Avoiding the Woodshed: The Third Circuit Examines Prosecutorial Misconduct in Closing Argument in United States v. Wood

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AVOIDING THE WOODSHEd: THE THIRD CIRCUIT EXAMINES PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT IN UNITED STATES v. WOOD

"What Mr. Donnell is saying is he doesn't trust juries. Well, that's the system of this country. And if it displeases him, perhaps he should move to Cuba."¹

I. INTRODUCTION

To be sure, comments such as this one are seldom heard as part of closing arguments in American courtrooms. In modern criminal cases, however, the closing argument is often viewed as the most important part of the trial, providing the attorneys with their last opportunity to convince the jury of the defendant's guilt or innocence.² Prosecutors especially place extraordinary weight on closing statements because they retain the burden of proof in the case.³ Given this degree of significance, prosecutors and defense counsel alike are generally afforded great leeway regarding what they may say in closing arguments, as the opening quotation demonstrates.⁴


². See Michael Frost, ETHOS, PATHOS & Legal Audience, 99 DICK. L. REV. 85, 113 (1994) (describing most modern theorists’ approach to closing arguments as important to any trial).

³. See John B. Mitchell, Why Should the Prosecutor Get the Last Word?, 27 AM. J. CRIM. L. 139, 140-41 (2000) (noting general agreement that party who bears burden of proof should get last opportunity to convince jurors of defendant’s guilt). Under the Federal Rules of Criminal Procedure, the prosecutor must receive the first opportunity to deliver a closing argument, and then retain the chance to give a rebuttal argument after defense counsel has delivered a summation. See FED. R. CRIM. P. 29.1 (2002) (mandating that government gives its closing argument first, followed by defense, and that government gives final rebuttal).

⁴. See Rosemary Nidiry, Note, Restraining Adversarial Excess in Closing Argument, 96 COLUM. L. REV. 1299, 1299 (1996) (observing that “final argument of a trial is often viewed as a legal battleground in which almost anything goes”) (quoting Bradley R. Johnson, Closing Argument: Boom to the Skilled, Bust to the Overzealous, 69 FLA. B.J. 12, 12 (1995)). Because of the combative adversarial nature of the American judicial system, there have been numerous comparisons of trials—and particularly of closing arguments—to battlegrounds and wartime strategy. See id. (same); see also Hansen v. United States, 299 F. 593, 594 (9th Cir. 1924) (comparing parties’ conduct to behavior of those individuals who had recently died in battle); Moody v. Ford Motor Co., 506 F. Supp. 2d 823, 835 (N.D. Okla. 2007) (noting attorney's closing argument that sale of ten thousand Ford Explorers caused ten thousand deaths per year, which was likened to rising number of military deaths in Iraq); Lawhorn v. Haley, 323 F. Supp. 2d 1158, 1200 (N.D. Ala. 2004) (holding attorney's comparison of jury's duty to that of wartime soldier constituted improper argument), aff’d in part, rev’d in part, Lawhorn v. Allen, 519 F.3d 1272 (11th
The importance of closing arguments is perhaps most notable in the context of sentencing hearings in capital cases. The jury has already been given the unenviable task of deciding whether to sentence a defendant to death or to recommend a death sentence, and the prosecutor’s argument can reassure uneasy jurors with respect to the monumental job before them. One common way that prosecutors reassure the jury is to explain the role that appellate courts play in the capital sentencing process. The theory behind this reassurance technique is that jurors who understand the appellate process will be more comfortable sentencing a person to death, because they know that their decision will be reviewable by a more influential court with experience in scrutinizing death sentences. Surely, however, an ethical dilemma arises when making such an argument—prosecutors are supposed to minimize arguments that prey on the mindsets and tendencies of individual jurors.

The Supreme Court has addressed the issue of prosecutorial remarks in closing argument several times in reviewing the validity of capital sentences and habeas petitions. The Third Circuit has applied the Su-

Cir. 2008); Thorsen v. City of Chicago, 392 N.E.2d 716, 721 (Ill. App. Ct. 1979) (discussing closing argument and noting that “partisanship and heat of battle inherent in a lawsuit militate in favor of granting a certain latitude to attorneys in representing their clients”) (emphasis added).

5. See Welsh White, Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments, 39 AM. CRIM. L. REV. 1147, 1149 (2002) (stressing importance of prosecutors’ closing statements in penalty phases of capital trials because of arguments’ context). As in most trials decided solely on the merits, most penalty hearings allow prosecutors to give their closing argument first and then provide a rebuttal argument to the defense’s statement. See id. (describing generally preferred order of arguments in penalty hearings).

6. See Caldwell v. Mississippi, 472 U.S. 320, 333 (1985) (recognizing that jury’s role in capital sentencing determination is fraught with discomfort). In his majority opinion in Caldwell, Justice Marshall characterized the jury’s determination as being considered “on behalf of the community.” See id. (same). jurors’ discomfort might be further derived from having limited guidance “as to how their judgment should be exercised, leaving them with substantial discretion.” Id.

7. See Wheat v. Thigpen, 793 F.2d 621, 628 n.7 (5th Cir. 1986) (recounting prosecutor’s explanation to jury of appellate review process that would take place should jury impose death penalty). In Wheat, the prosecutor not only expounded in detail upon the appellate process in capital cases for the jury, but also remarked: “Just remember this, if your verdict is that of the death penalty, that’s not final.” Id. For further discussion of similar remarks made in closing arguments concerning the apparent lack of finality of a jury verdict, see infra notes 32-58 and accompanying text.


9. See ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION 3-58(c) (3d ed. 1993) (“The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.”).

10. See Caldwell, 472 U.S. at 323 (determining validity of capital sentence issued to defendant in light of prosecutorial comments during closing argument); see also Romano v. Oklahoma, 512 U.S. 1, 6 (1994) (considering whether evidence and jury instructions impermissibly shifted jury’s sense of responsibility for its job.

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Supreme Court's framework to similar prosecutorial remarks during the penalty phase in a capital trial. Recently, in *United States v. Wood*, the Third Circuit addressed remarks made by prosecutors during the closing argument in a non-capital trial. Despite the non-capital nature of the case, the decision in *Wood* represents a potential willingness on the part of the Third Circuit to extend the Supreme Court's framework for referring to the appellate process during closing arguments in capital cases to similar remarks made during closing arguments in non-capital cases.

This Casebrief examines the Third Circuit's approach to evaluating prosecutorial remarks about the appellate process during closing argument. Part II of this Casebrief reviews the relevant Supreme Court precedent and discusses the "invited response doctrine," a justification that prosecutors frequently offer for making certain remarks during closing argument. Part III analyzes the *Wood* decision and explores the Third Circuit's readiness to extend the established law to the realm of non-capital cases. Part IV discusses the impact *Wood* may have on closing arguments within the Third Circuit and offers brief suggestions to prosecutors practicing during sentencing hearing; *Payne v. Tennessee*, 501 U.S. 808, 817 (1991) (noting prosecutor's statement evoking significant emotion in jurors' eyes and determining whether such commentary altered jury's sense of its own responsibilities); Sawyer v. Smith, 497 U.S. 227, 230 (1990) (noting that issue in case concerned comments made by prosecutor in closing argument during sentencing phase of trial); *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) (considering effect prosecutor's statement regarding appellate process had on jury's sense of its own role); *Donnelly v. DeChristoforo*, 416 U.S. 637, 638 (1974) (discussing defendant's contention that prosecutor's remarks during closing argument improperly swayed jury and deprived defendant of fair trial); *cf. Imbler v. Pachtman*, 424 U.S. 409, 425 (1976) (discussing prosecutorial misconduct during closing argument as typical issue with which judges tend to struggle in actions for post-trial relief).

11. See *Riley v. Taylor*, 277 F.3d 261, 294 (3d Cir. 2001) (en banc) (addressing defendant's assertion that prosecutor made inappropriate remarks concerning jury's "sense of responsibility in the sentencing process"). For a more complete description of *Riley* and its holding, see infra notes 49-58 and accompanying text.

12. 486 F.3d 781 (3d Cir. 2007).

13. For a detailed analysis of the *Wood* decision and its alignment with relevant law in the area of prosecutorial misconduct, see infra notes 74-130 and accompanying text.

14. For further discussion of why the *Wood* opinion indicates the Third Circuit's readiness to extend *Caldwell* to non-capital cases, see infra notes 124-42 and accompanying text.

15. For further discussion of the Third Circuit's analysis of remarks made by prosecutors during closing argument that concern the appellate process, see infra notes 97-130 and accompanying text.

16. For a discussion of the proper standard of review for potential prosecutorial misconduct in the Third Circuit, see infra notes 20-31 and accompanying text. For further discussion of the relevant Supreme Court and Third Circuit cases that developed the framework for consideration of prosecutorial remarks during closing argument and the legitimacy of certain prosecutorial strategies for making these remarks, see infra notes 32-75 and accompanying text.

17. For a discussion of the holding in *United States v. Wood* and the Third Circuit's approach to extending capital case precedent to non-capital cases, see infra notes 74-130 and accompanying text.
II. BACKGROUND: THE ESTABLISHED FRAMEWORK FOR EVALUATING IMPROPER REFERENCES TO THE APPELLATE FUNCTION IN CLOSING ARGUMENTS

A. The Standard of Review for Prosecutorial Misconduct in the Third Circuit

It is well-settled in the Third Circuit that during the closing argument, attorneys must refrain from making seditious comments or attacks on the opposing advocate. A prosecutor's remarks taken alone, however, do not automatically constitute misconduct. In fact, if evidence of the defendant's guilt is overwhelming, a court does not generally reverse a defendant's conviction despite any potential prosecutorial misconduct during the trial.

In the Third Circuit, an appellate court applies the abuse of discretion standard of review when considering whether there has been

18. For a discussion of the impact of the Wood decision on remarks prosecutors may make about the appellate process during closing arguments, see infra notes 131-33 and accompanying text. For suggestions to prosecutors given the Wood decision, see infra notes 132-41 and accompanying text.

19. For a discussion of the prosecutor's role in light of Wood, see infra notes 143-50 and accompanying text.

20. See United States v. Rivas, 493 F.3d 131, 139 (3d Cir. 2007) ("[N]o lawyer may make 'unfounded and inflammatory attacks on the opposing advocate.'" (citing Gov't of Virgin Islands v. Isaac, 50 F.3d 1175, 1185 n.7 (3d Cir. 1995))). The Rivas court, however, qualified that statement by accepting the government's counter-argument that it is perfectly acceptable to attack an opposing advocate's arguments and trial tactics. See id. at 139 (discussing government's response to rule in Isaac forbidding unfounded attacks on opposing advocate and agreeing with this contention). In fact, a major purpose of closing argument is "attacking and exposing flaws in one's opponent's arguments." See id.; see also United States v. Lore, 490 F.3d 190, 213 (3d Cir. 2005) (distinguishing between arguments aimed at opposing counsel's tactics and those aimed at opposing counsel's character); James H. Seckinger, Closing Argument, 19 AM. J. TRIAL ADVOC. 51, 70 (1995) (advising trial attorneys to move directly to attacking opponent's arguments and case strategies after providing their side of controversy). But see Michael J. Ahlen, The Need for Closing Argument Guidelines in Jury Trials, 70 N.D. L. REV. 95, 102 (1994) (cautioning that stepping from attacking arguments and tactics to attacking opposing attorney's character is very easy). Ahlen sees attacking a particular attorney's tactics as essentially attacking that attorney in public. See id. (describing effects of too harshly attacking arguments and tactics).

21. See Scott W. Bell, Prosecutorial Misconduct, 88 GEO. L.J. 1408, 1408 (2000) ("[T]he relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986))) (internal quotation omitted).

22. See Bell, supra note 21, at 1408 (noting courts' general refusal to overturn conviction based solely on apparently improper prosecutorial remarks).
prosecutorial misconduct in closing argument. The court must first be convinced that the prosecution actually engaged in misconduct before it can review the disputed comment's effect on the trial. Once the court is so convinced, the court balances the prejudicial effect of the misconduct against several different factors that tend to negate the prejudice stemming from the improper statements in the closing argument. Such factors include: the amount of evidence presented against the defendant, whether the trial judge issued a curative instruction to the jury and whether the prejudicial statement appeared to have a cumulative effect on the jury. If the appellate court finds that the misconduct's prejudice outweighs the corrective nature of these factors, the court may determine that the misconduct denied the defendant due process and that the trial court abused its discretion by failing to order a mistrial.

23. See United States v. Gambino, 926 F.2d 1355, 1365 (3d Cir. 1991) (providing proper standard of review in cases of potential prosecutorial misconduct); see also United States v. Hakim, 344 F.3d 324, 328 (3d Cir. 2003) (noting appellate review of trial court's refusal of mistrial is for abuse of discretion).

24. See Rivas, 493 F.3d at 139 (holding that court needed to be convinced of prosecutorial misconduct before being able to rule on whether court abused discretion in failing to order mistrial). In Rivas, the defendant argued that the prosecutor had "impugned' the 'function and dignity of defense counsel' during closing argument when he told the jury that defense counsel's job was "to take your focus off the issue." See id. The Third Circuit held that such an argument was not improper in the context of the trial. See id. (holding that closing argument remark failed to pass abuse of discretion standard for prosecutorial misconduct).

25. Cf. id. at 140 (balancing closing argument remark against other important actions taken by trial court as well as weight of evidence to determine that mistrial was unnecessary). But see Lyn M. Morton, Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?, 7 GEO. J. LEGAL ETHICS 1083, 1086 (1994) (arguing that appellate courts favor prosecutors in large part and stressing government's ability to argue successfully that prosecutor's remarks at trial constitute harmless error). Morton argued that prosecutors have been undertaking a "growing disregard" for the "ethical mandate of the legal profession." See id. (discussing lack of ethical responsibility pervading mindsets of prosecutors); see also United States v. Lopez, 765 F. Supp. 1433, 1437 (N.D. Cal. 1991) (noting increasing number of complaints being lodged by citizens regarding potential misconduct by attorneys).

26. See Bell, supra note 21, at 1408-10 (listing factors to be weighed when evaluating prosecutor's statement for misconduct and conviction reversal). A combination of the three factors may suffice to ensure that no violation of due process has taken place, and thus no need for reversal exists. See id. at 1410 (extending analysis to include potential for factors to combine together).

27. See id. at 1408 (noting due process violation occurs when court fails to properly consider circumstances surrounding prosecutorial misconduct). State courts have devised a standard similar to the one used by the Third Circuit to evaluate potential misconduct during prosecutors' closing arguments. See, e.g., Claire Gagnon, Note, A Liar By Any Other Name? Iowa's Closing Argument Conundrum, 55 DRAKE L. REV. 471, 477 (2007) (noting that Iowa's standard for evaluating due process claims stemming from potential misconduct in closing argument requires prosecutor's conduct to result in enough prejudice to deny defendant fair trial); Tara J. Tobin, Note, Miscarriage of Justice During Closing Arguments By an Overzealous Prosecutor and a Timid Supreme Court in State v. Smith, 45 S.D. L. REV. 186, 216 (2000) (observing that South Dakota courts find due process violation has
As previously stated, trial courts normally afford substantial deference to prosecutors making their closing arguments. The court's deferential approach, however, is subject to limitations that tend to restrict the substance of what the prosecutor is permitted to argue. As a general rule, the Supreme Court has stated that prosecutors should "refrain from improper methods calculated to produce a wrongful conviction." In addition, the American Bar Association has promulgated several prosecutorial summation standards that effectively limit what a prosecutor may choose to argue in closing.

B. The Appellate Process in Capital Closing Arguments: Caldwell v. Mississippi and Progeny

1. The Caldwell Rule

In the 1985 case of Caldwell v. Mississippi, the Supreme Court analyzed "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 occurred only after court first determines that prosecution engaged in misconduct)."

28. For further discussion of the substantial deference normally afforded to attorneys during closing argument, see supra note 4 and accompanying text.

29. See Nidiry, supra note 4, at 1306 (noting several limitations on closing argument procedure for attorneys). An important limitation on closing argument is that an attorney may not argue facts that were not properly admitted into evidence during the trial. See id. (stressing that attorney may discuss properly admitted facts, which may include credibility, "probity" of evidence and "application of the law"). The attorney is also "not permitted to assert [his or] her personal beliefs or opinions as to the weight of the evidence, and is prohibited from inflaming or prejudicing the jury." See id. at 1307-08; see also State v. Wickes, 805 A.2d 142, 150 (Conn. App. Ct. 2002) (affirming that attorneys are prohibited from interjecting personal opinions on witness credibility).


31. See ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION 3-5.8(a)-(d) (3d ed. 1993) (providing limitations on closing arguments for prosecutors). In practice, the standards operate to prevent the prosecutor from making impassioned statements to juries and to keep arguments focused on the evidence that has been heard in court. See id. (same). The regulations are as follows:
(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
(b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
(c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.
(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

Id.

reviews the case." In *Caldwell*, the defendant had been convicted of capital murder under Mississippi law and thus faced a jury in a sentencing hearing, who could impose a death sentence. Caldwell's attorneys argued fervently for mitigation and offered evidence at the hearing of their client's "youth, family background, and poverty" in order to appeal to the jury.

In response to these contentions, the Assistant District Attorney "sought to minimize the jury's sense of the importance of its role." In a forceful argument, the prosecutor excoriated the defense's remarks and conduct during closing argument. The prosecutor then went on to tell the jury: "Your job is reviewable. [The defense] know[s] it." Over a defense objection, the court allowed the prosecutor to make the statement

33. *Id.* at 323.

34. See *id.* at 324 (discussing defendant's crime, conviction and subsequent sentence). The defendant committed his actions during the course of robbing a small grocery store. See *id.* (describing circumstances of defendant's murder conviction).

35. See *id.* (describing mitigating evidence); see also Michael A. 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, 291 (1989) (noting remarks made in defense counsel's closing argument designed to stress "gravity and responsibility" of sentencing defendant to death). The following are those closing remarks made by the defense attorney to the sentencing jury:

> [E]very life is precious and as long as there's life in the soul of a person, there is hope. There is hope, but life is one thing and death is final. So I implore you to think deeply about this matter. It is his life or death—the decision you're going to have to make, and I implore you to exercise your prerogative to spare the life of Bobby Caldwell.... I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution.... You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility.

*Caldwell*, 472 U.S. at 324. In his dissenting opinion, Justice Rehnquist characterized these arguments as a "plea for mercy." See *id.* at 345 (Rehnquist, J., dissenting) (discussing defense's closing argument).

36. *Id.* at 325 (majority opinion).

37. See *id.* (discussing prosecutor's remarks in response to defendant's contentions in closing argument). Among other things, the prosecutor noted his "complete disagreement" with the defense's closing argument and, at several points, called into question the fairness of the defense's interpretations of the sentencing jury's role in the case:

> I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. 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?

*Id.* (emphasis added).

38. *Id.* At this point, defense counsel objected to this statement as being out of order. See *id.* (noting defense objection to prosecutor's statement during closing).
on the condition that the Government explained to the jury that capital sentences receive automatic review in the federal system.\textsuperscript{39} The jury eventually sentenced Caldwell to death; the Mississippi Supreme Court affirmed and the United States Supreme Court granted certiorari to review the prosecutor's remarks.\textsuperscript{40}

Writing for a plurality of four justices, Justice Marshall concluded that the sort of prosecutorial argument that had been made in \textit{Caldwell} "depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform."\textsuperscript{41} In the words of Justice Marshall, the fact that appellate review existed for capital sentence determinations was "wholly irrelevant" to the sentencing jury's evaluation process.\textsuperscript{42} As a result, \textit{Caldwell} announced the rule that in closing arguments, the jury must not be misled with regard to the role it plays in the sentencing decision.\textsuperscript{43} The plurality found that the prosecutor's comment in Caldwell's case violated this rule because the comment confused the jury's idea of its role; accordingly, the plurality overturned Caldwell's death sentence and remanded the case.\textsuperscript{44} Justice O'Connor wrote a concurring opinion in which she expressed her view that providing accurate and non-misleading information to the jury about its role is relevant to the jury's sentencing decision.\textsuperscript{45}

\textsuperscript{39} See id. at 325 (noting that trial court directed prosecutor to clarify statements made, in order to avoid juror confusion).

\textsuperscript{40} See id. at 324, 326 (pronouncing death sentence as handed down by Mississippi sentencing jury). The sentence was upheld by the Mississippi Supreme Court; although the vote on the court was 4-4, the tied vote meant that the sentence was to be affirmed. See id. at 326 (noting Mississippi Supreme Court's ruling on defendant's sentence).

\textsuperscript{41} Id. at 336.

\textsuperscript{42} See id. (finding that appellate review had no place in jury's deliberations).

\textsuperscript{43} See id. (noting inaccuracy and misleading nature of prosecutor's arguments to jury); see also Romano v. Oklahoma, 512 U.S. 1, 9 (1994) (noting Supreme Court's reading of \textit{Caldwell} rule to forbid 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" (quoting Darden v. Wainwright, 477 U.S. 168, 184 n.15 (1986))). In \textit{Romano}, the defendant argued that the prosecutor's introduction into evidence of defendant's prior death sentence undermined the sentencing jury's idea of its responsibility in the trial. See \textit{Romano}, 512 U.S. at 9 (discussing defendant's argument for why \textit{Caldwell} rule applied to his case). The Supreme Court, however, disagreed, holding that this evidence had not affirmatively misled the jury about its role. See id. at 10 (concluding that jury retained proper sense of its responsibility after having been privy to questionable evidence).

\textsuperscript{44} See \textit{Caldwell}, 472 U.S. at 341 (concluding that prosecutor's comments had detrimental effect on jury's sense of its own responsibilities).

\textsuperscript{45} See id. at 342 (O'Connor, J., concurring) (stressing importance in Caldwell's case that prosecutor provided jury with improper and inaccurate information regarding its role). O'Connor joined most of Marshall's opinion in \textit{Caldwell}—she wrote separately only to express differing views with regard to one portion of Marshall's opinion. See id. at 341 (noting O'Connor's joining of plurality opinion except for Part IV-A). As her position gave the court its majority, her opinion as to the giving of "non-misleading and accurate" information is considered technically
2. Caldwell’s Development and the Third Circuit’s Application of the Caldwell Rule

Eight years after Caldwell, the Court clarified its decision in that case in light of different state procedures in capital trials in the case of Romano v. Oklahoma. In Romano, Chief Justice Rehnquist adopted Justice O’Connor’s concurring opinion in Caldwell as controlling, and relied on past case law to hold that in order “to establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.” The Third Circuit has adhered to Rehnquist’s conclusion in Romano, and has applied it to capital cases within its jurisdiction.

In Riley v. Taylor, the Third Circuit considered the appeal of a defendant who sought to overturn his death sentence with a Caldwell argument. A Delaware court had convicted Riley of felony murder,
intentional murder and various charges associated with the killings.\textsuperscript{51} During the penalty phase of Riley’s trial, the prosecutor made the following remark that caused Riley’s attorney to object:

\textit{Let me say at the outset that what you do today is automatically reviewed by our Supreme Court and that is why there is an automatic review on the death penalty. That is why, if you return a decision of death . . . you will receive and have to fill out a two-page interrogatory that the Court will give you. . . . [T]his goes to the Supreme Court. That is why it is concise and we believe clear and it should be looked carefully on and answered appropriately.}\textsuperscript{52}

Writing for an en banc court, Third Circuit Judge Dolores Sloviter concluded that the prosecutor’s comments in Riley constituted a \textit{Caldwell} violation.\textsuperscript{53} In so concluding, the majority in \textit{Riley} adopted the position that “[f]or the jury to see itself as advisory when it is not, or to be comforted by a belief that its decision will not have effect unless others make the same decision, is a frustration of the essence of the jury function.”\textsuperscript{54}

The majority in \textit{Riley} found that the prosecutor’s statement “was misleading as to the scope of appellate review” in Delaware.\textsuperscript{55} Important to its opinion was the fact that “jurors who are unconvinced that death is the appropriate punishment but who are eager to send a message of disapproval for the defendant’s acts might be very receptive to the prosecutor’s assurance that [they] can . . . err because the error may be correctable.”\textsuperscript{56}

Toward the end of her opinion, Judge Sloviter rejected the notion that the mere brevity of the prosecutor’s questionable remarks should somehow

\textsuperscript{51} See \textit{id.} at 271 (summarizing Riley’s convictions that led to penalty phase of his trial). In addition to the murder convictions, Riley had been convicted of first degree robbery, possession of a deadly weapon during a felony and second degree conspiracy. See \textit{id.} (same).

\textsuperscript{52} \textit{Id.} at 296 (emphasis added). During argument before the court, the State conceded that this statement did not differ from the one adjudged unconstitutional by the Court in \textit{Caldwell}. See \textit{id.} (discussing Government’s argument that when “you compare the two [arguments], they are pretty much alike”). The court did, however, recognize that the attorney’s argument was technically correct because Delaware law provided for automatic review of Riley’s death sentence by the Delaware Supreme Court. See \textit{id.} (explaining relevant Delaware review provision).

\textsuperscript{53} See \textit{id.} at 299 (announcing majority holding in case and issuing writ of habeas corpus).

\textsuperscript{54} \textit{Id.} at 297 (quoting Sawyer v. Butler, 881 F.2d 1273, 1282 (5th Cir. 1989)). In \textit{Sawyer}, the prosecutor told the jury that “you yourself will not be sentencing Robert Sawyer to the electric chair.” See \textit{Sawyer}, 881 F.2d at 1296 (King, J., dissenting) (emphasis omitted). Writing for the majority in \textit{Riley}, Judge Sloviter adopted the \textit{Sawyer} court’s rationale. See \textit{Riley}, 277 F.3d at 296 (citing Sawyer’s framework).

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.} at 296-97. For further discussion of why a prosecutor might want to explain the role the appellate process plays in capital sentencing determinations, see supra notes 6-8 and accompanying text.
mitigate their harm. Instead, Judge Sloviter noted that the comments were the first the prosecutor had made to the jury at sentencing, and concluded that "[a] statement does not have to be lengthy to be effective in suggesting to the jury that ultimate responsibility for sentencing lies elsewhere." 

3. The Invited Response Doctrine

In order to avoid potential Caldwell violations, prosecutors often claim that their comments fall within the protections of the "invited response doctrine." The invited response doctrine responds to a common situation: defense counsel makes an improper argument and provokes the prosecutor to respond with his or her own potentially improper remark. The Supreme Court has held that this type of prosecutorial argument is allowable in the appropriate context. The Court has noted that "the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." Importantly, however, the doctrine does not excuse a prosecutor's improper comments in closing arguments, but rather evaluates the effect of the comments on the trial taken as a whole. Therefore, a court must take into account the "probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly." 

The Third Circuit allows prosecutorial use of the invited response doctrine when the comments at issue are reasonable responses to defense

57. See id. at 298 (dismissing notion that simple fact that objectionable remarks to jury were "brief" could excuse them from potential Caldwell violation).

58. Id.

59. See, e.g., United States v. Ramirez-Velasquez, 322 F.3d 868, 874 (5th Cir. 2003) (recognizing invited response doctrine invoked by Government after defense counsel had made first combative comment in closing argument); United States v. Dispoz-O-Plastics, Inc., 172 F.3d 275, 285 (3d Cir. 1999) (noting that Government invoked invited response doctrine to justify remarks made at closing argument after defense counsel had asserted that government witnesses had lied); United States v. Richardson, 130 F.3d 765, 778 (7th Cir. 1997) (noting Government's contention that controversial prosecutorial argument was made in response to defense suggestion during heated trial exchange), vacated on other grounds, Richardson v. United States, 526 U.S. 813 (1999).

60. See United States v. Young, 470 U.S. 1, 11 (1985) (commenting that situation where defense attorney makes controversial argument and prosecutor responds with own controversial remark has become commonplace in criminal trials).

61. See generally Lawn v. United States, 355 U.S. 339, 359 (1958) (affirming conviction on ground that potentially improper argument by prosecutor was justified on basis of invited response doctrine).


63. See id. at 13 (explaining appropriate standard for use of invited response doctrine and evaluating invocations of rule); see also Darden v. Wainwright, 477 U.S. 168, 182 (1986) (explaining that invited response is not to be used as excuse for improper comments, but as method for examining resulting effect on trial).

64. Young, 470 U.S. at 12.
contentions. A prosecutor may utilize the doctrine in a “defensive” manner when defense counsel has specifically attacked the prosecution in some form. The prosecution may not, however, invoke the doctrine in an “offensive” fashion; that is, it cannot use invited response as a “springboard for launching affirmative attacks” on defense counsel and individual defendants.

In United States v. Dispoz-O-Plastics, Inc., the Third Circuit recognized that the invited response doctrine is only proper in situations where the prosecutor has been personally attacked and such an attack was not supported by evidence at trial. In Dispoz-O-Plastics, the Government’s com-

65. See United States v. Walker, 155 F.3d 180, 186 n.5 (3d Cir. 1998) (“[W]here a prosecutorial argument has been made in reasonable response to improper tactics by defense counsel... the need for a new trial [may be obviated].” (quoting United States v. Pungitore, 910 F.2d 1084, 1126 (3d Cir. 1990))). The premise upon which the Third Circuit has based its reading of the doctrine is that "the unfair prejudice flowing from the two arguments may balance each other out," which then greatly reduces any need for a new trial. See id. (providing rationalization for use of invited response doctrine for argument within Third Circuit).

66. See United States v. Dispoz-O-Plastics, Inc., 172 F.3d 275, 284 (3d Cir. 1999) (allowing defensive use of invited response doctrine). In Pungitore, the prosecutor had made several remarks about his own witnesses after defense counsel had vigorously argued that state and federal government officials had conspired to fabricate the witnesses’ testimony. See 910 F.2d at 1123 (noting prosecutorial statements regarding integrity of both witnesses and government attorneys after both had been questioned during defense closing arguments). The Third Circuit held that the statements, although potentially improper if considered on their own, fell squarely within the invited response doctrine. See id. (concluding that improper prosecutorial comments did not require reversal of defendant’s conviction due to proper invited response invocation). The prosecutor’s comments had been made in response to what “amounted to a personal attack on virtually every government official involved in this case, including members of the prosecutorial team.” Id. at 1127. The court went on to note that the district court should have given closer supervision to the defense’s improprieties at trial. See id. (recognizing trial parties’ potential role in curbing improper defense arguments). It also noted that a timely government objection to the defense’s comments may have eliminated its own need to resolve the issue. See id. (same).

67. See Dispoz-O-Plastics, 172 F.3d at 284 (recognizing prohibition on offensive prosecutorial use of invited response doctrine). For further discussion of the holding in Dispoz-O-Plastics and a description of why invited response was invoked, see infra notes 68-73 and accompanying text.

68. 172 F.3d 275 (3d Cir. 1999).

69. See id. at 285 (noting that use of invited response doctrine is generally limited to situations where prosecution is attacked for no apparent reason); see also Pungitore, 910 F.2d at 1127 (identifying personal attacks made on prosecutors and law enforcement officers by defense counsel). Often, invited response comes into play when defense attorneys make personal attacks on prosecutors for what they believe to be the government’s attempt to elicit perjury from witnesses. See United States v. Pelullo, 964 F.2d 193, 217-18 (3d Cir. 1993) (noting prosecutor’s comment made at suggestion that he had suborned perjury from witness); United States v. Gambino, 926 F.2d 1355, 1364-66 (3d Cir. 1991) (noting that prosecutorial comments were made in direct response to defense contention that government had suborned perjury from witness); see also United States v. Smith, 962 F.2d 923, 927 (9th Cir. 1992) (describing prosecutor’s strong indication to jury that he had done nothing wrong after defense counsel suggested possibility of gov-
ments in closing argument had sought to bolster the credibility of two of its chief witnesses, each of whom had struck plea deals to avoid prosecution, and each of whom in turn testified against their defendant co-conspirators. In response to a defense motion for a mistrial after the comments about the pleas were made to the jury, the Government argued that the suggestions were made in response to a defense contention that the witnesses' guilty pleas made the witnesses more likely to lie. The trial court agreed with the Government and denied the motion for mistrial, but the Third Circuit reversed, holding that the defense had not made any direct personal attacks on the government or other law enforcement officials. Rather, the Third Circuit concluded that the prosecutor in *Dispos-O-Plastic* had used the invited response doctrine in an offensive manner.

III. **UNITED STATES v. WOOD: THE THIRD CIRCUIT EXTENDS CALDWELL BEYOND THE FORUM OF CAPITAL CASES**

A. **Facts and Procedure**

On January 10, 2004, a group of men wearing dark clothes attempted to rob a Pep Boys store on Market Street in West Philadelphia. The Government suborning perjury from witness); United States v. Tanner, 471 F.2d 128, 136-37 (7th Cir. 1972) (noting prosecutorial response to defense counsel's specific charges that FBI agents and other government officials had suborned perjury from witnesses during trial).

70. See *Dispos-O-Plastic*, 172 F.3d at 280 (noting prosecutor's comments during closing argument concerning price fixing testimony by chief witnesses). The prosecutor's exact comments were:

Common sense tells you people don't confess to a crime, they don't turn a completely innocent, legitimate business meeting into a crime, they don't confess to crimes they didn't commit and that's what the defendants are trying to tell you they did. . . . Why would [the witnesses] say they fixed prices at LaGuardia? Why would they tell that to the Government, why would they tell that to the judge who sentenced them?

Id.

71. See *id.* (recognizing basis of Government's contention that arguments were proper).

72. See *id.* at 285 (holding remarks concerning plea bargaining of key government witnesses were improper because they had not come in response to specific direct attack on government or law enforcement officers).

73. See *id.* (holding that prosecutor's statements had launched affirmative attack on defense counsel rather than invited response to defense comments).

74. According to Third Circuit precedent, the facts in each case must be presented in the light most favorable to the Government on an appeal by the defendant. See, e.g., Pungitore, 910 F.2d at 1087 (establishing manner in which facts must be presented before Third Circuit for opinions).

75. See United States v. Wood, 486 F.3d 781, 783 (3d Cir. 2007) (describing events that gave rise to defendant's trial). The address 4101 Market Street is in West Philadelphia, which lies within the Philadelphia Police Department's 16th District. See Philadelphia Police Department 16th District, Police Unit Profiles, http://www.ppdonline.org/hq_profile_ds16.php (last visited Feb. 4, 2008) (setting out boundaries of 16th Police District in Philadelphia, including site of robbery in
robbers ordered the store’s employees to the ground at gunpoint. Unbeknownst to the robbers, however, two uniformed Philadelphia police officers in an adjacent parking lot had quickly realized a robbery was occurring. Officer Martin Demota chased the robbers after they fired shots at him; eventually, Officer Demota set his sights on one fleeing heavy-set individual. After losing sight of the suspect for roughly five seconds, Officer Demota was able to catch up to the suspect and place him under arrest. The individual, identified as the defendant Shaheed Wood, was indicted on one count of robbery, one count of conspiracy to commit robbery and one count of using and carrying a firearm during the commission of a crime of violence.

76. See Wood, 486 F.3d at 783 (noting robbers’ use of firearms to subdue Pep Boys employees at scene).

77. See id. at 784 (recounting officers’ behavior and positioning during commission of robbery). One of the robbers had yelled the phrase “one time” while the robbery was occurring. See id. (describing phrase officers heard from within store). Officer Demota immediately recognized the phrase as a slang term often used to signal a police presence in the area. See id. (discussing Officer Demota’s understanding of slang term in context of robbery).

78. See id. (noting sound of gunfire during robbers’ conflict with police and Officer Demota’s subsequent response to gun shots). The suspect fled the scene after realizing the police were in the area; he was attempting to follow a thinner individual who had also emerged from the Pep Boys. See id. (recounting that two individuals started to flee from scene and Officer Demota decided to follow more heavy-set person). The thinner man was able to escape from the police officers. See id. (describing thinner suspect’s success in evading arrest).

79. See id. (noting failure to locate heavy-set suspect for short period of time and subsequent recognition and arrest of same suspect). Officer Demota’s loss of sight of the individual would become part of the defendant Wood’s case theory at trial of mistaken identity. For further discussion of the defendant’s case theory, and the manner in which it affected the closing arguments in the case, see infra notes 81-87 and accompanying text. See generally Oliva v. Commonwealth, 452 S.E.2d 877, 879 (Va. Ct. App. 1995) (discussing use of mistaken identity by defendant during forcible rape trial); David McCord, “But Perry Mason Made it Look So Easy!”: The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty, 63 TENN. L. REV. 917, 961-62 (1996) (discussing effectiveness and widespread use of theory suggesting that individual other than defendant is responsible for crime); Calvin TerBeek, A Call for Precedential Heads: Why the Supreme Court’s Eyewitness Identification Jurisprudence is Anachronistic and Out-of-Step With the Empirical Reality, 31 LAW & PSYCHOL. REV. 21, 21-22 (2007) (pointing out that flaws in eyewitness identification testimony have led many innocent defendants to guilty verdicts and posing suggestions for improvement of eyewitness identification testimony).

80. See Wood, 486 F.3d at 784 (describing superseding indictment returned by federal grand jury in Eastern District of Pennsylvania). The grand jury handed down an initial indictment of Wood in July, 2004; the superseding indictment was returned on March 9, 2005. See id. at n.2 (noting initial indictment date and superseding indictment date). For the charges that Wood was indicted on, see 18 U.S.C. § 1951(a) (1994) (criminalizing “interference with interstate commerce by rob-
At trial, Wood's defense attorneys vigorously questioned Officer Demota's ability to identify Wood as one of the persons who had robbed the store.\textsuperscript{81} The defense pointed specifically to the lighting of the area surrounding the store in an attempt to discredit Officer Demota's conclusion that Wood had committed the robbery.\textsuperscript{82} The defense also sought to portray Officer Demota as having been excited after being fired upon.\textsuperscript{83} The prosecutor, however, had ample evidence to support the argument for Wood's guilt—even the Third Circuit referred to certain evidence concerning an automobile left at the scene as "highly incriminating."\textsuperscript{84}

At closing argument, the defense continued to address the major issue of Officer Demota's identification of the defendant, by drawing attention to perceived inconsistencies in the officer's testimony.\textsuperscript{85} Wood's

\textsuperscript{81} See id. at 784 (discussing defense case theory attempting to undermine Demota's assertion that defendant was heavy-set man he followed out of Pep Boys store).

\textsuperscript{82} See id. (focusing on defense contention that lighting in area would make it difficult for Demota to identify Pep Boys store robber). In cases where identification of the crime's perpetrator is an important issue, especially when the crime was committed during nighttime hours, defendants regularly argue that the lighting in the area made it difficult for the true perpetrator to be recognized. Cf. Katherine R. Kruse, \textit{Instituting Innocence Reform: Wisconsin's New Government Experiment}, 2006 Wis. L. Rev. 645, 645-46 (2006) (discussing eyewitness identification problems as major "dysfunction" in investigation as well as prosecution of crimes).

\textsuperscript{83} See Wood, 486 F.3d at 784 (discussing defendant's assertion that Demota was acting with "excited state-of-mind" after having been shot at by fleeing individuals). The defense theory was that this excitement caused Demota to lose sight of the heavy-set man he intended to follow, which was thus an indication that he could not identify the suspect with particularity. See id. (discussing implications of defense theory).

\textsuperscript{84} See id. (referring to particular evidence as "highly incriminating"). The prosecutor put forth a mountain of evidence, much of which tended to improve the jury's view of Demota's credibility. See id. (noting prosecution attempts to bolster credibility of Officer Demota). Among the evidence presented were a surveillance video that captured images of the two men who had robbed the store, a black jacket recovered from Wood that was similar to what the surveillance tapes showed the heavy-set man to be wearing at the scene and Demota's ability to identify Wood as the robber from the surveillance tape. See id. (listing evidence used at trial in order to bolster Demota's credibility for jury). In addition, there was evidence of a gold 1997 Oldsmobile near the Pep Boys store that belonged to Wood's girlfriend and "for which Wood had the only set of keys." See id. at 794-95 (noting evidence of automobile near crime scene that court described as "highly incriminating"). Furthermore, after performing a search of the automobile, police recovered a receipt with Wood's name on it as well as a gun holster. See id. (noting items found by police officers during search incident to Wood's arrest).

\textsuperscript{85} See id. (discussing continued defense suggestion that particular case was one of mistaken identity). It is important for each side to convey a theme during closing argument, weaving in relevant evidence presented during trial, in order to communicate the most persuasive message to the jury. See H. Mitchell Caldwell et
attorney argued that "[Officer Demota] very well could have been mistaken as to what Mr. Wood might have said" at the time of the arrest, and that—given the stress of the situation—Officer Demota was also mistaken about where he was when shots were fired at him.86 Wood’s attorney continued:

I say to you, members of the jury, that no one saw Shaheed Wood drive that car to that location, that no one saw Mr. Wood get out of that car. . . . [A Government witness] got up here and had the gumption to tell you that we didn’t have to examine evidence because [the Government] had a case against this man . . . . Well, that belies common sense. You know . . . how many people on death row have been let off with the discovery of DNA evidence that says that they are innocent? Surely, the cops in that case thought they had the right guy.87

Given the final opportunity to argue in rebuttal, the prosecutor in Wood sought to cast doubt upon the defense’s theory of mistaken identity by asserting that “mistakes happen.”88 The prosecutor attempted to ingrain in the minds of the jurors the notion that mistakes happen all too frequently, repeating the phrase “mistake” several times throughout the

al., The Art and Architecture of Closing Argument, 76 Tulane L. Rev. 961, 970 (2002) (emphasizing necessity of theme development during closing argument as important goal for effective persuasion of jury); Stephen D. Easton, Cashing in Your Credibility During Final Argument, 46 Apr. Fed. Law. 30, 31 (1999) (noting that decision about trial theme is one to be made long before trial begins and theme should be developed further in closing argument). Theme is such an important goal to certain advocates that some unorthodox methods are frequently used to cement it in the jurors’ minds. See, e.g., Gene Curtis, Only in Oklahoma: Defense Attorney Had a Colorful Legacy, Tulsa World, Jan. 16, 2007, available at http://www.tulsaworld.com (follow “Advanced Search” hyperlink; then set date for Jan. 16, 2007 and search “Gene Curtis”) (providing account of attorney’s argument that defendant acted in self-defense and jurors would do same, culminating in attorney drawing two pistols to illustrate point).

86. See Wood, 486 F.3d at 785 (noting defense attorney’s arguments concerning Demota’s purported identification issues before and during arrest).

87. Id. The defense attorney went on to conclude that the evidence taken from Wood’s automobile and from his person (including the jacket), as well as the assertions made by Officer Demota in pursuing the fleeing robber, were inconsistent with any potential involvement in the robbery. See id. (describing conclusions drawn by defense attorney during closing argument). The comment concerning exculpatory DNA evidence, however, was one that became a focal point for the Government during oral argument before the Third Circuit. For a discussion of each party’s position during oral argument before the Third Circuit, see infra notes 97-102 and accompanying text.

88. See id. (asserting that defense theme lacked significance given frequency of mistakes). Specifically, the prosecutor argued: “Was Officer Demota accurate about what Shaheed Wood said[?] . . . You heard the officer’s screams. He was extremely agitated and excited and mistakes happen. Of course, they can happen.” Id.

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closing argument.\textsuperscript{89} Finally, the prosecutor made the following statement that became the disputed remark in this case: "[T]hat's how human nature is. I can't explain it but that's what it is. We all make mistakes. Government agents make mistakes, police officers make mistakes, citizens make mistakes, judges make mistakes, that's why we have courts of appeals."\textsuperscript{90}

Wood's attorney immediately objected to these statements and moved for a mistrial, but the trial judge denied the motion.\textsuperscript{91} The jury then went on to convict Wood on all counts, and the judge imposed concurrent sentences of 120 months for the first two counts of robbery and conspiracy to commit robbery to run consecutively to a 120-month sentence for the third count of using a firearm during the commission of a violent crime.\textsuperscript{92} Wood appealed both his conviction and his sentence to the Third Circuit.\textsuperscript{93}

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89. See id. (noting prosecutor's frequent reference to phrase "mistake" and emphasis on regularity of mistakes being made by several different members of society).

90. Id. at 785-86 (emphasis added). This was the portion of the prosecutor's argument that mirrored those mentioned in \textit{Caldwell} and \textit{Riley}. For a discussion of closing argument comments made in these cases and similar ones made in certain other cases, see \textit{supra} notes 32-73 and accompanying text.

91. See id. at 786 (discussing defense attorney's immediate objection to prosecutor's assertions). The defense attorney strenuously argued that the prosecutor's statements might "somehow lead this jury to believe that if they make a mistake . . . that, somehow, the Court of Appeals can correct that mistake," thus 'minimiz[ing] in the jury's mind the gravity of the responsibility to get [the verdict] right." Id. The trial judge considered such argument before concluding that the court's "instructions to the jury will more than adequately direct them to their purpose in their deliberations and not that they're to make mistakes for somebody else to clean up." Id.; see also Neil P. Cohen, \textit{The Timing of Jury Instructions}, 67 Tenn. L. Rev. 681, 682 (2000) (noting purpose of jury instructions is to aid jury in completing its "factfinding duties" and categorizing different types of jury instructions according to more specialized function).

92. See \textit{Wood}, 486 F.3d at 786 (referring to sentence given to defendant by district judge). The sentence given to Wood was a stringent one—it reflected a six-level enhancement because the trial judge found that his actions created a "substantial risk of serious bodily injury to [Officer] Demota." See id.; see also \textit{United States Sentencing Guidelines Manual} § 3A1.2(c) (2004) (providing for upward enhancement if defendant is found to have acted in manner that posed risk of serious bodily injury to another individual). In order to apply this enhancement, the trial judge needed to find this additional fact by a preponderance of the evidence, and the resulting sentence could not exceed the statutory maximum sentence applied to these crimes. See \textit{Apprendi v. New Jersey}, 530 U.S. 466, 490 (2000) (holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). The Third Circuit considered the sentence in its opinion in \textit{Wood} and remanded the case back to the Eastern District of Pennsylvania for reconsideration of the sentence. See \textit{Wood}, 486 F.3d at 789-91 (discussing error in sentence given to defendant and concluding sentence was inappropriate). The court's holding as to Wood's sentence, however, is not the focus of this Casebrief and is an issue apart from this discussion.

93. See id. at 786 (noting defendant's challenge of both verdict and sentence in Third Circuit).
B. *The Third Circuit’s Opinion*

After hearing arguments stemming from Wood’s appeal, a three-judge panel for the Third Circuit unanimously affirmed Wood’s conviction. The court did so by finding that the prosecutor’s reference to the appellate process in closing argument amounted to harmless error in the context of the case; thus, reversal and remand was unnecessary. Despite its decision, the Third Circuit in *Wood* strongly condemned the prosecutor’s statements made during the trial, and warned that such an argument in the future might infringe on the holdings in *Caldwell* and its progeny.

1. *The Parties’ Arguments*

On appeal, Wood’s attorneys forcefully argued that the statements in the prosecutor’s closing arguments should have led the district judge to grant his motion for a mistrial. They stressed that “[a] remark by the prosecutor in the course of his closing argument to the jury . . . that if the jurors make a mistake in the verdict, some other tribunal will correct it, is improper.” According to Wood’s attorneys, such a statement would tend “to influence [the jurors] to shift the burden of their responsibility from themselves to an appellate court.”

94. *See id.* at 791 (affirming defendant’s conviction by unanimous decision). In order to hear the case, the Third Circuit properly exercised federal appellate jurisdiction after Wood had appealed his conviction. *See id.* at 786 (providing for proper exercise of appellate jurisdiction pursuant to federal statute); *see also 28 U.S.C. § 1291 (1982) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."). In addition, because Wood challenged his sentence, the Third Circuit also needed to exercise appropriate jurisdiction to be able to consider the sentence. *See 18 U.S.C. § 3742(a) (2007) ("A defendant may file a notice of appeal in the district court for review of an otherwise final sentence."). For further discussion of the Third Circuit’s rationale for affirming Wood’s conviction, see *infra* notes 106-23 and accompanying text.

95. *See Wood*, 486 F.3d at 789 (concluding that any error in trial that resulted from prosecutor’s statement about appellate process could not have affected verdict in case and was thus harmless).

96. *See id.* (emphasizing that referencing appellate court function can be dangerous for trial attorney). For further discussion of why the Third Circuit found that such argument might be dangerous in closing arguments, see *infra* notes 124-30 and accompanying text.

97. *See id.* at 786 (discussing Wood’s major contentions during oral argument before Third Circuit).

98. *Id.* The Third Circuit would go on to agree with Wood’s contention but qualify that agreement in the context of this case. For further discussion of why the Third Circuit treated the prosecutor’s comments as improper, and the framework that it used in order to evaluate those comments, see *infra* notes 114-23 and accompanying text.

99. *Id.* Wood relied primarily on two state cases in support of his contention that the prosecutor’s remark was improper. *See id.* at 787 (noting two cases upon which defendant premised his argument were *Johnson v. Maryland*, 601 A.2d 1093 (1992) and *People v. Rutledge*, 578 N.Y.S.2d 162 (1992)). In *Johnson*, the prosecutor had made this statement, which the Maryland Court of Appeals deemed improper:

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In response to this argument, the Government invoked the invited response doctrine to defend the prosecutor’s remarks.\textsuperscript{100} It argued that the opportunity to use the doctrine arose when Wood’s attorney mentioned that defendants had been exonerated after trial because of later findings of DNA evidence.\textsuperscript{101} This type of statement, according to the Government, was “clearly intended” to persuade “the jury to decide to acquit based on uncertain[ty] caused by the results in different cases.”\textsuperscript{102}

\textit{Johnson}, 601 A.2d at 1093-94 (quoting prosecutor’s argument in rebuttal to defense attorney’s contentions during closing argument). The \textit{Johnson} court placed considerable weight on the fact that the prosecutor argued that defense counsel had attempted to “elevate reasonable doubt more than it is in the jurors’ minds.” See \textit{id.} at 1096 (emphasizing portion of improper statement made by prosecutor). Furthermore, the court determined that the jury might incorrectly infer from the prosecutor’s argument that if it returned a guilty verdict, the verdict would not be final. See \textit{id.} (noting possibility that jury might be improperly swayed by prosecutor’s statements). As a result, the court found that the statement implied that the jurors did not need to be concerned about convicting the defendant. See \textit{id.} (concluding that improper implication followed from prosecutor’s argument to jury).

In \textit{Rutledge}, the second case upon which Wood relied, the prosecutor told the jury “that as ‘sophisticated New Yorkers, you know there’s an appeal process . . . to safeguard that defendant’s rights. . . . So a verdict of guilty is not final and you need not agonize in this case [sic] there is nothing to agonize over . . . .’” \textit{Rutledge}, 578 N.Y.S.2d at 163. On appeal, the Government admitted that the statement during closing argument was improper; its only argument was that defense counsel had made a procedural error in objecting to the statement that would thus prevent reversal of the defendant’s conviction. See \textit{id.} (noting Government’s argument that defendant’s general objection to statement was insufficient to preserve defendant’s claim on appeal). The court rejected the Government’s argument and thus used the improper statements as grounds for reversal of the defendant’s conviction. See \textit{id.} (concluding that statement presented serious possibility of prejudice to defendant).

\textsuperscript{100} See \textit{Wood}, 486 F.3d at 788 (recounting Government’s argument that invited response applied to remarks made during closing argument at trial).

\textsuperscript{101} See \textit{id.} (considering Government’s argument that defense counsel had invited prosecutor’s apparently improper reply through contention that DNA evidence has in past provided for exoneration of previously convicted defendants).

\textsuperscript{102} \textit{Id.} For further discussion of the Third Circuit’s response to the Government’s contention that this statement invited the prosecutor’s response, see infra notes 114-18 and accompanying text.
2. The Third Circuit’s Rationale

The Wood court first referred to the Caldwell framework in the third paragraph of its discussion.\textsuperscript{103} Before undertaking any discussion of its own holding, the court emphasized that “comments tending to lead a jury to believe that the responsibility for determining the appropriateness of a defendant’s sentence lies with an authority other than the jury are inappropriate.”\textsuperscript{104} This assumption set an immediate tone that, in deciding this case, the Third Circuit was unwilling to accept this type of prosecutorial argument as appropriate.\textsuperscript{105}

For all its reservations toward the prosecutor’s argument, however, the Third Circuit was unanimous in deciding to affirm Wood’s conviction.\textsuperscript{106} The court noted that a “presumption of correctness” typically attaches to a verdict when considered on appeal.\textsuperscript{107} As a result, a jury

\textsuperscript{103} See id. at 787 (recognizing applicability of Caldwell framework to case at bar).

\textsuperscript{104} Id. (citing Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985)). The cited language in the case is found not only in the text of Caldwell, the court also cited to similar language in Riley. See Riley v. Taylor, 277 F.3d 261, 298 (3d Cir. 2001) (en banc) (“[A] Caldwell violation may be established where a technically accurate statement describing the state appellate review process nonetheless ‘misled the jury to minimize its role in the sentencing process.’” (quoting Driscoll v. Delo, 71 F.3d 701, 713 (8th Cir. 1995))).

\textsuperscript{105} For further discussion of the Third Circuit’s indignation with this statement and its conclusion that such a statement might not always be proper during closing arguments, see supra notes 94-96 and infra notes 124-30, and accompanying text.

\textsuperscript{106} See Wood, 486 F.3d at 791 (affirming judgment of conviction for defendant).

\textsuperscript{107} See id. at 787 (recognizing verdict found by jury is entitled to basic presumption of correctness in appellate determination); see also Caldwell, 472 U.S. at 330-31 (discussing presumption of correctness that normally applies in spite of potentially inappropriate comments made by attorneys). This presumption of correctness standard is applied in many federal circuits and state courts. See, e.g., Caldwell v. Bell, 288 F.3d 838, 845 (6th Cir. 2002) (Norris, J., dissenting) (citing Calderon v. Coleman, 525 U.S. 141, 145-46 (1998)) (noting that presumption of finality and validity attaches to conviction); Int’l Rehabilitation Assocs., Inc. v. Adams, 613 So.2d 1207, 1214 (Ala. 1992) (noting that “strong presumption of correctness attaches to a jury verdict in Alabama”); Peterson v. Minneapolis Star & Tribune Co., 164 N.W.2d 621, 628 n.1 (Minn. 1969) (“[T]he presumption of correctness which attaches to the verdict precludes any speculation as to whether the jury might in fact have based its verdict on some conclusion that is not supported by the evidence.” (quoting Petron v. Waldo, 139 N.W.2d 484, 490 (Minn. 1965))); see also Paramount Pest Control Serv. v. Brewer, 177 F.2d 564, 567 (9th Cir. 1949) (holding that presumption of correctness ought to attach to district court’s findings); Butler v. State, 23 S.E.2d 263, 264 (Ga. Ct. App. 1942) (declaring that sense of sanctity and validity should apply to formal judgments rendered in Georgia courts); Delashmutt v. McCoy, 176 N.W. 682, 682 (Iowa 1920) (recognizing that presumption of correctness generally attaches to jury verdict). But see Lowe v. City of St. Louis, 843 F.2d 1158, 1159 (8th Cir. 1988) (holding that no presumption of correctness is given to district court’s finding of directed verdict). Additionally, in federal civil cases, a trial court’s findings are not to be set aside unless they are found to be clearly erroneous. See Fed. R. Civ. P. 52(a)(6) (providing for clearly erroneous standard of review of trial court findings).
verdict normally will not be "destroyed by comments from the prosecutor misstating the jury's role in the judicial process."\textsuperscript{108}

Having recognized the applicability of the presumption of correctness for a verdict, the \textit{Wood} court was not convinced that the prosecutor's remarks were inappropriate.\textsuperscript{109} The court held that it was unclear whether the statement had any tendency to affect the jury's sense of responsibility for its own verdict.\textsuperscript{110} Important to this determination was that the prosecutor's disputed reference to the appellate function immediately followed his comment that judges can make mistakes.\textsuperscript{111} The court found that the order of these remarks made it "logical to believe that the jury would have understood the prosecutor's comment as relating to the functions of the trial judge and not the jury."\textsuperscript{112} The fact that the prosecutor did not mention juries among the group of entities whom he claimed tend to make mistakes was also significant to the court's determination.\textsuperscript{113}

The court did, however, treat the prosecutor's remarks as inappropriate for the purposes of its analysis and thus had to determine whether the Government could permissibly use the invited response doctrine to justify it.\textsuperscript{114} Relying on the holding in \textit{Dispoz-O-Plastics} that the Government may not use invited response offensively, the \textit{Wood} court held that the contention that Wood's attorney invited the response when the attorney mentioned DNA exoneration belied an "unduly broad" reading of the doctrine.\textsuperscript{115} The court determined that in referring to DNA evidence, defense counsel had simply sought to emphasize the importance of gather-

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\item \textsuperscript{108} \textit{Wood}, 486 F.3d at 787.
\item \textsuperscript{109} \textit{See id.} at 786-87 (noting that court would treat statement as appropriate for purposes of its opinion but was not automatically convinced that prosecutor's arguments were inappropriate).
\item \textsuperscript{110} \textit{See id.} at 787 (recognizing potential that prosecutor's statement had little to no effect on jury's sense of its own responsibilities).
\item \textsuperscript{111} \textit{See id.} (discussing natural order of prosecutor's argument and determining its potential effect in context of inappropriate statement).
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{See id.} (noting prosecutor's refraining from discussion of juries making mistakes that might be correctable by courts of appeal). During closing argument, the prosecutor had referred to governments, police officers, citizens and judges as being prone to mistakes. \textit{See id.} at 785-86 (listing entities whose mistakes prosecutor believed may be corrected by courts of appeal). For further discussion of the individuals and entities prone to mistakes that the prosecutor mentioned during closing argument, see \textit{supra} note 90 and accompanying text.
\item \textsuperscript{114} \textit{See Wood}, 486 F.3d at 788 (stating that court would treat prosecutor's remark as inappropriate for balance of its opinion and consider Government's argument of applicability of invited response doctrine). For further discussion of the invited response doctrine, see \textit{supra} notes 59-73 and accompanying text. For a discussion of the Government's rationale that the invited response doctrine applied in this case, see \textit{supra} notes 100-02 and accompanying text.
\item \textsuperscript{115} \textit{See Wood}, 486 F.3d at 788 (deciding that Government could not use invited response doctrine to justify its argument and respond to remarks concerning exoneration of defendants through subsequently discovered DNA evidence); \textit{see also} United States v. Dispoz-O-Plastics, 172 F.3d 275, 284-85 (3d Cir. 1999) (noting that invited response cannot be used as "springboard" for affirmative attacks to be
ing evidence for later investigation, and was not launching an attack on the prosecutor.116 Furthermore, the court concluded that there had been no showing by the Government on appeal that Wood’s attorney had “predicated” the summation upon arguments that had no basis in evidence presented at trial.117 The court therefore found that the invited response doctrine did not apply.118

Because it treated the prosecutor’s statement as potentially inappropriate, the Wood court was required to examine the remark in the context of several factors present in the trial, in order to determine whether the district court should have granted a mistrial.119 One major factor impacting the court’s view was that the disputed comment was a mere sentence in the prosecutor’s entire closing argument.120 Similarly, the appellate court noted that the district court had given an express instruction to the jury that “opening and closing statements made by counsel were not considered evidence,” and that the jury was only allowed to ground its verdict on the basis of the evidence presented.121 Finally, the court emphatically stated that there was a substantial amount of evidence launched on defense counsel). For further discussion of the facts and holding in Dispos-O-Plastics, see supra notes 68-73 and accompanying text.

116. See Wood, 486 F.3d at 788 (discussing interpretation of defense counsel’s contentions during closing argument); cf. United States v. Gambino, 926 F.2d 1355, 1364-66 (3d Cir. 1991) (noting that defense attorney’s insinuation that Government perjured its witnesses was enough to provide opportunity to use invited response); United States v. Pungitore, 910 F.2d 1084, 1126-27 (3d Cir. 1990) (concluding that defense counsel’s personal attack on integrity of prosecutor and law enforcement officers constituted appropriate instance for Government to use invited response doctrine). 117. See Wood, 486 F.3d at 788-89 (noting that nothing could make court view defense counsel’s statements as making concerted attack on prosecutor or prosecutor’s case).

118. See id. at 789 (holding that invited response doctrine could not apply in present case).

119. See United States v. Rivas, 493 F.3d 131, 140 (3d Cir. 2007) (“[A] mistrial is not required where improper remarks were harmless, considering their scope, their relation to the context of the trial, the ameliorative effect of any curative instructions and the strength of the evidence supporting the conviction.”).

120. See Wood, 486 F.3d at 789 (noting that objectionable statement in prosecutor’s closing argument was relegated to one sentence within entire summation).

121. Id. Besides giving this instruction, the district judge also instructed the jury to carefully and impartially consider all evidence and reach a just verdict. See id. at n.4 (discussing further instructions given by district judge). The judge closed his instructions with this comment:

As jurors, your role is to resolve and decide the factual issues in this case. You are the sole and exclusive judges of the facts[,] you decide upon the weight of the evidence. You determine the credibility of witnesses. You resolve such conflicts as there may be in the evidence, and you draw such reasonable inferences as may be warranted by the testimony or exhibits in the case.

Id.; see also A. Leo Levin & Robert J. Levy, Persuading the Jury With Facts Not in Evidence: The Fiction-Science Spectrum, 105 U. Pa. L. Rev. 139, 144 (1956) (noting that impropriety is present where counsel attempts to interject and establish material facts during course of argument that had not been established during trial).
presented against Wood at trial.\textsuperscript{122} Therefore, the court was “certain beyond any possible doubt that the prosecutor’s comment could not have affected the verdict” and affirmed Wood’s conviction accordingly.\textsuperscript{123}

Nevertheless, in arriving at their conclusion, the Third Circuit judges expressed considerable disdain for the prosecutor’s comments.\textsuperscript{124} The panel expressly acknowledged its disapproval of similar comments in other closing arguments, and stated that “it would have been better” if the prosecutor had refrained from making the questionable comment during the trial.\textsuperscript{125} Furthermore, in ending its review of the remark, the court warned prosecutors that references to the appellate process similar to the one made in Wood’s trial could constitute reversible error in certain circumstances.\textsuperscript{126}

Most importantly, the Third Circuit drew on the \textit{Caldwell} rule throughout its opinion in order to apply the rule to non-capital cases.\textsuperscript{127} It cited the capital cases of \textit{Caldwell} and \textit{Riley} early in its discussion and stated:

Even though arguments regarding the shifting of responsibility for the outcome in a criminal case appear to arise most often on appeals of sentences in capital cases, “state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court” similarly have no place in cases where a defendant may be sentenced to \textit{a punishment other than death}.\textsuperscript{128}

Using this framework, the court felt comfortable enough to declare that the notion that prosecutors ought to refrain from attempting to alter the jury’s sense of responsibility applies to the determination of guilt or innocence as well as the sentencing determination.\textsuperscript{129} In closing, the court emphasized that “reference in an argument to the review function of the

\begin{itemize}
\item \textsuperscript{122} \textit{See Wood}, 486 F.3d at 789 (concluding that “there is simply no doubt that Wood is guilty”).
\item \textsuperscript{123} \textit{Id}.
\item \textsuperscript{124} \textit{See generally id.} at 786-89 (discussing general disregard for closing arguments that improperly reference appellate process).
\item \textsuperscript{125} \textit{See id.} at 787-88 (admonishing prosecutor for argument during trial and indicating that more proper argument could have been made).
\item \textsuperscript{126} \textit{See id.} at 789 (concluding that this instance of inappropriate comment failed to yield reversal but cautioning that future transgressions in same area may lead to reversible trial error).
\item \textsuperscript{127} \textit{See id.} at 787-89 (referencing applicability of \textit{Caldwell} rule to factual situation at bar).
\item \textsuperscript{128} \textit{Id.} at 787 (emphasis added); \textit{see also} \textit{Caldwell} v. Mississippi, 472 U.S. 320, 330 (1985) (concluding that Government’s suggestions to jury that appellate process plays role in its decision may alter jury’s sense of responsibility for its own decision).
\item \textsuperscript{129} \textit{See Wood}, 486 F.3d at 787 (noting applicability of \textit{Caldwell} rule to guilt or innocence phase of trial as well as penalty phase).
\end{itemize}
courts of appeals may be dangerous territory into which a prosecutor should venture with care."

IV. **Wood's Impact on Closing Argument in the Third Circuit**

With this decision, the Third Circuit did not establish a "bright-line" rule that forbids referring to the appellate process during closing arguments. The decision did, however, declare that such references in non-capital cases will be heavily scrutinized under the *Caldwell* framework. As such, the Third Circuit has left open the possibility that *Caldwell* can apply outside the capital arena and thus can serve as the basis for reversing a conviction.

The Third Circuit's ruling in *Wood* emphasizes an important area that prosecutors would be wise to avoid in closing arguments. Not only does the potential for reversal loom, but the mere mention of a court of appeal during closing argument could also unnecessarily confuse a jury into believing that the prospect of appellate review makes its decision less binding or important, which could ultimately have an impact on its decision. In closing argument in a non-capital trial, eliminating any reference to an appellate court ensures that the jury’s focus remains on the evidence presented during the trial and on any inferences that can be drawn solely on the basis of that evidence. Furthermore, the *Wood* decision seems to

130. *Id.* at 789.
132. For further discussion of the *Caldwell* opinion and the rule that it set forth, see *supra* notes 92-45 and accompanying text.
133. For further discussion of the holding in *United States v. Wood* and the manner in which it applied the rule announced in *Caldwell*, see *supra* notes 94-130 and accompanying text.
134. *See* *Wood*, 486 F.3d at 789 (warning practitioners about danger of discussing appellate role in trial process during closing argument).
135. *See generally* John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1201-04 (2002) (discussing research to determine sources of juror confusion and recommendations for lessening criminal jury confusion in future). Closing arguments are not always the major reason why a juror or several jurors in a trial become confused; often, this distinction belongs to the judge’s instructions and the jurors’ inability to decipher or remember them. *See id.* at 1202 (noting that confusion may result from difficulty in remembering charges or instructions from court); *see also* Drum v. Shaul Equip. & Supply Co., 760 A.2d 5, 9-10 (Pa. Super. Ct. 2000) (noting several jurors’ misunderstandings of terms "substantial" and "negligence" as they applied to decision and subsequent verdict).
136. *See* Peter W. Agnes, Jr., *An Ounce of Prevention is Worth a Pound of Cure: A Collaborative Approach to Eliminate Improper Closing Arguments*, 87 MASS. L. REV. 33, 42 (2002) (noting attorney’s role to keep closing argument focused on only that evi-
disfavor use of the invited response doctrine—an otherwise important prosecutorial tool for closing arguments—to justify references to the appellate process.\textsuperscript{137} The Third Circuit most likely will be unwilling to hold that invited response is a viable approach for asserting any comment about courts of appeal unless the defense attorney launches an affirmative attack on the prosecutor or a key government witness.\textsuperscript{138}

Completely avoiding any reference to the appellate process is certain the best way for a prosecutor to sidestep the type of scrutiny that the court applied to the statement in \textit{Wood}.\textsuperscript{139} There still remains, however, the goal of making jurors feel more at ease with their decisions; finding a defendant guilty in a non-capital arena can still prove to be a significantly stressful exercise.\textsuperscript{140} If prosecutors seek to ease the burden on the jurors, they should avoid referring to appellate review, and instead discuss the strength in numbers that jurors possess, in that all of the jurors together
dence which has been admitted at trial). The judge also plays an important role in keeping extraneous matters from being heard by the jury by ensuring that parties do not make improper closing arguments. \textit{See id.} (emphasizing judge's role in closing argument proceedings).

137. For a discussion of why the Government argued that the invited response doctrine applied to the prosecutor's comments during closing argument at Wood's trial, see \textit{supra} notes 100-02 and accompanying text. For further discussion of why the Third Circuit held that the invited response doctrine was inapplicable to the \textit{Wood} decision, see \textit{supra} notes 114-18 and accompanying text.

138. \textit{Compare} United States v. Gambino, 926 F.2d 1355, 1365-66 (3d Cir. 1991) (holding that invited response was appropriate for prosecutorial remark after defense counsel had referred to government witness as "perjurer," "murderer," "robber" and "burglar"), \textit{with} \textit{Wood}, 486 F.3d at 788-89 (holding that invited response was inappropriate for prosecutorial reference to appellate court role in correcting mistakes after defense counsel remarked that DNA evidence had been used to clear previously convicted criminals).

139. For a discussion of why the Third Circuit frowned upon the prosecutor's statement in closing argument during Wood's trial, see \textit{supra} notes 94-96 and 124-30, and accompanying text.

140. \textit{See} Monica K. Miller et al., \textit{Juror Stress: Causes and Interventions}, 30 T. MARSHALL. L. REV. 237, 239 (2004) (noting that jurors tend to feel stress at every stage of jury duty). An evidentiary study showed that a sample of jurors felt at least a moderate level of stress during different stages of jury duty, from summons to verdict and dismissal. \textit{See id.} (reporting juror stress levels in response to several potential stress factors associated with jury duty). The survey found that 44\% of criminal trial jurors included in the sample indicated being stressed about having to make a decision that might falsely convict an innocent defendant or that might tend to let a guilty defendant go free. \textit{See id.} at 240 (noting percentage of jurors who experience stress during deliberations). Another important stress factor was being able to arrive with fellow jurors on a unanimous verdict—49\% of the jurors indicated that they felt stress because of this factor. \textit{See id.} (affirming stress felt due to necessity of unanimous verdict). The issue of juror stress is rampant enough that counseling may be offered to those who may have become traumatized after serving on a jury. \textit{See, e.g.,} Leigh B. Bienen, \textit{Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials}, 68 IND. L.J. 1333, 1350 (1993) (discussing stress debriefing treatment for those jurors who have served in particularly emotional trials).
arrive at a unanimous verdict. This would provide an alternative basis for jury reassurance that would more than likely avoid Caldwell and Wood scrutiny.

V. Conclusion

Prosecutors have an important job in our society: they must explore all possible avenues to see that justice is accomplished on behalf of American citizens. They have a specific duty to protect at all costs the people whom they serve while at the same time ensuring that criminals are appropriately brought to bear for their crimes. Such a rigorous job is constantly recognized as inherently difficult given the pressures that many prosecutors must face from citizens and governmental entities alike. Thus, given the importance of closing arguments to a trial, prosecutors should continue to be afforded a deferential standard as to what they are allowed to say in their final remarks to the jury.

141. See United States v. Johnson, 495 F.3d 951, 979 (8th Cir. 2007) (noting defendant’s objection to prosecutor’s statement under Caldwell v. Mississippi, 472 U.S. 320 (1985)). In Johnson, the prosecutor made this statement, which the defendant subsequently argued had diminished the jury’s sense of responsibility for its decision: “And if you choose the death penalty, you choose it as a group. It doesn’t rest on the shoulders of any one of you. There’s courage in numbers.” Id. The Eighth Circuit held that such comments were not improper under Caldwell and instead made the jurors feel more comfortable about their upcoming decision by reminding them that they were undergoing the process as a collective group. See id. (concluding that prosecutor’s argument was proper under circumstances).

142. See Wood, 486 F.3d at 787 (discussing applicability of Caldwell to prosecutor’s closing argument during trial).

143. See Robert W. Clifford, Identifying and Preventing Improper Prosecutorial Comment in Closing Argument, 51 Me. L. Rev. 241, 258 (1999) (defining primary responsibility of prosecutor as duty “to see that justice is accomplished”). In Clifford’s eyes, the prosecutor’s role is not simply limited to that of an advocate—the prosecutor also has the responsibility to be a “minister of justice.” See id. (observing potential dual roles for prosecutors in legal arena).

144. See, e.g., Maine v. Ashley, 666 A.2d 103, 105 (Me. 1995) (characterizing important prosecutorial duty to people); see also Clifford, supra note 143, at 258 (discussing that prosecutors owe duty to people whom they represent and have duty to ensure that criminals are brought to justice).

145. See Kay L. Levine, Article, The New Prosecution, 40 Wake Forest L. Rev. 1125, 1174-75 (2005) (discussing difficulties in prosecutor’s job). Often prosecutors must act as justice-seekers, protectors of the people and as counselors to injured victims, further adding to their arsenal of responsibilities. See id. at 1175 (noting prosecutors’ frequent frustration with having to counsel victims and seek support for them). Because they take away from courtroom and investigation time, such counseling sessions have been referred to by prosecutors as “dog and pony shows.” See id. at n.146 (referring to author’s interview with local prosecutor and noting prosecutor’s characterization of sessions made before local audiences concerning counseling and social services).

146. See Nidiry, supra note 4, at 1506 (“By its nature, effective closing argument is designed to persuade the trier of fact. With few exceptions, litigators are given wide latitude in that persuasion process.” (quoting Harry Caldwell, Name Calling at Trial: Placing Parameters on the Prosecutor, 8 Am. J. Trial Advoc. 385, 385 (1985))).
Discussing the role of appellate courts in the jury’s determination, however, is something best left to a party other than the prosecutor.147 The prosecutor’s argument is most effective when it focuses the jury on the trial itself and the evidence presented there.148 Wading beyond these parameters into a discussion of appellate review not only takes away from that focus, but under Wood, may provide potential grounds for a mistrial or reversal of a conviction.149 Although Wood’s conviction was upheld, the Third Circuit’s opinion in the case represents a major caution to Third Circuit prosecutors to be wary of making this kind of argument.150

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147. See Walter W. Steele et al., Jury Instructions: A Persistent Failure to Communicate, 67 N.C. L. Rev. 77, 77 (1988) (discussing role of judge to instruct jurors on which duties are theirs and which duties are not assigned to them).

148. See Agnes, supra note 136, at 42 (emphasizing role of prosecutor to keep closing argument more focused on evidence presented and admitted at trial rather than on empirical matters).

149. For the decision in Wood, and the possibility that the decision will lead to reversals and mistrials in the Third Circuit, see supra notes 74-148 and infra note 150 and accompanying text.

150. See United States v. Wood, 486 F.3d 781, 789 (3d Cir. 2007) (warning prosecutors to discuss appellate process in closing arguments with care).