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No More Tears: Anti-Sympathy Jury Instructions Attempt to Disallow Impulsive Emotion

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NO MORE TEARS: ANTI-SYMPATHY JURY INSTRUCTIONS ATTEMPT TO DISALLOW IMPULSIVE EMOTION

I. INTRODUCTION

There is no area of criminal law where it is of more significance to ensure fairness than in a capital punishment trial. To guarantee a just outcome, it is crucial to guard against the influence of impermissible factors during both the trial and sentencing stages. Post-judgment appeals provide further opportunity for higher courts to correct injustice by vacating a death sentence founded upon unconstitutional grounds.

In 1972, the United States Supreme Court decided *Furman v. Georgia*.[1] The Court, in a five to four margin, held that capital punishment was unconstitutional under then-existing statutes.[2] Post-*Furman* Supreme Court cases have specifically addressed prosecutors' comments which may diminish a jury's sense of responsibility and anti-sympathy jury instructions in death penalty cases.[3] These holdings provide guidelines for future court proceedings in order to avoid violation of constitutionally guaranteed rights.

In *Parks v. Brown*,[4] the Tenth Circuit Court of Appeals reviewed two separate issues in light of these new Supreme Court guidelines. The first issue presented by the petitioner-appellant in *Parks*, claimed that the prosecutor's remarks misled the jury by impermissibly diluting their sense of responsibility when imposing sentence.[5] The petitioner's second contention focused on an anti-sympathy jury charge in the penalty phase of the trial.[6] The petitioner claimed that this instruction violated his eighth amendment rights.[7]

This article examines the significance of the Tenth Circuit decision in *Parks*, and the possible future affect it will have on prosecutor's comments and anti-sympathy jury instructions. Furthermore, it will discuss

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1. 408 U.S. 238 (1972).

2. *See* Bowers & Pierce, *Arbitrariness And Discrimination Under Post Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980).

3. *See* Caldwell v. Mississippi, 472 U.S. 320 (1985) where the Supreme Court found that the prosecutor impermissibly mislead the jury as to its responsibility in the sentencing decision; *see also*, California v. Brown, 479 U.S. 538 (1987) where the Court, in a five to four decision, upheld an anti-sympathy jury instruction.

4. District Court of Oklahoma County, Case No. CRF 77-3159, *aff'd*, Parks v. State, 651 P.2d 686 (Okla. Crim. App. 1982), *cert. denied*, Parks v. Oklahoma, 459 U.S. 1155 (1983), *cert. denied on post conviction proceedings*, Parks v. Oklahoma, 467 U.S. 1210 (1984), *habeas corpus proceeding*, Parks v. Brown, 823 F.2d 1405 (10th Cir. 1987), *opinion withdrawn and republished*, Parks v. Brown, 840 F.2d 1496 (10th Cir. 1987), *different results reached on reh'g en banc*, Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc).

After this article was written the Supreme Court granted Oklahoma's petition for certiorari and agreed to review the Tenth Circuit decisions in Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc), and Parks v. Brown, 840 F.2d 1496 (10th Cir. 1987). *See* Saffle v. Parks, 109 S. Ct. 1930 (1989).

5. *Parks*, 860 F.2d at 1549.

6. *Id.* at 1552.

7. *Id.*

the *Parks* opinion in light of the Supreme Court's position on prosecutorial conduct and the fine line the Court has drawn in upholding certain anti-sympathy jury instructions.

II. BACKGROUND

A. *Caldwell v. Mississippi*[8]

The issue presented to the Supreme Court for review in *Caldwell* was whether a capital punishment sentence could be upheld when the jurors had been led to believe that the "responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case."[9]

Upon review, the Supreme Court invalidated the petitioner's death sentence,[10] holding that the prosecutor had wrongfully minimized the jury's sense in the importance of its role.[11] The prosecutor's argument suggested to the jury that the ultimate responsibility for the imposition of the death penalty did not rest with them, but with the appellate court.[12] The assistant district attorney had repeatedly informed the jurors that their capital punishment decision was automatically reviewable by a higher court.[13]

Another factor which affected the Court's judgment in *Caldwell* was the trial court's affirmation of the prosecutor's remarks. In response to the defense's objection to the prosecutor's closing argument, the trial judge overruled the objection by addressing the prosecutor,". . . go on and make the full expression so the jury will not be confused. I think it proper that the jury realizes that it [the jury's decision] is reviewable automatically as the death penalty commands."[14] The Supreme Court highlighted the trial court's mistake when it asserted, "[t]he trial judge in this case not only failed to correct the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct."[15]

The Supreme Court in *Caldwell* held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[16]

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8. 472 U.S. 320 (1985).
9. *Id.* at 323.
10. The petitioner shot and killed a small grocery store owner while in the process of robbing it. He was later convicted of murder and a death sentence was imposed. *Id.* at 324.
11. *Id.* at 328-29.
12. *Id.* at 323.
13. *Id.* at 325.
14. *Id.*
15. *Id.* at 339.
16. *Id.* at 329.

B. Dutton v. Brown[17] & Coleman v. Brown[18]

Dutton v. Brown and *Coleman v. Brown* are two post-*Caldwell* cases decided by the Tenth Circuit. In neither instance did the court of appeals find the prosecutor's remarks had impermissibly violated the defendant's constitutional rights. The prosecutor's closing remarks in *Dutton* underscored the fact that the jury is part of the whole justice system. The prosecutor emphasized that jurors do not "function as individuals" but are "part of the process."[19] The Tenth Circuit held that the comments, taken in context, were permissible. The court found that "[t]he statement was not designed to, nor did it, suggest to the jury that it was not ultimately responsible for deciding Mr. Dutton's punishment."[20]

Similarly, in *Coleman*, the Tenth Circuit asserted that the "dangers the [Supreme] Court identified in *Caldwell* are not present in the remarks made here."[21] The prosecutor in *Coleman* did not attempt to diminish the jury's accountability in a capital punishment conviction. Instead, the prosecutor emphasized that the defendant bore the burden of his present situation.[22] Looking at the prosecutor's remarks as a whole, it was evident that the he did not intend to dilute the jury's sense of duty. Commenting on the jury's task, the prosecutor stated, "[i]t will be one of the most serious things you've every done in your life and it won't be easy . . . [i]t's a grave responsibility you have . . . and it's not easy to shoulder that kind of load, but somebody's got to."[23]

C. California v. Brown[24]

In *Brown*, the Supreme Court held that the respondent's eighth amendment rights had not been violated by a jury instruction.[25] The instruction informed the jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase of a murder trial.[26]

The five to four decision, with Chief Justice Rehnquist writing the majority opinion, found that the Court's eighth amendment criteria had been met.[27] Past Supreme Court holdings have established two prerequisites for valid death sentencing. First, the jury may not act with unrestrained discretion. This is to prevent the administration of arbitrarily

17. 812 F.2d 593 (10th Cir. 1987) (en banc).
18. 802 F.2d 1227 (10th Cir. 1986).
19. *Dutton*, 812 F.2d at 596.
20. *Id.* at 597. The defendant had been sentenced to death for killing a bar owner while robbing the establishment. The sentence was modified to life imprisonment by the Tenth Circuit due to error. The error was the exclusion of mitigating evidence offered by the petitioner's mother. The trial court refused to allow her to testify because she had remained in court after a sequestration order.
21. Coleman v. Brown, 802 F.2d 1227, 1240 (10th Cir. 1986).
22. *Id.* at 1241.
23. *Id.*
24. 479 U.S. 538 (1987).
25. *Id.* at 543.
26. *Id.* at 539.
27. *Id.*

arrived at penalties.[28] Next, the defendant "must be allowed to introduce any relevant mitigating evidence"[29] regarding his character.[30]

In reaching its conclusion, the majority stressed the exact wording of the jury charge at issue. "What the Rehnquist group deemed dispositive was the inclusion of the adjective 'mere.' "[31]The Court found that the respondent had incorrectly focused solely on the noun "sympathy."[32] The Court maintained that from the inclusion of the word "mere," a juror would understand that the jury should not rely on "extraneous emotional factors" when making its death sentence determination.[33]

The Court reasoned that the directive would limit the jury's consideration to matters introduced into evidence, while conveying the message that the jury must "ignore . . . the sort of sympathy that would be totally divorced from the evidence."[34] An instruction which prohibits the jury from consideration of extrinsic factors does not violate the eighth amendment.[35]

In a separate opinion, Justice O'Connor concurred with the majority in *Brown*. She noted that imposition of the death penalty involves a "reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion."[36] (emphasis in original). However, Justice O'Connor cautioned that anti-sympathy instructions may mislead jurors "into believing that mitigating evidence about a defendant's background or character . . . must be ignored."[37]

III. PARKS v. BROWN

A. *History of Proceedings*

The District Court of Oklahoma County by jury conviction found Robyn Leroy Parks, petitioner-appellant, guilty of first-degree murder of a gas station attendant. The same jury sentenced Parks to death. "Parks' conviction and sentence were affirmed on direct appeal by the Oklahoma Court of Criminal Appeals."[38] The Supreme Court of the United States denied certiorari with Justices Brennan and Marshall dissenting.[39]

28. Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).
29. California v. Brown, 479 U.S. 538, 541 (1987).
30. The respondent in this case was convicted of forcible rape and first degree murder of an adolescent girl. At the penalty phase, the defendant presented character witnesses to testify to his peaceful nature. *Id.* at 539.
31. Brief for Petitioner-Appellant on Rehearing En Banc at 19, Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (No. 86-1400). [hereinafter Brief for Petitioner-Appellant (en banc)].
32. *Brown*, 479 U.S. at 541.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 841.
37. *Id.* at 842.
38. Parks v. Brown, 840 F.2d 1496, 1498 (10th Cir. 1987).
39. Parks v. Oklahoma, 459 U.S. 1155 (1983).

Parks then attempted to challenge his post-conviction proceedings in Oklahoma. He was denied relief in state district court and the Oklahoma Court of Criminal Appeals affirmed.[40] The United States Supreme Court denied certiorari.[41]

"Having exhausted his state remedies, Parks filed a *habeas corpus* petition in the United States District Court for the Western District of Oklahoma."[42] Parks' execution, scheduled eleven days from his date of appeal, was stayed by the district court pending its decision. The district court denied relief and dismissed all claims.[43]

The United States Court of Appeals for the Tenth Circuit agreed to hear Parks' appeal. Circuit Judges Monroe G. McKay, Bobby R. Baldock and Robert H. McWilliams sat on the review panel. The panel affirmed the district court finding in a split decision[44] with two of the judges, McKay and Baldock supporting a petition for rehearing. The full court of appeals granted an *en banc* rehearing with respect to the sentencing issues on which the panel had been divided.[45]

B. *Facts*

The facts of the case presented by the state which led to Parks' conviction of first degree murder are as follows. Abdullah Ibrahim, a part-time Gulf gas station attendant in Oklahoma City, Oklahoma was found dead of a gun shot wound on the morning of August 17, 1977. There were no signs of struggle and no money or property had been taken. The police found an unused credit card slip at the station which led to the discovery of a car containing Parks' possessions.[46] This link caused Parks to become the chief suspect of the homicide. At this time Parks was in California, but frequently called a friend of his in Oklahoma, James Clegg. Clegg allowed the police to tape two of his phone conversations with Parks.[47]

In these two conversations, Parks admitted to shooting Ibrahim because Parks intended to use a stolen credit card to buy gas and feared the attendant would call the police.[48] Based on this evidence, the jury

40. The Oklahoma Court of Criminal Appeals affirmed in an unreported order and opinion. *Parks*, 840 F.2d at 1498.

41. Parks v. Oklahoma, 467 U.S. 1210 (1984).

42. Brief for Petitioner-Appellant (en banc) at 2.

43. However, the district court did grant a Certificate of Probable Cause to appeal. Brief for the Petitioner-Appellant (en banc) at 3.

44. Judge McKay dissented in a separate opinion as to three of appellant's claims. These claims involved, (1) the jury instruction on second-degree murder; (2) the prosecutor's comments to the jury during the penalty phase; and, (3) the propriety of the anti-sympathy jury instruction. In the second claim, the appellant claimed the prosecutor's comments minimized the importance of the jury's role in pronouncing sentence. Parks v. Brown, 840 F.2d 1496, 1512 (10th Cir. 1987). (McKay, J., dissenting).

45. Judge McKay "would have ordered a new trial for both the guilt and penalty phases." Brief for Petitioner-Appellant (en banc) at 3.

46. *Parks*, 840 F.2d at 1498.

47. Clegg's assistance was motivated by the prospect of a $5,000 reward from Gulf, and the possibility that the authorities might dismiss a burglary charge against him. Brief for Petitioner-Appellant (en banc) at 5.

48. During the trial, Parks denied killing Ibrahim. He testified he was somewhere

found Parks guilty of first degree murder. After further hearing, the same jury sentenced him to death.[49]

C. *The en banc Opinion of the Tenth Circuit*

On appeal, the Tenth Circuit reviewed two of the petitioner's contentions.[50] The first argument claimed that the prosecutor's comments to the jury impermissibly diluted the juror's sense of responsibility in violation of *Caldwell v. Mississippi*.[51] The second argument asserted that the anti-sympathy jury instruction violated the petitioner's eighth amendment rights.[52]

The Tenth Circuit reversed the petitioner's death sentence. Six of the circuit judges held that the anti-sympathy jury charge violated the defendant's constitutional rights. While in a seven to three split regarding the prosecutor's remarks, the court concluded that *Caldwell* was inapplicable to the instant case.

1. Majority Opinion - Issue I

Judge Ebel, writing for the majority, affirmed the district court's decision that the prosecutor's remarks "did not violate *Caldwell* by improp-

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other than the gas station at the time of the killing and presented a witness to corroborate his alibi. He explained the presence of the credit card slip by stating that he had purchased gas at that particular gas station a few days prior to the shooting but did not have cash with him. Parks claimed that the attendant copied his license number and later that same day he came back to the station and paid for the gas. Parks v. Brown, 840 F.2d 1496, 1499 (10th Cir. 1987).

However, during the first taped telephone conversation with Clegg, Parks admitted to killing the attendant because he did not want the police to discover his use of the stolen credit card. Also, if the police caught him they might discover that he had guns and dynamite in the trunk of his car. (The reason Parks had these explosives was never explained in the appellate court record). *Id.* at 1499.

49. "The jury found only one of the three statutory aggravating circumstances that were charged—that the murder was 'committed for the purpose of avoiding or preventing a lawful arrest or prosecution.'" *Parks*, 860 F.2d 1545, 1547 (10th Cir. 1988) (en banc). The other two aggravating factors which the jury rejected were, (1) that Parks would probably commit other crimes in the future which would pose a continued threat to society, and (2) that the murder was "especially heinous, atrocious and cruel." *Id.* at 1547 n.1.

At the time of the homicide, Parks was 22 years old. When Parks was 17, he was charged with robbery by force and fear to which he pled guilty. "In brief, the facts were that Parks, and two other black youths, accosted a white student in a school yard and after a fight took six cents from the victim." A few years later Parks was convicted for attempted burglary. This is the history of his prior convictions. Parks v. Brown, 840 F.2d 1496, 1502 (10th Cir. 1987).

50. The three member Tenth Circuit panel considered seven arguments on petitioner's appeal. These included (1) an instruction on the lesser offense of second-degree murder; (2) admission of petitioner's prior robbery conviction; (3) the prosecutor's comments to the jury during penalty phase (one of the two arguments reconsidered en banc); (4) the trial court's anti-sympathy instruction (the second contention re-examined on appeal en banc); (5) instructions which addressed aggravating and mitigating circumstances; (6) whether petitioner was denied effective assistance of counsel during the penalty phase; and (7) whether Oklahoma arbitrarily applied the death penalty in a racially discriminatory manner. Parks v. Brown, 840 F.2d 1496 (1987).

51. 472 U.S. 320 (1985).

52. For purposes of discussion the two arguments heard by the Tenth Circuit in the *Parks* case will be referred to as issue I and issue II. Issue I refers to the prosecutor's closing remarks while issue II involves the anti-sympathy jury charge.

erly reducing the jury's sense of responsibility for the sentencing decision."[53] The court approached its examination of issue I in a two-step inquiry.[54] First, it determined whether the prosecutor's statements were the type of remarks covered by *Caldwell*. This means that the statements must tend to alleviate the jurors of responsibility for their actions. If the first criteria is met, then the "second inquiry evaluates the effect of such statements on the jury."[55] The Tenth Circuit never progressed to step two because it concluded that the comments did not violate the petitioner's constitutional rights.[56]

The court of appeals analyzed issue I in light of *Darden v. Wainwright*.[57] This Supreme Court case elaborated on the *Caldwell* doctrine.[58] In *Darden*, the Court asserted that a *Caldwell* violation occurs only when the comments "mislead the jury as to its *role* . . . in a way that allows the jury to feel less responsible than it should for the sentencing decision."[59] (emphasis added).

Although the prosecutor told the jurors in *Parks* that they had "become a part of the criminal-justice system that says when anyone does this [crime], that he must suffer death . . . so it's not on your conscience,"[60] the majority of the court believed that the prosecutor's other comments had adequately stressed the gravity of the jury's responsibility.[61]

Besides the prosecutor's statements which emphasized the jurors' role in the process, the court found other portions of the trial protected against the danger of diluting or trivializing the jury's sense of duty. Unlike *Caldwell*,[62] the judge's instructions[63] in *Parks* underscored the jurors' function as the penalty assessors. The defense counsel's statements in response to the prosecutor's arguments also served to counteract any misunderstanding the jury members may have had as to their function.

Last, the Tenth Circuit examined the *Parks* facts in light of its previ-

53. *Parks*, 860 F.2d at 1548.

54. *Id.* at 1549.

55. *Id.*

56. The second step would determine the effect such statements have on the jury during the sentencing phase, possibly rendering the sentence unconstitutional. *Id.*

57. 477 U.S. 168 (1986).

58. *Supra* note 16.

59. *Darden*, 477 U.S. at 184 n.15.

60. Parks v. Brown, 860 F.2d 1545, 1564 (10th Cir. 1988) (McKay J., concurring and dissenting).

61. In his closing argument, the prosecutor stated, "We are sorrowful that you do have a duty that you must perform . . ." and "[y]ou consider all of this evidence . . . . Can you think of a more proper case . . . in which your verdict assessing death would be more proper?" The Tenth Circuit interpreted these statements as clear messages to the jury that they had the ultimate responsibility in sentencing. *Id.* at 1550.

62. The misleading information regarding the jury's role was compounded by the trial court when it supported the assistant district attorney's remarks. The court stated, "I think it proper that the jury realizes that it [the jury's decision] is reviewable automatically as the death penalty commands." Caldwell v. Mississippi, 472 U.S. 320, 325 (1985).

63. The jury instructions stated, "It is now your duty to determine the penalty which shall be imposed for this offense." *Parks*, 860 F.2d at 1551.

ous holdings in *Dutton* and *Coleman*. In *Dutton*, the Tenth Circuit held that the prosecutor's statements telling jurors that they are "part of the process"[64] and that "you [the jurors] are not here in your individual capacities"[65] were not constitutionally impermissible. Instead, the court found such comments "merely underscored that the jury was part of the whole system of justice."[66] The court of appeals held that similar statements in *Parks* were equally innocuous.

The majority in *Parks* also noted the Tenth Circuit's reasoning in *Coleman*. The prosecutor in *Coleman* emphasized that the defendant bore the burden of his present plight because he was the perpetrator of the crimes committed. The court of appeals found that these remarks did not pose the dangers the Supreme Court identified in *Caldwell*.[67] The *Coleman* opinion went on to state, "[t]his method of argument does not permit the jury to rely on someone else to make the ultimate sentencing decision . . . ."[68]

In conclusion, the Tenth Circuit asserted that the prosecutor's comments viewed in context "did not unconstitutionally diminish the jurors' sense of authority and responsibility for the sentencing decision."[69] Therefore, there was no *Caldwell* violation in the *Parks* case.

2. Majority Opinion - Issue II

The anti-sympathy jury instruction under attack in the *Parks* case reads as follows: "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence . . . ."[70] Petitioner contended that this charge violated his constitutional rights. The majority of the Tenth Circuit agreed.[71]

The first premise which the court relied upon in reaching its conclusion is found in the United States Supreme Court case of *Mills v. Maryland*.[72] The *Mills* precedent holds that if there is a possibility that a "reasonable juror could construe the instruction . . . as to make its sentencing decision improper . . ."[73] this error is enough to require resentencing.[74]

The next question which the Tenth Circuit had to decide was whether the anti-sympathy charge in *Parks* would skew a jury's decision making process. The court approached this question by comparing a similar jury instruction found in *California v. Brown*,[75] and analyzing the Supreme Court's reasons for its holding in *Brown*.

64. Dutton v. Brown, 812 F.2d 593, 596 (10th Cir. 1987).
65. *Id.*
66. *Id.* at 597.
67. *Parks*, 860 F.2d at 1550.
68. *Id.* at 1551.
69. *Id.* at 1552.
70. *Id.* at 1548.
71. *Id.* at 1552.
72. 108 S. Ct. 1860 (1988).
73. *Parks*, 860 F.2d at 1553.
74. *Id.*
75. California v. Brown, 479 U.S. 538 (1987).

The jury instructions in the two cases were similar, but not identical. In *Brown*, the charge cautioned the jurors not to be swayed by "*mere* sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[76] On the other hand, the jury in *Parks* was directed not to allow "*any* influence of sympathy . . ."[77] to bias its determination. (emphasis added). The court found this difference decisive, because the Supreme Court established the word "mere" as the crucial point in its decision to uphold the instruction. The Court concluded that a juror would understand "mere sympathy" as "a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase."[78] Conversely, the Tenth Circuit resolved that "any" is an all-inclusive term, which "carries with it the danger of leading the jury to ignore sympathy that is based on the mitigating evidence."[79]

Previous Supreme Court cases have held that it is a "capital defendant's constitutional right to present and have the jury consider mitigating evidence"[80] and "[t]he sentencer . . . may not be precluded from considering 'any relevant mitigating evidence.' "[81] Based on these precepts, the Tenth Circuit concluded that the *Parks* jury charge had "improperly undermined the jury's ability to consider fully petitioner's mitigating evidence" in making its sentencing decision, thereby violating the defendant's constitutional rights.[82]

3. Issue I: Dissenting Opinion

Both Chief Judge Holloway and Circuit Judge McKay concluded that there was a *Caldwell* violation in the *Parks* trial. In his dissent, McKay asserted that the prosecutor's remarks were improper "because they diffuse the juror's sense of responsibility for the death sentence by intimating that the jury is performing a dispassionate, mechanical" function.[83]

In the opinion of both judges, the absence of any corrective instruction by the court, combined with the damaging effect of the prosecutor's remarks resulted in an unreliable jury verdict which could not be sustained.[84]

4. Issue II: Dissenting Opinion

In his dissent, Judge Anderson criticized the majority for its limited focus on the modifier "any" in the anti-sympathy charge.[85] Judge An-

76. *Id.* at 540 (emphasis added).
77. *Parks*, 860 F.2d at 1552.
78. *Brown*, 479 U.S. at 542.
79. *Parks*, 860 F.2d at 1553.
80. *Id.* at 1554.
81. *Id.* (quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982)).
82. *Parks*, 860 F.2d at 1556.
83. *Id.* at 1564. (McKay J., dissenting).
84. *Id.* at 1560. (Holloway C.J., concurring and dissenting).
85. *Id.* at 1566. (Anderson J., dissenting).

derson believed the majority's assumption that the jury could misconstrue the charge and thus ignore mitigating evidence was fallacious. Instead, he argued that the anti-sympathy instruction "sensibly cautions the jury against imposing sentence simply on the basis of arbitrary emotions."[86]

IV. ANALYSIS

A. *The Prosecutor's Comments Concerning the Jury's Responsibility*

From the trilogy of Tenth Circuit decisions, comprised of *Coleman*, *Dutton*, and *Parks*, it appears egregious prosecutorial remarks will not invalidate a death sentence if the court believes the defense counsel adequately counteracted the remarks, or the trial court corrected any misconception the comments may have caused.[87] In short, the defendant's eighth amendment rights are violated only if the remarks render the trial fundamentally unfair. The court of appeals justified its holdings in *Dutton* and *Coleman* by resolving that the prosecutorial comments did not impermissibly taint the trial. However, the court's rationale in *Parks* is less convincing.

The Supreme Court, in *Caldwell*, announced the principle that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[88] Nevertheless, that is exactly what has occurred in *Parks*. The challenged portion of the prosecutor's argument reads, in part, as follows:

> [Y]ou know, as you as jurors, you really, in assessing the death penalty, you're not yourself putting Robyn Parks to death. You have just become a part of the criminal justice system that says when anyone does this, that he must suffer death. So all you're doing is you're just following the law, and what the law says, and on your verdict—once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just a part of the criminal justice system that says when this type of type [sic] of thing happens, that whoever does such a horrible, atrocious thing must suffer death.[89]

This argument "offers jurors a view of their role which might frequently be highly attractive."[90] Perhaps this view is highly attractive, but its basis is incorrect. The prosecutor's remarks here are in direct violation of *Caldwell* and are designed specifically to undermine the jury's sense of responsibility for the "life-or-death determination"[91]

86. *Id.*

87. It appears the Tenth Circuit adheres to the Supreme Court's permissive position on prosecutorial remarks. *See* Darden v. Wainwright, 477 U.S. 168 (1986).

88. Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985).

89. Parks v. Brown, 840 F.2d 1496, 1503 (10th Cir. 1987).

90. *Caldwell*, 472 U.S. at 332-33.

91. Brief for Petitioner-appellant (en banc) at 11.

they make. Instead, the prosecutor furnished the jury with the comforting notion that "the law" commanded the jury to find Parks guilty and "the law" would be answerable for his execution.[92]

To further alleviate each juror's conscience, the prosecutor invoked God in his argument. "Now that's man's law. But God's law is the very same. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know."[93]

Unlike *Parks*, the challenged comments in *Dutton* and *Coleman* were not aimed at reducing the jury's sense of duty. In *Dutton*, the remarks in dispute simply placed the jury's role in the context of the judicial system. While the prosecutor in *Coleman* did maintain that the defendant was responsible for his plight, he also stressed that the jury alone bears the burden of imposing judgment.

Both Chief Judge Holloway and Judge McKay raised a crucial point in their dissents.[94] In *Parks*, the record is devoid of any curative language by the court. The trial court did not attempt to remedy any misleading remarks, or supply additional instructions to the jury after the prosecutor spoke.[95] In disagreement with the majority, both dissenters believed the prosecutor's comments were improper. Therefore, the absence of any corrective instructions by the trial court to "effectively neutralize the prosecutor's impermissible remarks,"[96] resulted in constitutional error.[97]

The omission of judicial clarification was one reason for the Supreme Court's holding in *Caldwell*.[98] The Court stated in *Caldwell*, "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role."[99]

In their brief, respondent-appellees argued that the prosecutor's comments were constitutional because they did not actually mislead the jury into believing that an appellate court or some other authority would decide whether to impose the death penalty.[100] This is fallacious reasoning. Although the prosecutor did not specifically ascribe sentencing authority to another body, his remarks did relieve the jurors of their

92. *See infra* notes 100-01 and accompanying text.

93. *Parks*, 840 F.2d at 1503.

94. *Supra* note 84.

95. Parks v. Brown 860 F.2d 1545, 1560 (10th Cir. 1988) (en banc) (Holloway, C.J., dissenting).

96. *Id.* at 1565.

97. For a study on the impact of judicial instructions and the effect of nullification information to a jury see Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 L. & HUM. BEHAV. 439 (1988).

98. Also, the opinion noted that the trial judge supported the prosecutor's remarks, thus sending a strong message to the jurors that the statements by the prosecutor were correct. Caldwell v. Mississippi, 472 U.S. 320, 339 (1985).

99. *Caldwell*, 472 U.S. at 333.

100. Brief for Respondent-Appellees on Rehearing (en banc), Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (No. 86-1400). [hereinafter, Brief for Respondent-Appellees (en banc)].

personal responsibility by claiming that "the law" required the jury to find Robyn Parks guilty. The prosecutor asserted, "all you're doing is you're just following *the law*, and what *the law* says . . . once your verdict comes back in, the law takes over. The law does all of these things, so *it's not on your conscience*."[101] (emphasis added). The prosecutor's description of the jury's role reduces it to a mechanical performance of adjudication. The jurors are stripped of their free choice by the implicit message that they must find Parks guilty, because this enigmatic creature, "the law," requires the death penalty.

A worrisome aspect of the Tenth Circuit opinion in *Parks* is the majority's partial reliance on the defense counsel to counteract any of the prosecutor's misrepresentations. The court stated that "defense counsel, in his closing argument, responded directly to the prosecutor's comments, thereby underscoring to the jury the full scope of its responsibility."[102] This approach reduces a constitutional question to a contest of persuasion. If the court allows the opposing parties to debate the responsibility of the jury, or manipulate the jury's understanding of its responsibility, a juror could end up believing whichever side is most convincing, or most appealing.[103] When this occurs, the court is no longer adequately guarding against impermissible comments. This approach could potentially allow an eighth amendment violation to occur because the court mistakenly believes any inappropriate statements have been adequately corrected by opposing counsel.

B. *The Anti-Sympathy Jury Instruction*

The Tenth Circuit rightfully concluded that the anti-sympathy jury instruction in *Parks* was unconstitutional. Interestingly, the court used the Supreme Court's reasoning in *California v. Brown*[104] to arrive at an opposite holding in the instant case. Like *Brown*, the outcome of the *Parks* appeal hinged on the court's interpretation of one word. This key word distinguished the *Parks* jury charge from the *Brown* precedent.

The pivotal word in the *Parks* jury charge was the adjective "any." Since the purpose of mitigating evidence is to humanize the defendant, the court concluded that the use of the word "any" as a modifier was overly inclusive, virtually prohibiting any sympathetic response from the jury, even a response predicated on mitigating evidence. The defendant's background and character information are intentionally presented to the jury to invoke feelings of compassion.[105] Thus, the inclusion of the word "any" could easily cause the jury to incorrectly believe that no

101. *Parks*, 840 F.2d at 1503.

102. *Parks*, 860 F.2d at 1550. Granted, the *Parks* opinion acknowledged that the judge's instructions re-emphasized "that the sentencing responsibility rested with this jury." *Id.* at 1551.

103. *See* Caldwell v. Mississippi, 472 U.S. 320, 332-33 (1985). The Court recognizes that an impermissible argument may be "highly attractive" to a juror, since it erroneously relieves the jury of its responsibility to impose judgment.

104. 479 U.S. 538 (1987).

105. Parks v. Brown, 860 F.2d 1545, 1555 (10th Cir. 1988).

feelings of sympathy for the defendant were acceptable. As Justice Brennan stated in his dissent in *California v. Brown*,[106] "forbidding the sentencer to take sympathy into account, this language on its face precludes precisely the response that a defendant's evidence of character and background is designed to elicit . . . ."[107]

What is disturbing about the *Parks* decision, in light of future cases, is that it appears the use of one word instead of another will be decisive as to whether the charge is deemed constitutional or not.[108] Such attention to semantics is understandable within the legal community, however, it is doubtful that a juror will dissect an instruction as keenly as persons in the legal profession might.[109] Also, it is not ascertainable whether a juror will comprehend the purpose of the charge, even if she is attentive to the wording of the instruction. In *Brown*, Justice Brennan pointed out in his dissent that, "[i]t is simply unrealistic to assume that an instruction ruling out several emotions in unqualified language would be construed as a directive that certain forms of emotion are permissible while others are not."[110] Both the majority and dissent in *Brown* attempt to make educated guesses regarding a juror's synthesis of the instruction. But well thought out assumptions are small comfort to a capital offense defendant.

The majority in *Parks* highlighted another important caveat to anti-sympathy jury charges. During voir dire and closing arguments the prosecutor made statements to the jury about sympathy and its relation to the jury's determination.[111] In its opinion, the Tenth Circuit only briefly discussed these remarks due to its previous determination that the anti-sympathy instruction had violated the petitioner's eighth amendment rights. However, the court commented strongly about the prosecutor's behavior when it stated, "[t]he prosecutor's use of the [anti-sympathy] instruction demonstrates how a general anti-sympathy instruction may be used to reduce improperly the jury's consideration of

106. 479 U.S. 538 (1987).

107. *Id.* at 548.

108. On June 13, 1988, the United States Court of Appeals for the Fifth Circuit upheld an anti-sympathy jury instruction in Byrne v. Butler, 847 F.2d 1135 (5th Cir. 1988). The instruction directed that the jurors should "not be influenced by sympathy, passion, prejudice, or public opinion." *Id.* at 1137. Similarly, the Louisiana Supreme Court found in State v. Copeland, 530 So. 2d 526 (La. 1988), that a jury charge which read, "You are not to be influenced by sympathy, passion, prejudice, or public opinion. You are to reach a just verdict," was constitutional. *Id* at 537.

109. Justice Brennan in his dissent in *Brown*, noted that it can not be expected that jurors will engage in the "tortuous reasoning process necessary to construe it [sympathy] as 'unfettered sympathy.' " *Brown*, 479 U.S. at 550-51.

110. *Brown*, 479 U.S. at 550.

111. The prosecutor told the jury during voir dire that they would be given an anti-sympathy instruction which would prohibit their sympathy, sentiment or prejudice to influence their decision. Then in closing the prosecutor stated, "[h]is [the defense counsel's] closing arguments are really a pitch to you for sympathy—sympathy, or sentiment . . . and you told me in voir dire you wouldn't do that . . . . You leave the sympathy, and the sentiment and prejudice part out of it." Parks v. Brown, 860 F.2d 1545, 1559 (10th Cir. 1988). In direct response to the prosecutor's behavior, the Tenth Circuit asserted, "Thus, the prosecutor relied on the antisympathy [sic] instruction to overcome the defense counsel's arguments regarding mitigation and mercy." *Id.* at 1559.

mitigating circumstances."[112]

V. CONCLUSION

Obviously, prosecutorial statements which will corrupt the fundamental fairness of a trial are forbidden. However, recognition of an impermissible comment is not always easy, and it is the gray areas of the process that cause difficulty. In order to assure the defendant a fair judgment, the courts should not rely on the defense to equalize the proceedings. Instead, the judiciary must become more assertive about nullifying any misconceptions created by the opposing counsel's statements.

Although it is crucial for prejudice to be banned from the courtroom, it seems unlikely that a jury charge will accomplish this task. It appears, however, the trend for the future will include similar charges. Therefore, courts should endeavor to explain the intent of an anti-sympathy instruction to the jury when such a charge is applied in the sentencing phase of a trial. Unfortunately, this precaution will not remedy the danger of misleading the jury as to the role emotion may play in reaching a decision; but at least it will guard against complete misunderstanding.[113]

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112. *Id.*

113. There has been strong criticism that criminal law is racially biased. For a detailed study of the affect of racial bias in capital punishment verdicts *see* White, *Juror Decision Making in the Capital Penalty Trial: An Analysis of Crimes and Defense Strategies*, 11 L. & HUM. BEHAV. 113 (1987); Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563 (1980).