors in penalty trials for their prejudicial effect upon the jury.[2]

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1. Most jurisdictions provide that the sentencer should impose a sentence of death if and only if it is determined that at least one aggravating circumstance exists and the aggravating circumstance outweighs any mitigating circumstances. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9711 (Purdon 1982). The extent to which aggravating and mitigating circumstances are defined by statute as opposed to being left to the sentencer's discretion varies from jurisdiction to jurisdiction. *See generally* Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 307.

2. *See* W. WHITE, THE DEATH PENALTY IN THE EIGHTIES 93-95 (1987).

Sadly, this state of affairs reflects the lack of judicial supervision of closing arguments which has generally been the rule in criminal trials. In fact, according to Professor Francis Allen, "minimizing prosecutorial excesses is one of . . . [the] great unsolved problems in criminal law administration."[3] Typically, courts have allowed and do allow prosecutors to engage in considerable rhetorical excess in their closing arguments.[4] Moreover, even if a particular closing argument was deemed improper, appellate courts tended to resort to a variety of doctrines to avoid reversal of the defendant's conviction.[5] As a result, defense counsel's job of protecting her client from prejudicial statements of the prosecutor was difficult not only at the trial level, where the prosecutor was able to directly address the jury, but also at the appellate level, where a judge's sense of what actually occurred at trial is considerably diminished.

However, two decisions of the United States Supreme Court have marked a move towards closer scrutiny of the prosecutor's closing argument at the penalty trial. Taken together, *Caldwell v. Mississippi*[6] and *Darden v. Wainwright*[7] create the parameters within which defense counsel can argue that a prosecutor's closing statement establishes grounds for reversing a death sentence. This Article will first examine the holdings in *Caldwell* and *Darden*. It will then identify those prosecution arguments which, when objected to by the defense,[8] are likely to constitute reversible error.

I.
THE SUPREME COURT CASES

Any determination that a prosecutor's closing argument during a death penalty trial constitutes reversible error must begin with a consideration of the standards established by *Caldwell v. Mississippi*[9] and *Darden v. Wainwright*.[10] In *Caldwell*, defense counsel, in his closing argument at the penalty trial, told the jurors that they were confronted with the awesome responsibility of deciding whether the defendant would be granted life or death.[11] In response, the prosecutor asserted that this argument was unfair, telling the jury: "they

3. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 335 (1985).

4. *See generally* Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972).

5. *See id.* at 656-68.

6. 472 U.S. 320 (1985).

7. 477 U.S. 168 (1986).

8. *See, e.g.*, Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1972 (1989) (errors at trial not preserved by contemporaneous objection are barred in a collateral habeas corpus review unless petitioner can show cause and prejudice); Dutton v. Brown, 812 F.2d 593, 596 (10th Cir.), *cert. denied sub nom.* Dutton v. Maynard, 484 U.S. 836 (1987) (under Oklahoma law, improper remarks must be objected to at trial or they are waived).

9. 472 U.S. 320 (1985).

10. 477 U.S. 168 (1986).

11. 472 U.S. at 324 ("You can give him life or you can give him death. It's going to be your decision. . . . It is an awesome responsibility, I know — an awesome responsibility.").

would have you believe that you're going to kill this man and they know — they know your decision is not the final decision. . . . Your job is reviewable."[12] Defense counsel objected to the prosecutor's statement, but the judge ruled that it was proper to tell the jury that their decision was automatically reviewable.[13] The prosecutor then reiterated that defense counsel's argument was unfair, and that "they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court."[14]

In a 5-4 decision, the Supreme Court held that the defendant's death sentence was in violation of the eighth amendment because the sentencing jury had been led improperly to believe that the responsibility for determining the appropriateness of the defendant's death sentence rested elsewhere. Justice Marshall, in an opinion joined by Justices Brennan, Blackmun, Stevens, and O'Connor, mentioned several reasons why this kind of argument might cause bias at sentencing.[15] Among other reasons, he said that it might cause the sentencing jury to impose a death sentence out of a desire to avoid ultimate sentencing responsibility, "a factor [that is] wholly irrelevant to legitimate sentencing concerns."[16]

The majority also specifically considered the appropriate standard of review to be used in cases involving a *Caldwell* violation. Noting that the Court's death penalty decisions are premised on the assumption that the sentencing jury acts with an awareness of its "awesome responsibility,"[17] the majority stated:

> In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.[18]

This language indicates that a *Caldwell* violation mandates reversal of a death sentence unless it appears that the violation had no effect on the jury's sentencing decision.

Although Justice O'Connor joined in most of the Marshall opinion, she felt it was not improper for the judge or prosecutor to give the jury informa-

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12. *Id.* at 325.

13. *Id.* ("I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands.").

14. *Id.*

15. *Id.* at 330-33.

16. *Id.* at 332. Marshall voiced concerns that the jury might be more inclined to send a message of disapproval to the defendant, even if it was unsure that death was appropriate, reasoning that a "wrong" sentence would be reversed. Therefore, knowing death sentences are reviewable, a jury would impose the death penalty just for the purpose of having it reviewed. *Id.* at 331-32.

17. *Id.* at 341.

18. *Id.*

tion regarding its role in a capital sentencing scheme, provided the information was not misleading or inaccurate. For O'Connor, the prosecutor's argument in *Caldwell* was improper, not because it stated that the jury's decision was reviewable, but because it left them with an incomplete understanding of the appellate court's role. A jury hearing the prosecutor's argument and the judge's charge could easily form the mistaken impression that an appellate court would make a redetermination as to whether the death penalty was the appropriate sentence.[19]

In *Darden v. Wainwright*,[20] decided a year later, the Court considered a case in which the prosecutor made numerous inflammatory statements in his closing argument in the guilt phase of the capital case. For instance, he referred to the defendant as an "animal"[21] and stated that "[h]e shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash."[22] Most strikingly, perhaps, the prosecutor expressed the desire to see the defendant sitting at counsel table with his face blown away by a shotgun.[23]

In a 5-4 decision, the Court held in *Darden* that, although the prosecutor's closing argument was improper, it did not deprive the defendant of a fair trial.[24] The majority emphasized that "[t]he prosecutor's argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent."[25] "[M]uch of the objectionable content," observed the Court, "was invited by or was responsive to the opening summation of the defense."[26] The majority also emphasized the strength of the evidence against the defendant[27] and the effect of both the defense counsel's final closing argument[28] and the judge's charge.[29]

Beyond stating that the prosecutor's comments did not render the defendant's trial fundamentally unfair, the majority did not articulate a precise standard of review. Clearly, however, the *Caldwell* standard — requiring reversal of a defendant's death sentence unless the prosecution can show that its improper argument had no effect on the sentencing decision[30] — was not applicable to the facts of *Darden*. In distinguishing *Caldwell*, the majority stated that "*Caldwell* is relevant only to certain types of comment — those that mislead the jury as to its role in the sentencing process in a way that allows the

19. *Id.* at 342-43 (O'Connor, J., concurring in part and concurring in the judgment).
20. 477 U.S. 168 (1986).
21. *Id.* at 179.
22. *Id.* at 180 n.12.
23. *Id.*
24. *Id.* at 180-83.
25. *Id.* at 181-82.
26. *Id.* at 182.
27. *Id.*
28. *Id.* The Court observed that defense counsel was able to make an effective rebuttal by presenting many of the prosecution's comments in an unfavorable light.
29. *Id.* The judge instructed the jury to make a decision based solely on the evidence and not on counsels' arguments.
30. *See supra* text accompanying notes 18-19.

jury to feel less responsible than it should for the sentencing decision."[31]

As a result of *Caldwell* and *Darden*, defense counsel has some basis for challenging a prosecutor's closing argument and winning reversal of a defendant's death sentence. Under *Caldwell*, if defense counsel can convince the court that the prosecutor's statements have misled the jury as to its role in sentencing or the appellate court's role in reviewing the jury's decision, then the death sentence must be reversed. *Darden*, on the other hand, implies that any improper statement that violates the defendant's right to a fair trial warrants reversal of a death sentence, though winning a reversal on this broader ground will be more difficult. That is, *Darden* affords defense counsel greater latitude for grounding a reversal argument, while *Caldwell* sets out a very clear, though limited, basis for overturning a death sentence. The next two sections of this Article will discuss, in light of these two decisions, possible defense challenges to a prosecutor's statements. The Article will also consider the difficulties defense counsel is likely to encounter in making such arguments.

II.
ARGUMENTS IN VIOLATION OF *CALDWELL*

Since the Supreme Court decided *Caldwell*, the courts of appeals in various circuits have identified two types of prosecutors' arguments which potentially violate *Caldwell*. They are: (1) those that inform the jury that its decision to sentence the defendant to death will be reviewed by an appellate court, and (2) those that tell the jury that its sentencing decision need not be accepted by the trial judge. A third type of prosecutors' arguments which may potentially violate *Caldwell* but which has not been identified by the courts of appeals consists of those arguments that inform the jury that it should arrive at a sentencing decision by engaging in a kind of mental arithmetic.

A. Arguments Stating the Death Penalty Decision Will Be Reviewed by an Appellate Court

In *Wheat v. Thigpen*,[32] the prosecutor outlined the process of state and federal review in his closing argument and then said, "[J]ust remember this, if your verdict is that of the death penalty, that's not final."[33] He also informed the members of the jury that if they made a mistake, one of the reviewing courts would send the case back for retrial.[34]

The Fifth Circuit held that this argument was in violation of *Caldwell*.[35]

31. 477 U.S. at 183 n.15. The Court also noted that while the questionable comments in *Caldwell* were made by the prosecutor during the sentencing phase of the capital case, the statements in *Darden* were made during the guilt phase. *Id.* Furthermore, in *Caldwell*, the trial judge approved of the prosecutor's comments. *Id.*

32. 793 F.2d 621 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987).

33. *Id.* at 628.

34. *Id.*

35. *Id.* at 629.

Even though the description of the appellate process may have been technically accurate, it still misled the jury into believing that the responsibility for imposing the death penalty rested elsewhere.[36] By this reasoning, any statement by the prosecutor informing the jury that its decision to impose the death penalty will not be final constitutes a violation of *Caldwell*, unless either the prosecutor or the judge accurately delineates the very limited extent of appellate review.[37]

B. Arguments Informing the Jury that the Judge Has Final Sentencing Authority

A more difficult issue arises when the prosecutor accurately tells the jury at the penalty trial that the judge has final responsibility for imposing the sentence. This situation is particularly likely to occur in Florida, because under Florida law, the jury renders an advisory verdict of life or death and the judge makes the final sentencing determination.[38] In their closing penalty trial arguments, Florida prosecutors have frequently told juries, in one way or another, "your sentence is advisory only and the judge makes the final decision."[39]

Although this instruction is technically accurate, it is misleading and therefore arguably in violation of *Caldwell* because it fails to tell the jury that its recommendation will be entitled to great weight.[40] Based on Eleventh Circuit cases, the question of whether this kind of instruction will be deemed a violation of *Caldwell* depends on the precise language of both the prosecutor's argument and the judge's instructions to the jury.

The two leading cases that frame this issue are *Mann v. Dugger*[41] and *Harich v. Dugger*.[42] In *Mann*, the prosecutor told the jury in his closing argu-

36. *Id. See also* Jones v. Butler, 864 F.2d 348, 360 (5th Cir. 1988) ("[t]he prosecutor may not minimize the jury's sense of responsibility for a death sentence by referring to the availability of appellate review"), *cert. denied*, 109 S. Ct. 2090 (1989).

37. On the basis of Justice O'Connor's analysis, a reference to appellate review would not be unconstitutional so long as the prosecutor or trial judge accurately informed the jury of the "limited nature of appellate review." Caldwell v. Mississippi, 472 U.S. 320, 342 (1985) (O'Connor, J., concurring in part and concurring in the judgment).

38. FLA. STAT. § 921.141 (1983). Alabama and Indiana are two other states with jury override statutes. In both, the judge is required to consider, though not follow, the jury's advisory sentence. *See* ALA. CODE § 13A-5-47(e) (1975) ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."); IND. CODE § 35-50-2-9(e) (1981) ("[t]he court shall make the final determination of the sentence, after considering the jury's recommendation"); *see also* 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, 288 (1989).

39. *See, e.g.*, Mann v. Dugger, 844 F.2d 1446, 1455-56 (11th Cir. 1988) (prosecutor repeatedly told the jury that its task was only to render an "advisory" recommendation), *cert. denied*, 109 S. Ct. 1353 (1989) .

40. Although occasionally downplayed by prosecutors, advisory opinions are not taken lightly by the bench. For example, after the jury announced its recommendation of death in *Mann*, the judge noted for the record that "[the] court, as required by law, will give great weight to the recommendation of the jury." *Id.* at 1456.

41. 844 F.2d 1446 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1353 (1989).

42. 844 F.2d 1464 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1355 (1989).

ment that "the ultimate responsibility for the imposition of the sentence rests with [the judge]. . . . He may have the opportunity to learn more before he imposes a sentence."[43] In his instructions to the jury, the judge refused a defense instruction informing the jury that its recommended sentence would be entitled to great weight. Instead, he reiterated that "the final decision as to what punishment shall be imposed is the responsibility of the judge."[44] The judge also told the jurors that whether or not a majority recommendation of death or life imprisonment could be determined by a single ballot should not influence them "to act hastily or without due regard for the gravity of these proceedings."[45] The jury subsequently announced a recommendation of death.[46]

In finding a *Caldwell* violation, the Eleventh Circuit reviewed both the prosecutor's comments and the trial judge's charge. According to the court, the prosecutor's statements about the jury's advisory role in sentencing and his failure to explain the weight of its recommendation could "mislead or at least confuse the jury as to the nature of its sentencing responsibility under Florida law."[47]

The court also concluded that "the trial judge's comments did not correct the false impression left by the prosecutor."[48] It observed that the judge's only potentially corrective statement was the admonition to the jury to "proceed with due regard to the gravity of the matter."[49] Noting that "[t]he statement would do little if anything to change a juror's misapprehension about the *effect* of the jury's decision,"[50] the court held that the combination of the prosecutor's misleading statements and the judge's failure to correct the resulting misimpression established a *Caldwell* violation.

Harich v. Dugger[51] was similar in some respects to *Mann v. Dugger*. As in *Mann*, the prosecutor told the jury during voir dire that its sentencing decision was only a recommendation and the judge had final sentencing authority.[52] The trial judge made several statements similar to those made by the prosecutor, both at the guilt phase and at the sentencing phase. In his final instructions to the jury, the judge said:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence, based upon your determi-

43. 844 F.2d at 1456. The prosecutor also made similar statements during the pre-trial voir dire. *Id.* at 1455.
44. *Id.* at 1456.
45. *Id.*
46. *Id.*
47. *Id.* at 1457.
48. *Id.* at 1458.
49. *Id.*
50. *Id.* (emphasis in original).
51. 844 F.2d 1464 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1355 (1989).
52. *Id.* at 1474.

> nation as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.[53]

However, *Harich* differed from *Mann* in at least two respects. First, at the voir dire, the prosecutor did advert to the fact that the jury's sentencing recommendation was "a very vital part of the proceedings."[54] Moreover, defense counsel in his closing argument told the jury that, although the judge alone determines the sentence, their sentencing recommendation carries great weight.[55]

In concluding that no *Caldwell* violation was established in *Harich*, the Eleventh Circuit addressed the *Caldwell* claim in a cursory fashion, making no effort to distinguish it from *Mann*. The majority opinion merely stated that the challenged statements would not mislead the jury as to its role in sentencing because "[n]either the prosecutor nor the trial judge implied that the jury's recommendation was superfluous."[56]

The five-judge concurrence[57] gave more thoughtful consideration to Harich's *Caldwell* claim. Given the prosecutor's reference to the jury's vital role and defense counsel's unchallenged statement regarding the great weight of the jury's recommendation, the concurrence concluded the prosecutor had not misled the jury as to the importance of its sentencing responsibility.[58] The concurrence also noted that the judge's instructions did not "disturb the nonmisleading impression"[59] created by the prosecutor and defense counsel.

Based on *Mann* and *Harich*, it seems that the Eleventh Circuit's assessment of *Caldwell* violations — both in this particular context and in general — will depend on a detailed examination of the entire record. A mere showing that the prosecutor made a comment likely to mislead the jury as to its sentencing responsibility will not be sufficient. Instead, the defense must show that either: (1) the prosecutor's comments, taken as a whole, would be likely to mislead the jury as to its sentencing responsibility and the judge failed to correct this impression; or (2) the judge affirmatively misrepresented the nature of the jury's responsibility in sentencing.[60]

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53. *Id.*

54. *Id.* at 1476 (Tjoflat, J., concurring).

55. *Id.*

56. *Id.* at 1475.

57. *Id.* Judge Tjoflat, who wrote the concurring opinion for five judges in *Harich*, also wrote the majority opinion for seven judges in *Mann*. Two judges who joined Judge Tjoflat's opinion in *Mann* dissented in *Harich*, finding that a *Caldwell* violation occurred in both cases. Thus, it appears that a majority of the court did not agree with the *Harich* majority's analysis of the *Caldwell* issue.

58. *Id.* at 1477-78.

59. *Id.* at 1478.

60. *Id.*; *see also* Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986) (although the prosecutor's argument might have misled the jury, the trial court's instructions corrected the error), *cert. denied*, 480 U.S. 911 (1987). Other circuits have taken similar approaches. For example,

C. *Arguments Informing the Jury that It May Engage in a Kind of Mental Arithmetic*

In his examination of prosecutors' closing arguments at the penalty trial, Professor Robert Weisberg has observed that some prosecutors try "to make the case for death in the most lawyerly, legalistic, dispassionate form."[61] He explains that:

> [I]f the formula of fact-finding produces a certain result, the jury has a duty to vote for death. But the prosecutor does not emphasize legal duty as such, but rather legal duty as a reassuring escape from the anxiety of moral choice. The prosecutor's job is essentially to help the jurors realize that their apparently painful choice is no choice at all — that the law is making it for them.[62]

A prosecutor adopting this rhetorical strategy will often write the possible aggravating and mitigating circumstances on a blackboard and then tell the jurors that their job is simply to engage in a kind of mental arithmetic in which they weigh the aggravating and mitigating circumstances. The prosecutor will then end by stating that if the "scale tips at all towards the factors in aggravation outweighing the circumstances in mitigation, then you are bound by law to impose the sentence of death in this case."[63]

Arguments of this type ostensibly violate *Caldwell*. To the extent that the argument suggests that the jury must mechanically determine whether there is a greater number of aggravating or mitigating circumstances, it is, of course, inaccurate. The sentencer may properly determine that in view of one mitigating circumstance the defendant should not be sentenced to death, despite the existence of numerous aggravating circumstances.[64]

More importantly, this kind of argument impermissibly diminishes the jury's sense of responsibility by suggesting that the sentencing determination is based on quantifiable factual findings rather than an individualized determination of whether the particular defendant before it should be sentenced to death. In a line of eighth amendment decisions beginning with *Woodson v. North Carolina*,[65] the Supreme Court has held that the latter kind of sentenc-

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in Hopkinson v. Shillinger, 888 F.2d 1286, 1296 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 3256 (1990), the Tenth Circuit ruled that the trial court's formal, written instructions to the jury that it was the final decisionmaker negated any possible prejudice resulting from the prosecutor's improper statements.

61. Weisberg, *supra* note 1, at 375.

62. *Id.* at 375-76.

63. *Id.* at 378.

64. Under Lockett v. Ohio, 438 U.S. 586 (1978), and its progeny, a penalty jury must be allowed to decide for itself whether any evidence pertaining to the crime or the character of the defendant should be considered a mitigating circumstance. Moreover, since the jury may determine the weight of each mitigating circumstance, it could properly find that one mitigating circumstance outweighs all of the aggravating circumstances established by the prosecutor. *See generally* Weisberg, *supra* note 1, at 373-74.

65. 428 U.S. 280 (1976).

ing decision is constitutionally required.[66] According to the Court, an argument that suggests the jury is required to make its sentencing decision on the basis of discrete factual findings is calculated to cloud the jury's awareness of its "truly awesome responsibility"[67] in capital sentencing. Thus, the "mental arithmetic" argument should be deemed a violation of *Caldwell* since it misrepresents the jury's capital sentencing role "in a way that allows the jury to feel less responsible than it should for the sentencing decision."[68]

III.
OTHER IMPROPER CLOSING ARGUMENTS

In view of the lenient standard of review articulated in *Darden v. Wainwright*,[69] improper prosecutorial arguments which do not violate *Caldwell* will generally 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. Both the Supreme Court and lower courts have identified several categories of arguments that may pose such a danger: arguments that relate to the particular characteristics of the victim; arguments that implicate the defendant's constitutional right to remain silent; arguments that suggest that an authoritative source has determined that the death penalty is appropriate; and arguments that misrepresent the jury's sentencing role. Each is addressed separately below.

A. Arguments that Relate to the Particular Characteristics of the Victim

In *Booth v. Maryland*,[70] the Supreme Court held that the use of "victim impact statements"[71] at the penalty stage of a capital trial violated the principle that a sentence of death must be related to the moral culpability of the defendant. In *South Carolina v. Gathers*,[72] decided two years later, the Court extended *Booth* to a case involving argument rather than testimony. In *Gathers*, the prosecutor's closing argument at the penalty trial focused on cards that were in the victim's possession at the time of his death.[73] The prosecutor

66. *See also* Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

67. Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

68. Darden v. Wainwright, 477 U.S. 168, 183 n.15; *see supra* text accompanying note 31.

69. 477 U.S. 168 (1986); *see supra* text accompanying notes 25-26.

70. 482 U.S. 496 (1987).

71. In *Booth*, the prosecutor read a "victim impact statement" [hereinafter VIS] to the jury during the sentencing phase of the defendant's capital trial. The VIS, required by Maryland statute to be included in all felony pre-sentence reports, contained interviews with the victim's family members about the profound effects the murders had had on their lives. *Id.* at 498. The Court held that the VIS contained irrelevant information and created "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 503.

72. 109 S. Ct. 2207 (1989).

73. These cards had been entered into evidence without objection. Apparently, the victim's killers scattered them around the victim's body while they were rummaging through his belongings in an attempt to find something of value. *Id.* at 2209.

read from a prayer written on a card that the victim carried in his wallet[74] and also referred to the fact that the victim carried a voter's registration card.[75]

In a 5-4 decision, the Court reversed the defendant's death sentence on the basis of the prosecutor's comments. Arguments that pertain to characteristics of the victim that were not known to the defendant, the Court ruled, are constitutionally suspect because they could result in the jury imposing the death penalty on the basis of factors that are "irrelevant to the decision to kill."[76] Following this analysis, the Court concluded that "the [prosecutor's] statement is indistinguishable in any relevant respect from [the witnesses' testimony] in *Booth*."[77] The Court also observed, conversely, that characteristics of the victim that were known to the defendant and thus relevant to the circumstances of the crime could properly be the subject of comment by the prosecutor.[78]

Gathers is noteworthy in that it reversed the defendant's death sentence on the basis of the prosecutor's argument, without exploring the question of whether the argument was so improper as to deny the defendant a fair trial. Read broadly, the case may be interpreted as holding that a closing argument pertaining to the victim, that is not relevant to the particular circumstances of the crime, will be grounds for reversal of the death penalty providing the argument is harmful to the defendant. At a minimum, the case establishes that prosecutorial arguments relating to the victim constitute an area of special sensitivity.

Prosecutors in fact frequently employ rhetorical strategies which invite the jury to empathize with the victim or the victim's family. For example, in *Kordenbrock v. Scroggy*,[79] the prosecutor commented that "the victim was lying on a slab in a morgue and that somewhere out there today the rain falls on the victim's grave."[80] Moreover, in speaking of the victim's last day, the prosecutor said "little did the victim know that that would be the last time he would dress himself"[81] and he described the victim's garments as his "death shroud."[82] Similarly, in *Byrne v. Butler*,[83] the prosecutor directed the jurors to think about the victim's feelings and asked them to compare the kind of person the victim was with the kind of person the defendant is.[84] And in

74. The prayer, entitled "The Game Guy's Prayer," read in part, "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got." *Id.*

75. *Id.* at 2210.

76. *Id.* at 2210-11 (quoting Booth v. Maryland, 482 U.S. 496, 505 (1987)).

77. *Id.* (citing Booth v. Maryland, 482 U.S. 496 (1987)).

78. *Id.* at 2211.

79. 680 F. Supp. 867 (E.D. Ky. 1988), *aff'd*, 889 F.2d 69 (6th Cir. 1989), *vacated*, 896 F.2d 1457 (6th Cir. 1990) (en banc).

80. *Id.* at 895.

81. *Id.*

82. *Id.*

83. 845 F.2d 501 (5th Cir.), *cert. denied*, 487 U.S. 1242 (1988).

84. *Id.* at 510.

Daugherty v. Dugger,[85] the prosecutor referred to the absence of the victims at Christmastime and said that if the defendant were given life imprisonment rather than the death sentence, "the tears of the victims will flow again."[86] Based on the Supreme Court's analysis in *Gathers*, each of these arguments should constitute grounds for reversing a defendant's death penalty in the absence of a showing that the argument had no effect on the jury's sentence.[87]

B. Arguments that Implicate the Defendant's Constitutional Right to Remain Silent

In justifying the lenient standard of review adopted in *Darden v. Wainwright*, the majority stated that the prosecutor's closing argument in that case did not "implicate other specific rights of the accused such as . . . the right to remain silent."[88] This suggests that an argument that does implicate the defendant's right to remain silent will be treated more strictly. Moreover, earlier cases, starting with *Griffin v. California*,[89] developed the principle that a prosecutor's comment on the defendant's failure to testify at the guilt trial will result in reversal of the defendant's conviction, unless it appears that the improper argument "did not contribute to the verdict obtained."[90] Extending that logic, if a defendant can show that a prosecutor's closing argument in the penalty trial infringes upon his constitutional right to remain silent, the defendant's death penalty should be reversed in the absence of a showing that the argument did not contribute to the imposition of that penalty.

When will a closing penalty trial argument infringe upon a defendant's right to remain silent? One such instance occurs when the prosecutor tells the jury that the defendant's total silence (at both the guilt and penalty stages) may be considered as evidence of his lack of remorse.[91] The government might attempt to distinguish this situation from *Griffin* on the ground that the prosecutor is not asking the jury to use the defendant's silence to incriminate him, but only to draw an inference that is adverse to him. This argument, however, is not sound in the context of a penalty trial, where the ultimate issue to be determined by the jury is whether the defendant deserves to live or die. Any evidence that suggests the propriety of the death penalty, such as allusions to the defendant's lack of remorse, is inherently incriminating. Indeed, asking the penalty jury to infer lack of remorse from silence is directly analogous to asking the guilt jury to infer guilt from silence. Both arguments equally violate the defendant's fifth amendment privilege.

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85. 699 F. Supp. 1517 (M.D. Fla. 1988).

86. *Id.* at 1522.

87. All of these cases were decided before *Gathers*. In each of them, the lower court considered and rejected the contention that the defendant's death penalty should be reversed under Booth v. Maryland, 482 U.S. 496 (1987).

88. 477 U.S. 168, 182 (1986).

89. 380 U.S. 609 (1965).

90. Chapman v. California, 386 U.S. 18, 24 (1967).

91. *See, e.g.*, People v. Ramirez, 98 Ill. 2d 439, 445, 457 N.E.2d 31, 37 (1983), *cert. denied*, 481 U.S. 1053 (1987).

A more complex issue arises when the defendant testifies for a limited purpose at the penalty trial and the prosecutor asks the jury to draw an adverse inference from his silence on other issues. In *Commonwealth v. Travaglia*,[92] for example, one of the defendants did not testify at the guilt stage of the capital trial and was found guilty of first-degree murder, a capital offense. At the penalty stage, the defendant testified for the limited purpose of explaining his troubled family background. In closing argument, the prosecutor commented on the defendant's failure to testify about the crime charged. He told the jurors that they should "consider [the defendant's] arrogance" because he "didn't even have the common decency to say I'm sorry for what I did."[93]

When a defendant testifies as to a collateral matter at the guilt phase, the prosecutor is not permitted to comment adversely upon his refusal to testify on the merits of the charge against him.[94] A similar rule should apply at the penalty trial, particularly in light of the Court's holding in *Estelle v. Smith*.[95] In that case, the Court ruled that the fifth amendment privilege against self-incrimination applies at the penalty stage of a capital trial.[96] Thus, the prosecutor's adverse comment regarding the defendant's decision to testify only on a collateral issue likewise should be deemed a violation of the defendant's constitutional rights.

The collateral issue rule is premised on the view that a defendant should be permitted to testify to an issue that is not material to guilt without forfeiting the protection afforded by *Griffin*. The government might argue that the rule should not apply at the penalty trial because the defendant has already been adjudicated guilty of the crime. However, in *Malloy v. Hogan*,[97] the Supreme Court held that a criminal conviction does not negate the defendant's privilege against self-incrimination as to the underlying criminal transaction. That rule is especially appropriate where a capital defendant's conviction stands a chance of being reversed and any incriminating testimony given by him at the penalty trial might be used against him at a subsequent retrial. Therefore, even at the penalty trial, a defendant should be permitted to testify as to a collateral issue without affording the prosecutor an opportunity to argue that the jury may draw an adverse inference of guilt from the defendant's silence on other issues.

C. *Arguments that Suggest an Authoritative Source Has Deemed the Death Penalty Appropriate*

In *Drake v. Kemp*,[98] the prosecutor read to the jury excerpts from two

92. 502 Pa. 474, 467 A.2d 288 (1983), *cert. denied*, 467 U.S. 1256 (1984).
93. *Id.* at 498, 467 A.2d at 300.
94. *See* Calloway v. Wainwright, 409 F.2d 59 (5th Cir. 1969), *cert. denied*, 395 U.S. 909 (1969).
95. 451 U.S. 454 (1981).
96. *Id.* at 462-63.
97. 378 U.S. 1 (1964).
98. 762 F.2d 1449 (11th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

nineteenth century Georgia Supreme Court opinions in his closing penalty trial argument. The gist of the opinions was that failure to impose the death penalty is equivalent to abdicating one's duty to society. A portion of the prosecutor's argument ran as follows:

> If your Honor please, in *Eberhart v. State*, . . . the Justice of the Supreme Court of Georgia said this, in connection with the death sentence for murder: "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at last about to suffer for a crime."[99]

The Eleventh Circuit held that this argument was improper, stating that any argument which asserted that mercy should not be considered when determining whether to impose the death penalty is a misrepresentation of the jury's power of discretion during the sentencing process.[100] Moreover, the court held that the prosecutor's impropriety in reading from the Georgia Supreme Court decisions rendered the defendant's sentencing hearing fundamentally unfair, even though this was the only improper argument presented.[101] In reaching this conclusion, the court emphasized that the prosecutor's attribution of this factually misleading and legally inaccurate view of capital sentencing to the Georgia Supreme Court was highly prejudicial because it "created a severe danger that [the jury] would defer to such an expert legal judgment in their choice of penalty."[102]

Drake therefore establishes that a penalty trial argument that suggests an authoritative source has deemed the death penalty appropriate is reversible error. Accordingly, *Drake* should also apply when the prosecutor invokes *any* authoritative source, including her own judgment or expertise, in an effort to persuade the jury to impose the death penalty.

It is far from uncommon for a prosecutor to interject her own judgment or opinion into the sentencing proceeding. Frequently, in their closing penalty arguments, prosecutors state that they rarely seek the death penalty.[103] Indeed, sometimes they even state that this is the first case in which they have sought the death penalty.[104] The Eleventh Circuit has held that such arguments are improper; however, to date it has not reversed a death penalty on

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99. *Id.* at 1458.

100. *Id.* at 1459.

101. *Id.* at 1461. The court found that quoting the language from the old cases " 'undermine[d] confidence in the outcome' of [the] sentencing proceeding." *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

102. *Id.* at 1460.

103. *See, e.g.*, Tucker v. Kemp, 762 F.2d 1480, 1484 (11th Cir.) (prosecutor told jury he requested death penalty less than 12 times in the years he had been in office), *vacated*, 474 U.S. 1001 (1985), *aff'd*, 802 F.2d 1293 (11th Cir. 1986), *cert. denied*, 480 U.S. 911 (1987); Brooks v. Kemp, 762 F.2d 1383, 1439 (11th Cir. 1985) (prosecutor told jury "[i]n the seven and one-half years that I have been a district attorney, I believe that we have asked for it less than a dozen times"), *vacated* 478 U.S. 1016 (1986), *aff'd* 809 F.2d 700 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

104. *See infra* note 107 and accompanying text.

this basis.[105]

In *Newlon v. Armontrout*,[106] the Eighth Circuit considered the propriety of another argument filled with the prosecutor's judgments and opinions. In that instance the prosecutor stated, "I've been a prosecutor for ten years and I've never asked a jury for a death penalty, but I can tell you in all candor, I've never seen a man who deserved it more than Rayfield Newlon."[107] The prosecutor also made other improper arguments, including reassurances to the jury that appellate review would follow if it returned with a death sentence.[108] The Eighth Circuit affirmed the federal district court's holding that the combination of these arguments rendered the penalty trial fundamentally unfair.[109]

In affirming, the court of appeals did not single out any particularly prejudicial aspect of the prosecutor's argument. It merely observed that the district court had correctly held that several portions of the argument were improper.[110] The court did specifically note, however, that the evidence against the defendant in this case was no more overwhelming than the evidence against the defendant in *Drake v. Kemp*.[111] By adopting *Drake* as the yardstick, the court implicitly suggested that the prejudicial impact of the improper argument in *Newlon* was comparable to that in *Drake*.

This conclusion seems eminently sound. If anything, the sentencing jury may view the prosecutor as an even more reliable authority than the state supreme court. Unlike the state court, the prosecutor is physically present and personally known to the jury. Moreover, jurors might give special credence to the prosecutor's views at the penalty trial because they have already accepted her position at the guilt trial.[112] In any event, the prosecutor's

105. In Tucker v. Kemp, 762 F.2d at 1484, the prosecutor stated that he had sought the death penalty fewer than a dozen times while he had been in the District Attorney's Office. Nevertheless, the Eleventh Circuit found there was ample evidence of statutory aggravating circumstances and that the improper argument did not affect the threshold finding. *Id.* at 1488. In Brooks v. Kemp, 762 F.2d at 1395, the Eleventh Circuit found that a similar statement, though improper, was mitigated by the judge's jury instructions, the defense counsel's closing argument, and the evidence against the defendant. *See also* Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985), *cert. denied sub nom.* Johnson v. Dugger, 484 U.S. 872 (1986).

106. 885 F.2d 1328 (8th Cir. 1989), *cert. denied sub nom.* Delo v. Newlon, 110 S. Ct. 3301 (1990).

107. *Id.* at 1339.

108. *Id.* at 1336.

109. *Id.* at 1338.

110. The Eighth Circuit accepted the district court's findings that the prosecutor made no fewer than seven improper comments. In addition to the two already discussed, the prosecutor emphasized his authority as "the top law enforcement officer in St. Louis County." *Id.* at 1342. He compared the defendant to Charles Manson, the Son of Sam, and Richard Speck. *Id.* He likened the jury's role to a justifiable killing in a "street war." *Id.* Finally, he compared imposition of the death penalty to defending the life of a third person. *Id.*

111. *Id.* at 1338 (citing Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986)); *see supra* notes 98-102 and accompanying text.

112. *See* W. WHITE, *supra* note 2, at 97 ("Because the jury has accepted the prosecutor's position at the guilt stage, they are especially likely to view the prosecutor as more credible than defense counsel and to give greater weight to any comments he may make during closing argument.").

suggestion that an authoritative source has already declared the death penalty appropriate should be held improper and should mandate reversal because, as in *Caldwell*, it creates a grave risk that the jury will defer to that authority in making its sentencing determination.

D. Arguments that Overstate the Jury's Sentencing Role

In several cases, lower courts have indicated that penalty arguments that exaggerate the role of a sentencing jury in crime prevention are especially problematic.[113] A prime example of such an argument is the "war on crime" speech that is often used by Georgia prosecutors at penalty trials.[114] In *Brooks v. Kemp*,[115] the prosecutor gave the following version of this speech:

> Let me say this to you, during my lifetime this country has been in three wars, each war we've taken our young men down to the age of seventeen, we've trained them, we've put guns in their hands, we've taught them how to kill the enemy, and we've sent them overseas, and they have killed other human beings who are enemies of our country, and when they did a good job of killing them, we decorated them and gave them citations, praised them for it.
>
> Well, I say to you that we're in a war again in this country, except it's not a foreign nation, it's against the criminal element in this country, that's who we're at war with, and they are winning the war, is what's so bad, and if you don't believe they are winning, just look about you.
>
> . . . .
>
> And, if we can send a seventeen-year old young man overseas to kill an enemy soldier, is it asking too much to ask you to go back and vote for the death penalty in this case against William Brooks, and I submit to you that he's an enemy, and he's a member of the criminal element, and he's our enemy, and he's an enemy of the law abiding citizens and the people who want to live peacefully in this country, and who want to be secure in their persons and their homes.[116]

The Eleventh Circuit held the "war on crime" speech improper. In determining whether the speech provided sufficient grounds for reversing the death penalty, it observed that the speech was "troubling" in that it suggested that the jury should forego an individualized consideration of the defendant's case

113. *See generally* Gates v. Zant, 863 F.2d 1492 (11th Cir. 1989); Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), *cert. denied sub nom.* Delo v. Newton, 110 S. Ct. 3301 (1990); Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987), *cert. denied*, 485 U.S. 929 (1988); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), *vacated*, 478 U.S. 1016 (1986), *aff'd*, 809 F.2d 700 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

114. *See, e.g.*, Gates v. Zant, 863 F.2d at 1492; Brooks v. Kemp, 762 F.2d at 1397; Drake v. Kemp, 762 F.2d at 1449.

115. 762 F.2d 1383 (11th Cir. 1985).

116. *Id.* at 1396-97.

and "instead choose execution merely because [the defendant] was part of the broad 'criminal element' terrorizing American society."[117] The court stated that "the fact that [the speech's] improper suggestion was diametrically opposed to the requirement that capital sentencing be individualized demands careful scrutiny to determine whether the jury correctly understood its sentencing duty."[118] However, after reviewing the entire prosecution argument, the defense argument, and the judge's charge, the court concluded that the jury had not been misinformed as to the criteria it was to use in making the sentencing decision.[119]

Although the defendant's death sentence was not reversed in that case, the *Brooks* court did set out a demanding standard of "careful scrutiny" for review of penalty trial arguments that distort the nature of the jury's role in sentencing.[120] The standard is an appropriate one, since such arguments, if not corrected by the judge, are potentially as pernicious as arguments that violate *Caldwell*. Clearly, an argument that misrepresents the nature of the jury's role in capital sentencing should be considered equally suspect as one that diminishes the jury's sense of responsibility in capital sentencing. Based on Justice Marshall's reasoning in *Caldwell*, the prosecutor's argument in *Brooks* should be found unconstitutional on the grounds that it "[seeks] to give the jury a view of its role in the capital sentencing procedure that [is] fundamentally incompatible" with the heightened reliability demanded by the eighth amendment.[121]

If this analysis is correct, then any prosecutorial argument that encourages the jury to impose the death penalty on a basis other than individualized sentencing considerations, as mandated by statute and by the Court's decisions in cases such as *Lockett v. Ohio*,[122] *Eddings v. Oklahoma*[123] and *Penry v. Lynaugh*,[124] should be designated constitutionally suspect. If the prosecutor argues that the jury should impose the death penalty to stop crime,[125] to even the score between society and the defendant,[126] or to save the taxpayers'

117. *Id.* at 1414.
118. *Id.* at 1414-15.
119. *Id.* at 1415.
120. *Id.* at 1414.
121. Caldwell v. Mississippi, 472 U.S. 320, 340 (1985).
122. 438 U.S. 586 (1978) (sentencing authority must not be precluded from considering and giving independent weight to individualized mitigating factors).
123. 455 U.S. 104 (1982) (defendant's death sentence invalid under *Lockett* because sentencer refused to consider, as a matter of law, relevant mitigating evidence).
124. 109 S. Ct. 2934 (1989) (death penalty imposed under Texas sentencing statute that required jury to answer three "special issue" questions and to impose death if answer to all three was "yes" ruled unconstitutional because jury was not authorized to give weight to proffered evidence of defendant's mental retardation).
125. *See, e.g.*, Evans v. Thigpen, 809 F.2d 239, 242 n.2 (5th Cir.) (prosecutor argued that only imposing the death penalty would stop crime), *cert. denied*, 483 U.S. 1033 (1987).
126. *See* Commonwealth v. Travaglia, 502 Pa. 474, 502, 467 A.2d 288, 302 (1983) (The Prosecutor stated "that right now the score is [defendants] two, society nothing. When will it stop? When is it going to stop? Who is going to make it stop? That's your duty."), *cert. denied*, 467 U.S. 1256 (1984).

money,[127] the argument's potential effect on the jury should be subject to close scrutiny. Unless the judge corrects the prosecutor's misrepresentation of the jury's role in capital sentencing, the argument should be treated as the equivalent of a *Caldwell* violation, one that will mandate reversal of a death sentence unless it can be shown to have "had no effect on the sentencing decision."[128]

CONCLUSION

The Court's expression in *Caldwell v. Mississippi* of the need for a heightened guarantee of reliability in capital sentencing mandates real restrictions on the penalty trial arguments of prosecutors. Although *Darden v. Wainwright* limits the scope of *Caldwell*, both *Caldwell* and other Supreme Court decisions[129] provide considerable ammunition to defense counsel seeking to show that prosecutors' arguments warrant more exacting review than that provided by *Darden* or the traditional doctrines applied by the lower courts. The key to finding such ammunition lies in creative expansion of the protective coverage of *Caldwell* as well as the exception provided by *Darden*. *Caldwell*, for example, can be particularly useful for challenging arguments made in jurisdictions which treat jury verdicts as advisory opinions,[130] arguments which discourage a jury from treating a capital defendant as an individual,[131] as well as arguments which minimize the jury's responsibility in the sentencing process.[132] In addition, *Darden* carries implications for arguments which make emotionally charged references to the victim[133] or arguments that seek to draw adverse inferences from a defendant's testimony on collateral matters.[134] This Article has tried to show how such ammunition may be developed and used to prevent the prosecution from tainting the sentencing jury's perception of its "awesome responsibility"[135] in a capital case.

127. *See, e.g.*, Tucker v. Kemp, 762 F.2d 1480, 1495 (11th Cir.) (prosecutor referred to the "thousands and thousands and thousands of taxpayers [sic] dollars [required] to support [the defendant] for the rest of his life . . . ."), *vacated*, 474 U.S. 1001 (1985), *aff'd*, 802 F.2d 1293 (11th Cir. 1986), *cert. denied*, 480 U.S. 911 (1987); Brooks v. Kemp, 762 F.2d 1383, 1396 (11th Cir. 1985) (prosecutor argued, "why should the taxpayers, and that's you folks, all of us, . . . have to keep up somebody like William Brooks the rest of his life when he's done what he's done?"), *vacated*, 478 U.S. 1016 (1986), *aff'd*, 809 F.2d 700 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

128. Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

129. *See, e.g.*, South Carolina v. Gathers, 109 S. Ct. 2207 (1989); Booth v. Maryland, 482 U.S. 496 (1987); Estelle v. Smith, 451 U.S. 454 (1981).

130. *See supra* notes 38-60 and accompanying text.

131. *See supra* notes 113-28 and accompanying text.

132. *See supra* notes 32-37, 61-68 & 98-112 and accompanying text.

133. *See supra* notes 70-87 and accompanying text.

134. *See supra* notes 92-97 and accompanying text.

135. Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).