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Prosecutorial Misconduct: Recognizing Errors in Closing Argument

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Abstract

Professor Cantrell discusses many forms of prosecutorial misconduct found in closing arguments. Using examples from case law, the author is able to classify and describe such errors as to help make them more recognizable to both practitioners and judges.

Introduction

Many trial attorneys believe that the final summation to the jury is the most critical stage of a criminal trial. It presents the last opportunity to convince the jury of the defendant's innocence or guilt. Yet many scholars have recognized a recurring problem with the proliferation of improper prosecutorial argument in closings.¹ These arguments send to juries the dangerous message that they are allowed to consider extraneous, prejudicial factors in determining guilt or punishment. Why this problem exists is no mystery. These improper arguments can be devastatingly effective in influencing verdicts. Additionally, the existence of the harmless error² and

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¹ See Albert Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972); Ronald Carlson, *Argument to the Jury: Passion, Persuasion, and Legal Controls*, 33 ST. LOUIS U. L.J. 787 (1989); Henry Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22 (1973); see also Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115 (1999); J. Thomas Sullivan, *Prosecutorial Misconduct in Closing Argument in Arkansas Criminal Trials*, 20 U. ARK. LITTLE ROCK L. REV. 213 (1998); Marc Kantrowitz et al., *Closing Arguments: What Can and Cannot Be Said*, 81 MASS. L. REV. 95 (1996).

² See *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (federal constitutional error may be harmless if the reviewing court believes so beyond a reasonable doubt); *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) (applying the harmless error standard applicable to *Griffin* violations). See generally Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501 (1998); Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973).

plain error³ doctrines limits meaningful appellate review to only instances of egregious misconduct by prosecutors.

The purposes of this Article are to reveal, explain, and classify improper arguments both for attorneys and for judges. Cases from several jurisdictions are utilized in an attempt to illustrate the different modes of argument employed. This Article makes no focused effort to address whether there was a defense objection made to the prosecutorial remarks. Little would be gained because of the contextual differences of the cases and the various applications of the harmless error doctrine used. In addition, this Article does not attempt to analyze the pedestrian errors of misstatement of fact or law. Analyzing the arguments has yielded four main categories to discuss. This Article does not recommend strategic objectives; its major goal, instead, is to educate and inform trial participants that some arguments are unethical and have no place in a criminal trial.

I. Commenting on Self-incrimination Issues

A. Failure to Testify

The most significant constitutional prohibition on prosecutorial misconduct in final argument finds its genesis in *Griffin v. California*.⁴ The prosecution in that case repeatedly pointed out the defendant's failure to testify:

He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

These things he has not seen fit to take the stand and deny or explain.

And in the whole world, if anybody would know, this defendant would know.

³ This doctrine allows appellate courts to reverse a case even if no error has been preserved for review. See *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (asserting plain error affects substantial rights and seriously affects the fairness, integrity, or public reputation of judicial proceedings).

⁴ 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

Essie Mae is dead, she can't tell you her side of the story. The defendant won't.⁵

The United States Supreme Court characterized such comments as “a remnant of the ‘inquisitorial system of criminal justice,’” and held that they constituted a penalty on the exercise of a constitutional privilege.⁶ *Griffin* establishes a clear rule that is easily recognizable and applicable to direct references to the defendant’s failure to testify or offer evidence. Such direct comments are seldom made in argument today. If so, they are usually the result of attorney negligence or oversight.

The modern controversial *Griffin* problem revolves around comments considered to be an indirect reference to the defendant, or to uncontradicted evidence in the case. The generally applicable standard governing the propriety of these remarks is usually defined as “whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the accused’s failure to testify.”⁷ Thus, the test is an examination of the “language” used by the prosecutor. The first prong examines such language through the prism of the “manifest intent” of the prosecutor. The second, and independent, prong measures the “natural and necessary” effect of the words on the jury.

Any text purporting to examine intent must necessarily include all the relevant manifestations that demonstrate the presence of such intent by the prosecution. An examination of the prosecutor’s language must take into account the particular facts of each case. If there is a reasonable alternative explanation for the remarks of the prosecutor, the intent will not be deemed “manifest.”⁸ An example of this process can be found in *United States v. Johnston*.⁹ During the redirect examination of a conspiracy witness, the prosecutor attempted to bolster his witness’s testimony after the latter admitted on cross-examination no one could corroborate his story concerning

⁵ *Griffin*, 380 U.S. at 611.

⁶ *Id.* at 614 (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55, 84 S. Ct. 1594, 1597, 12 L. Ed. 2d 678, 681 (1964)).

⁷ WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* § 24.5, at 1125 (3d ed. 2000).

⁸ *United States v. Collins*, 972 F.2d 1385, 1406 (5th Cir. 1992).

⁹ 127 F.3d 380 (5th Cir. 1997).

certain cocaine deliveries.¹⁰ “On redirect the prosecutor inquired, ‘[A]ren’t there some people in this courtroom that can back up what you say?’ Simultaneously the prosecutor made a sweeping arm gesture indicating the individuals seated at counsel tables.”¹¹ The court correctly concluded the prosecutor’s implication was that the defendants were the only persons who could have corroborated the incidents. Taking these circumstances into account, the court found the necessary “manifest intent” present.¹²

Another important factor to consider under the intent test is the body language or physical actions of the prosecutor. In addition to the type of gesture performed in *Johnston*, a prosecutor will sometimes position himself to make an unspoken point to the jury. These stares, gestures, and movements are not transcribed by the court reporter. A proper objection from the defense must include a recital of the challenged movements. An example from personal experience demonstrates this principle.

Prosecutor: But, anyway, he looks—you know—he is sitting over there—you know—we had Dr. Anderson—Dr. Anderson had that thing there, and he had his lawyer arguing to you and everything. But there is somebody that we haven’t heard from in this case. And I think you all know who it is.

Cantrell: Your Honor, we’re going to object to that comment. He is obviously commenting—inferring by the place he stood—let the record reflect that he stood right behind the defendant, raised his voice, at that time, and objected—excuse me—not objected—said, ‘We haven’t heard from somebody in this court.’ At that time, Mr. Casey looked down at the defendant in such that by his actions and inferences and comments made, was a comment on not testifying by the defendant.

Prosecutor: I was referring to Dr. Stockton, Your Honor.

Cantrell: You were not.

Prosecutor: Let the record clearly reflect that I was talking about the medical testimony, and Dr. Stockton, the man that took the EEG wasn’t up here testifying in court.

Court: I’ll overrule your objection.

Cantrell: Note our exception.¹³

¹⁰ *Johnston*, 127 F.3d at 397.

¹¹ *Id.*

¹² *Id.*

¹³ *Hicks v. State*, 525 S.W.2d 177, 182 (Tex. Crim. App. 1975).

Articulating the prosecutor's physical actions allows the appellate court to review the language in the context of the actual trial and gain the jurors' perspective of what transpired in court. The appellate court held that the prosecutor's physical actions and argument was "manifestly intended to be, and was, of such a character that the jury would naturally or necessarily take it as a comment on the failure of the appellant to testify."¹⁴

The second component of the *Griffin* test views the language from the jury's perspective. In so doing, the issue becomes whether the "character" of the language would "naturally and necessarily" cause the jury to understand it as a comment on the defendant's failure to testify. Testing these indirect remarks also requires an understanding of the context of the proceeding at the time they were uttered. The identical argument may be permissible in one trial yet constitute error in another.

One of the most frequent oratorical devices employed by prosecutors in final summation is the "uncontradicted evidence" statement. The basic approach is to determine whether the defendant "is or appears to be 'the only one who could explain or contradict the evidence.'"¹⁵ In *State v. Blackman*, the "uncontradicted evidence" remark was permissible because the prosecutor's immediately subsequent references were to other persons at the scene who could have been called as witnesses.¹⁶ Thus, the defendants were not the only persons who could have contradicted the evidence. In contrast, the court in *United States v. Cotnam* held an identical comment to be improper when the prosecution's witness testified that several of the conversations in question were held with only the defendant present.¹⁷ Thus, the natural implication for the jury was to understand the alleged comment as being uncontradicted by the defendant.¹⁸

A final grouping of prosecutorial comments on the defendant's silence includes statements that create an inference of guilt by shifting the burden to the defendant to come forward with evidence. Included in this category are comments such as, "What other witnesses could the defendant's case have put forward who were totally available to you? What other witnesses?

¹⁴ *Id.* at 180.

¹⁵ *State v. Blackman*, 201 Ariz. 527, 545, 38 P.3d 1192, 1210 (Ct. App. 2002) (quoting *State v. Still*, 119 Ariz. 549, 551, 582 P.2d 639, 641 (1978)).

¹⁶ 201 Ariz. 527, 545, 38 P.3d 1192, 1210 (Ct. App. 2002).

¹⁷ 88 F.3d 487, 500 (7th Cir. 1996).

¹⁸ *Cotnam*, 88 F.3d at 500.

Ask yourself that question. Who else could have testified in this case?"¹⁹ Another prosecutor crossed the line when he commented on the defendant's demeanor by noting that he "has been very quiet at the end of counsel table."²⁰ Shortly thereafter he opined that the defendant "has been very quiet, quietly apparent throughout this case."²¹

B. Post-Arrest Silence

Since commenting directly on the defendant's decision to be silent at trial is prohibited, prosecutors occasionally attempt to utilize an earlier post-arrest silence for impeachment purposes. In other words, "why didn't he tell anyone about his alibi before trial?" Using this technique does not depend upon whether or not the defendant testifies at trial. This type of powerful impeachment can be used to create an inference of guilt due to the defendant's failure to explain his defense earlier. In *Doyle v. Ohio*, the Supreme Court held that the immediate post-arrest silence of an arrestee may not be used as impeachment because the *Miranda* warnings imply "that silence will carry no penalty."²² Such use of silence amounts to a "deprivation of due process."²³

In contrast, the Supreme Court has permitted comment or cross-examination when a defendant makes inconsistent statements,²⁴ when a defendant testifies in his own behalf,²⁵ and when the defendant did not receive *Miranda* warnings.²⁶ The holding in *Doyle* has been limited for use in situations where the defendant has received *Miranda* warnings. Although the *Doyle* holding is rather narrow, prosecutorial comments continue to violate its parameters. For example, in *United States v. Laury*, the defen-

¹⁹ *Eberhardt v. Bordenkircher*, 605 F.2d 275, 278 (6th Cir. 1979).

²⁰ *United States v. Rodriguez*, 627 F.2d 110, 112 (7th Cir. 1980).

²¹ *Id.*

²² 426 U.S. 610, 618, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 98 (1976).

²³ *Doyle*, 426 U.S. at 618.

²⁴ *Anderson v. Charles*, 447 U.S. 404, 408, 100 S. Ct. 2180, 2182, 65 L. Ed. 2d 222, 226 (1980).

²⁵ *Jenkins v. Anderson*, 447 U.S. 231, 235, 100 S. Ct. 2124, 2127, 65 L. Ed. 2d 86, 92 (1980).

²⁶ *Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1309, 1312, 71 L. Ed. 2d 490, 494 (1982).

dant had made post-arrest statements to law enforcement.²⁷ Normally this would enable the State to cross-examine over any inconsistent statements. Instead, the court observed that the prosecutor missed the mark on his selection of topic:

Although Laury made post-arrest statements to FBI agents, he did not discuss his whereabouts during the robbery. Therefore, nothing Laury told the FBI agents was inconsistent with his trial testimony that he was at a party on the date of the bank robbery. The prosecutor did not comment on what Laury told FBI agents, but on what he did not tell them. Jurors would naturally and necessarily view the prosecutor's line of questioning on cross-examination, as well as his statement in closing argument, as an attack on Laury's credibility. On cross-examination, the prosecutor suggests an implausible scenario—that Laury would prefer to languish in jail than tell the FBI about his alibi. Clearly the prosecutor meant to suggest that Laury's alibi was not disclosed prior to trial because it was not true, for the prosecutor's comments could not have served any other purpose. Therefore, the prosecutor's "manifest intent" was to comment on Laury's post-arrest silence with regard to his alibi. Only "when a defendant chooses to contradict his post-arrest statements to the police . . . [does] it become[] proper for the prosecutor to challenge him with those [post-arrest] statements and with the fact that he withheld his alibi from them." Because Laury's post-arrest and trial statements were not inconsistent, we view the prosecutor's comments as comments on Laury's post-arrest silence, and therefore in violation of *Doyle*.²⁸

C. Failure to Produce a Witness

A distinct issue of self-incrimination sometimes arises in a situation when the State argues to the jury that the defendant failed to call a witness to substantiate his claims or defenses. Normally such a comment is permissible if the defendant has the power to produce a witness "whose testimony would elucidate the transaction."²⁹ Another approach is to comment on

²⁷ 985 F.2d 1293, 1299 (5th Cir. 1993).

²⁸ *Laury*, 985 F.2d at 1303-04 (quoting *Lofton v. Wainwright*, 620 F.2d 74, 78 (5th Cir. 1980)) (citations & footnotes omitted); see, e.g., *United States v. Curtis*, 644 F.2d 263 (3d Cir. 1981) (reversing the lower court's position that referral to the cross-examination question concerning the witness's failure to tell his story post-arrest was proper); *Williams v. Zahradnick*, 632 F.2d 353 (4th Cir. 1980) (reversing the lower court's denial to strike statements made in the closing argument referring to the failure of the defendant to tell his story post-arrest to the police).

²⁹ *United States v. Young*, 463 F.2d 934, 939 (D.C. Cir. 1972) (quoting *Graves v. United States*, 150 U.S. 118, 121, 14 S. Ct. 40, 41, 37 L. Ed. 1021, 1023 (1893)).

the failure to produce a witness whose testimony could be considered material.³⁰ The defendant's right against self-incrimination arises when the comment either is "'phrased to call attention to [the] defendant's own failure to testify,'"³¹ or leads the jury to "naturally and necessarily" interpret the remark as a comment on the defendant's silence.³² Thus, substantial latitude is given to the State when a comment is directed toward a possible helpful defense witness³³ or is in response to an assertion by defense counsel.³⁴

II. Personal Opinions and Beliefs

A. Opinions and Beliefs Generally

One of the most flagrant types of improper argument is when the prosecutor interjects his *personal* opinion or belief during summation. This method employs a devastatingly powerful approach combining the stature of the prosecutor's office with his experience and knowledge of the case. He is, in effect, becoming a witness advising the jury as to the guilt of the defendant. Further reasons for the prohibition of personal beliefs are contained in *United States v. Bess*.³⁵

"There are several reasons for the rule, long established, that a lawyer may not properly state his personal belief either to the court or to the jury in the soundness of his case. In the first place, his personal belief has no real bearing on the issue; no witness would be permitted so to testify, even under oath,

³⁰ *Assadollah v. State*, 632 P.2d 1215, 1219 (Okla. Crim. App. 1981).

³¹ *United States v. Bagley*, 772 F.2d 482, 494-95 (9th Cir. 1985) (quoting *United States v. Soulard*, 730 F.2d 1292 (9th Cir. 1984)) (citing *United States v. Passaro*, 624 F.2d 938, 944 (9th Cir. 1980)).

³² *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir. 1977) (citing *United States ex rel. Leak v. Follete*, 418 F.2d 1266 (2d Cir. 1969)).

³³ *United States v. Dyba*, 554 F.2d 417, 422 (10th Cir. 1977).

³⁴ *United States v. Mitchell*, 613 F.2d 779, 782 (10th Cir. 1980) (stating that defense summation concerning why the defendant did not testify invited prosecutorial response concerning why the defendant's wife, allegedly a witness to the crime at issue, did not testify); *United States v. Lipton* 467 F.2d 1161, 1168-69 (2d Cir. 1972) (stating that a comment about the failure to call a witness was a fair rejoinder to the assertion that the witnesses were uncooperative).

³⁵ 593 F.2d 749 (6th Cir. 1979).

and subject to cross-examination, much less the lawyer without either. Also, if expression of personal belief were permitted, it would give an improper advantage to the older and better known lawyer, whose opinion would carry more weight, and also with the jury at least, an undue advantage to an unscrupulous one. Furthermore, if such were permitted, for counsel to omit to make such a positive assertion might be taken as an admission that he did not believe in his case.”³⁶

The *Bess* decision is an illustrative close case. The court had to determine whether the prosecutor’s disclaimer of his personal statement, “based on the evidence which has been presented to you (the jury),” was adequate enough to cloak his personal vouching.³⁷ Of course, this familiar phrase has other derivatives such as “under the evidence” or “the facts and evidence clearly show.” The court was not convinced that the incantation of such a phrase “should convert improper argument into proper argument.”³⁸ The opinion further rejected the proposition that a prosecutor’s belief of guilt was permissible so long as it was based solely on the evidence presented at trial.³⁹ Yet, other courts have rejected the reasoning in *Bess* and allow “I think” and “I believe” statements so long as they are based on the evidence.⁴⁰ In any event, a timely objection should be raised by defense counsel whenever the prosecutor employs the “I” pronoun. In the majority of cases one can safely predict the “I” pronoun signifies the beginning of testimony from the prosecution.⁴¹

³⁶ *Bess*, 593 F.2d at 755 (quoting HENRY DRINKER, LEGAL ETHICS 147 (1953)).

³⁷ *Id.* at 756.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *Mintun v. State*, 966 P.2d 954, 960 (Wyo. 1998); *Marshall v. State*, 395 N.W.2d 362, 367 (Minn. Ct. App. 1986).

⁴¹ See *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1980). Nonetheless, personal pronouns should not dominate an attorney’s courtroom conversation.

More than 60 times in the summation the prosecutor introduced a sentence with “I’m telling you” or “I suggest to you.” Occasional use of such rhetorical devices is simply fair argument, but their constant use runs the risk that the jury may think the issue is whether the prosecutor is truthful, instead of whether his evidence is to be believed. A prosecutor should exercise restraint to avoid needless personal references, without sacrificing the vigor or effectiveness of his argument.

Modica, 663 F.2d at 1181 (citing *United States v. Murphy*, 374 F.2d 651, 655 (2d Cir.), *cert. denied*, 389 U.S. 836 (1967)).

B. Credibility of Witnesses

Another notable subject concerning prosecutorial beliefs and opinions is the impermissible bolstering of State witnesses. An associated area is when the State attacks the credibility of defense witnesses. An example of the former is found in *United States v. Dandy*, wherein the court held it was "improper for the prosecutor to state that Mr. McColgan is honest."⁴² The court concluded that "[s]uch a statement conveys a conviction of personal belief regarding the witness' veracity."⁴³ In another trial, the prosecutor stated, "I'm here to tell you that Mr. Amato's testimony when it relates to the evidence in this case is truthful."⁴⁴ Prosecutors often attempt to bolster the credibility of police officers who have been attacked by the defense.⁴⁵ In a remarkable oration, a district attorney delivered the following improper argument without objection:

I know that there is one thing you can be proud of. It's the New Mexico State Police. It's the finest state police that I have personally seen. Those people do their job unswayed by any person who would like to sway them. . . . I know personally, that can't be said of New York's police. I know personally that can't be said of a lot of the police forces in the Midwest. But I know personally that those police officers in the New Mexico State Police are people that you can be proud of and they do their job, no matter what the consequences to them, no matter the fact that they have to sit around for five days to be asked a question, like Mr. Lujan was asked at the end of this trial.⁴⁶

In addition to personal beliefs about the defendant's guilt or about the credibility of State witnesses, the prosecution is also barred from giving personal opinions about defense witnesses.⁴⁷ Any comment concerning the credibility of a witness must be based solely upon the evidence and fair inferences therefrom.⁴⁸ The line is crossed when the prosecutor clearly

⁴² 998 F.2d 1344, 1353 (6th Cir. 1993).

⁴³ *Dandy*, 998 F.2d at 1353.

⁴⁴ *Modica*, 663 F.2d at 1178.

⁴⁵ *United States v. Ludwig*, 508 F.2d 140 (10th Cir. 1974).

⁴⁶ *Id.* at 143.

⁴⁷ *Id.*

⁴⁸ See *Capps v. State*, 674 P.2d 554, 557-58 (Okla. Crim. App. 1984).

interjects *his* interpretations of the testimony and credibility of the defense witnesses.⁴⁹

We find several comments by the prosecutor during closing argument were clearly improper. The prosecutor was wrong to argue: “Bring this guy in here from Ohio, pay him to come in here to testify. He’s an expert. Here’s what we need to testify. Here’s your ten grand. Thank you.”; “If he’s telling the truth for the first time in his life, nine good law-abiding citizens are not.”; “Well, that’s the biggest bunch of crap I’ve ever heard.”; and “he drummed up a dope dealer rat to lie for him ten years later.” These comments went beyond the bounds of what can be considered fair argument.⁵⁰

Characterizing a witness’s testimony as a “lie” or using the word “liar” is usually considered improper.⁵¹ Overuse of these terms exceeds the proper boundary of argument. A prosecutor in *Dupree v. State* accused defense witnesses of making up a story, saying, “he told a lie” and “I submit to you why he lied.”⁵² The appellate court found the argument to be “highly improper.”⁵³ In stark contrast, the Second Circuit held in *United States v. Peterson* that using the words “liar” and “lie” to “characterize disputed testimony when the witness’ credibility is clearly in issue is ordinarily not improper unless such use is excessive or is likely to be inflammatory.”⁵⁴ The court found no error since the prosecutor tied each comment to part of the record and did not attempt to inflame the passions of the jury.⁵⁵

C. Inferences Outside the Record

A final area of improper argument occurs when the prosecution allows the jury to draw an impermissible inference. This inference, in effect, informs the jury that the prosecution is relying on undisclosed evidence to assure the credibility of the State’s witnesses. The dual errors of bolstering and going outside the trial record are both presented in this scenario.

⁴⁹ *Martinez v. State*, 984 P.2d 813 (Okla. Crim. App. 1999).

⁵⁰ *Id.* at 825.

⁵¹ *See id.*

⁵² 514 P.2d 425, 426 (Okla. Crim. App. 1973).

⁵³ *Dupree*, 514 P.2d at 426.

⁵⁴ 808 F.2d 969, 977 (2d Cir. 1987).

⁵⁵ *Peterson*, 808 F.2d at 977.

In *Gradsky v. United States* the prosecutor told the jury that “the government representatives don’t put a witness on the stand unless there appears to be some credibility, until he appears to be a truthful witness.”⁵⁶ This general form of personal vouching is arguably made worse when it refers to a specific witness for the State. In another case from the Fifth Circuit, the prosecutor stated, “I know him to be a fine F.B.I. officer—absolutely the finest I know. A man of absolute integrity.”⁵⁷ Both decisions condemned using such improper arguments because they suggest that undisclosed evidence exists that would bolster the prosecutor’s witnesses.

III. Attacks on Defense Counsel

These types of improper arguments arise in the State’s rebuttal stage of the final argument. It seems plausible that these statements are in response to a defense argument, or are employed to shock the jury when the defense has rebutted some of the State’s case. Since the prosecution opens and closes the final summation, many defense attorneys believe they must make full use of their opportunity to speak to the jury. In doing so, they often “open the door” and waive any error under the doctrine of “invited response.”⁵⁸ Categorizing these errors reveals two general groupings: attacks on defense ethics and assertions of defense beliefs on guilt.

A. Ethical Attacks

Many arguments contain various attacks on the ethics of the defense attorney. Often, the prosecutor’s comments assert that the defense attorney concocted the defense strategy as a device to thwart the jury’s search for truth. The seminal case is *Berger v. United States* wherein the State asserted, “But, oh, they can twist the question. . . . [T]hey can sit up in their offices and devise ways to pass counterfeit money; but don’t let the Government touch me, that is unfair; please leave my client alone.”⁵⁹ The same argument has been phrased as the defense counsel “making up a

⁵⁶ 373 F.2d 706, 710 (5th Cir. 1967).

⁵⁷ Hall v. United States, 419 F.2d 582, 585 (5th Cir. 1969).

⁵⁸ United States v. Young, 470 U.S. 1, 12-13, 105 S. Ct. 1038, 1045, 84 L. Ed. 2d 1, 10-11 (1985) (articulating the test as to whether “invited response” comments unfairly prejudice the defendant).

⁵⁹ 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 2d 1314, 1321 (1935).

story,”⁶⁰ playing “cheap tricks,”⁶¹ being a “cheap shot artist,”⁶² being a “hired gun,”⁶³ or “lying or trying to mislead you.”⁶⁴

B. Belief in Client’s Guilt

Many defense arguments feature the attorney as the client’s surrogate who “believes” in his true innocence. Unfortunately, this approach invites the State to respond with its reply that the defense attorney knows the client is actually guilty. An example of this is found in *Fryer v. State*.⁶⁵ In *Fryer*, the prosecutor responded to an expression of personal opinion by the defense by saying, “The only nightmare that [defense counsel] had last night was that *he knew his client was guilty*.”⁶⁶ The court sustained a timely objection by the defense.⁶⁷

A related argument occurs when the prosecutor implies that the defense attorney does not believe his client’s testimony. In *Bates v. United States* the defense chose to emphasize the testimony of an alibi witness rather than the defendant’s testimony.⁶⁸ The prosecutor’s response was predictable: “And, you must wonder, must you not, why defense counsel never even mentions the testimony of his own client. . . . Why is that?”⁶⁹ The court found this argument to be harmless error due to its isolated nature and overwhelming evidence of guilt.⁷⁰

IV. Arguing Outside the Record

The prosecution may comment upon any fact in evidence and any permissible inference drawn from the evidence. When argument strays outside

⁶⁰ *McCarty v. State*, 765 P.2d 1215, 1220 (Okla. Crim. App. 1988).

⁶¹ *Redish v. State*, 525 So. 2d 928, 931 (Fla. Dist. Ct. App. 1988).

⁶² *Jackson v. State*, 421 So. 2d 15, 15 n.1 (Fla. Dist. Ct. App. 1982).

⁶³ *Barnes v. State*, 743 So. 2d 1105, 1106 (Fla. Dist. Ct. App. 1999).

⁶⁴ *State v. Lyles*, 996 S.W.2d 713, 716 (Mo. Ct. App. 1999).

⁶⁵ 693 So. 2d 1046 (Fla. Dist. Ct. App. 1997).

⁶⁶ *Fryer*, 693 So. 2d at 1047.

⁶⁷ *Id.*

⁶⁸ 403 A.2d 1159, 1162 (D.C. 1979).

⁶⁹ *Bates*, 403 A.2d at 1162.

⁷⁰ *Id.* at 1163.

this role, it is improper. Research has revealed several categories properly included in this section. The following subsections represent the most recurring classifications of arguments going outside the record of the trial.

A. Other Evidence

1. "I Wish I Could Present This to You . . ."

Often prosecutors appeal to the jury's sense of fair play by implying that their hands are bound by the rules of the legal system, or that they are not allowed to bring a necessary witness to court. The former is exemplified by the prosecutor in *Berger v. United States*.⁷¹ During final summation the State's attorney informed the jury, "I was examining a woman that I knew knew Berger and could identify him, she was standing right here looking at him, and I couldn't say, 'Isn't that the man?' Now imagine that! But that is the rules of the game, and I have to play within those rules."⁷² These improper statements actually violate rules prohibiting impermissible inferences, prosecutorial testimony, and going outside the record. An example of a prosecutor explaining the testimony of a missing expert is *People v. Ellison*.⁷³ After stating that it was unfortunate that a fingerprint expert could not testify, the prosecutor summarized what would have been the expert's testimony and concluded assuredly, "Mr. Maxwell, I would submit, would have told you all of this had he been here."⁷⁴

2. "I Could Show You More Evidence . . ."

On occasion, a prosecuting attorney will assure the jury that he has much more evidence than he produced at trial. This is typically a psychological ploy to ensure the jury that a verdict of guilt is beyond question. This argument is a powerful forensic device when employed by one who has made a favorable impression on the jury. So used, the prosecutor becomes

⁷¹ 295 U.S. 78, 88-89, 55 S. Ct. 629, 632, 79 L. Ed. 2d 1314, 1321 (1935); *see, e.g.*, *People v. Emerson*, 455 N.E.2d 41, 45 (Ill. 1983) ("[W]e can't tell you everything he did after his arrest and he knows it.").

⁷² *Berger*, 295 U.S. at 87.

⁷³ 133 Mich. App. 814, 820, 350 N.W.2d 812, 815 (Ct. App. 1984).

⁷⁴ *Ellison*, 350 N.W.2d at 814.

a trusted confidant assuring the jury he has not wasted its time by calling more witnesses than needed. In response to the presentation of defense character witnesses, one prosecutor argued, "I could probably have fifty people in here who would show that he isn't a good character."⁷⁵ In a particularly egregious example, an argument continued, "We could have gone on with this case for probably [two] weeks had I presented all of the evidence in detail that points toward the defendant. . . ."⁷⁶

B. Punishing for Other Conduct or Associations

Many defendants either have prior criminal records or are otherwise subject to impeachment by prior bad acts. Arguments that incorporate mention of these are extremely prejudicial because they call the jury's attention to those acts outside the proper scope of impeachment. Often, the defendant does not testify but is faced with this inflammatory argument. The obvious risk is that the jury will convict on the basis that the defendant is a "bad" man—regardless of the evidence in the case. The following quoted portion of an argument improperly called for conviction based on the defendant's actions in court. This particular argument contains multiple errors—noted by the court in the second half of the following—and may deserve a separate law review article dedicated solely to it.

"Ladies and Gentlemen, I wish to God that when you retire to deliberate, I hope that you come back with a speedy verdict so that we can tell Kelly Spencer Ward that we don't appreciate this type of behavior in a court of law. That we don't appreciate having to endure his threats, insults and every other thing that you have heard in this trial. If you give him less than two years, I'll be sorely disappointed in this jury and I know that you are reasonable people and I know that you will do what's right because only when you say to him, 'Nuts, Mr. Ward, we're not going to put up with it as citizens, 'can you do what's right.' You have worked hard to get where you are at. You went through the system. He spits on the system. Find him accountable and give him the maximum, for how much time will he indeed do on two years?"

There can be no doubt as to the impropriety of the quoted remarks. The prosecutor went outside of the evidence produced at trial. He appealed to the jury to punish the appellant for his conduct at trial rather than the offense

⁷⁵ Ginsberg v. United States, 257 F.2d 950, 954 (5th Cir. 1958).

⁷⁶ State v. Ranicke, 3 Wash. App. 892, 897, 479 P.2d 135, 139 (Ct. App. 1970).

for which the trial was being held. He argued that by according rights to minorities, society has somehow been demeaned. He argued that the appellant was in the same class as convicted killers. He insinuated that appellant had the gun in the bar in order to commit a homicide. Finally, he made comments on the pardon and parole system. We have condemned similar arguments in the past.⁷⁷

Other examples of this type of prejudicial argument typically include situations where the State interjects into summation the defendant's prior criminal record or past bad acts not in evidence. In *Joyner v. State* the district attorney improperly referred to the defendant as a "four time loser."⁷⁸ The reviewing court found that, since *no* prior conviction had been established during trial, the prosecutor had acted in bad faith.⁷⁹ Another prior bad act not in evidence was improperly argued in *Barron v. State*, where the district attorney stated "that if you fail to convict this defendant, you are releasing him to go and kill some little boy on a bicycle again."⁸⁰ The absence of any such death in the record rendered the argument reversible error.⁸¹

C. Inferences From Non-Existent or Limited Evidence

An improper implication usually is coupled with one of two methods of argument. The most common is when the prosecutor argues a factual nexus exists to something that has *not* been admitted into evidence. The second is when the State utilizes evidence admitted only for a *limited* purpose but asks the jury to draw factual conclusions beyond that purpose.

An improper inference was drawn from limited evidence in *State v. Nickens*.⁸² Evidence of the defendant's prior convictions had been received by the jury through the testimony of expert psychiatric witnesses.⁸³ This evidence was limited to the "issue of [the] defendant's mental condition."⁸⁴

⁷⁷ *Ward v. State*, 633 P.2d 757, 759 (Okla. Crim. App. 1981).

⁷⁸ 436 S.W.2d 141, 142 (Tex. Crim. App. 1969).

⁷⁹ *Joyner*, 436 S.W.2d at 144.

⁸⁰ 479 P.2d 614, 615 (Okla. Crim. App. 1971).

⁸¹ *Barron*, 479 P.2d at 615.

⁸² 403 S.W.2d 582 (Mo. 1966).

⁸³ *Nickens*, 403 S.W.2d at 588.

⁸⁴ *Id.*

During final argument the State referred to these convictions as a reason for imposing maximum punishment.⁸⁵ The appellate court found the statement to be “an abuse of [the] defendant’s rights.”⁸⁶

The more prevalent improper inference argument is one that stems from facts not in evidence. In an illustrative case, the prosecutor argued outside the record: “He and Houston, and Mr. Miller knew exactly where they were going. Do you think this is the first time they’ve been in a building [together]?”⁸⁷ The reviewing court found this to be a “direct statement” that the defendants were “habitual storebreakers.”⁸⁸ Arguably, this is not a direct statement at all but rather the creation of an impermissible inference. In any event, the result is the same.

A final example is the classic textbook use of a nonexistent fact that all trial attorneys will recognize. In *State v. VanWagner* the trial court ruled that a police officer could not testify regarding a hearsay statement made to him by a person who identified the defendant as driving a certain car.⁸⁹ During closing argument, the State twice made reference to the excluded statement. First, “[o]ne of the questions they asked [Soland] was, ‘Who was driving?’ He answered that question. You didn’t hear his response. But it was with that question, that answer, that the officers further firmed up their conclusion. . . .”⁹⁰ Shortly thereafter, the State continued: “They talked to Mr. Soland and he was asked who was the driver and he answered that question, and that answer was taken into consideration by the deputies in charging Lloyd VanWagner.”⁹¹ The reviewing court granted a new trial based on the elicitation of the testimony and its use in summation.⁹²

D. Evidence Disparaging to the Defendant

Often there are more than sufficient facts available to the prosecution showing that the defendant is a person who has no guilt, no shame, nor any

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *State v. Miller*, 271 N.C. 646, 656, 157 S.E.2d 335, 343-44 (1967).

⁸⁸ *Miller*, 157 S.E.2d at 344.

⁸⁹ 504 N.W.2d 746, 748-49 (Minn. 1993).

⁹⁰ *VanWagner*, 504 N.W.2d at 749.

⁹¹ *Id.*

⁹² *Id.* at 750.

semblance of a moral code. Outside of these admissible facts, the State sometimes resorts to revealing prior dealings with the State. An example includes the mentioning of a prior guilty plea in the same case used in an effort to rebut the defendant's present not guilty plea.⁹³ In *United States v. Wiley*, the prosecutor bolstered the credibility of one of his witnesses by relating the private conversation he had had with the witness that included no inducements to testify.⁹⁴ In each of these examples, the prosecution divulged prior legal proceedings or conversations in an improper effort to influence the jury.

In addition to the above category, another group of cases indicates that disparagement of the defendant's character can be accomplished by insinuating or suggesting wildy prejudicial facts outside the record. Recall that the former category had at least a basis in fact. However improper the argument, both the guilty plea and the conversation discussed in summation actually had occurred. In *State v. Kolander*, the prosecutor argued during an arson trial that the defendant was "under suspicion of murder," and that they were "dealing with a desperate and a dangerous man."⁹⁵ The appellate court reversed the conviction because the argument lack evidentiary support and urged a conviction based on a suspicion of a more serious crime.⁹⁶

A final example of a district attorney inserting prejudicial facts during argument is *McCarty v. State*.⁹⁷ During the guilt-innocence stage summation, the State commented, "I wonder if [the appellant] was grinning and laughing that night when he murdered Pam Willis."⁹⁸ This statement was held to be "highly improper" because it had no basis in evidence and was completely outside the record.⁹⁹ Citing another court reviewing a similar argument by the same prosecutor, the court characterized it as "at best speculation and at worst fantasy."¹⁰⁰

⁹³ *State v. Reardon*, 245 Minn. 509, 510-11, 73 N.W.2d 192, 193 (1955).

⁹⁴ 534 F.2d 659, 664 (6th Cir.), *cert. denied*, 425 U.S. 995 (1976).

⁹⁵ 236 Minn. 209, 223, 52 N.W.2d 458, 466 (1952).

⁹⁶ *Kolander*, 52 N.W.2d at 466.

⁹⁷ 1988 Okla. Crim. App. 271, 765 P.2d 1215 (Crim. App. 1988).

⁹⁸ *McCarty*, 765 P.2d at 1220.

⁹⁹ *Id.* References to the defendant's courtroom behavior are considered improper in some circuits. See *United States v. Schuler*, 813 F.2d 978 (9th Cir. 1987); *United States v. Wright*, 160 U.S. App. D.C. 57, 62, 489 F.2d 1181, 1186 (1973).

¹⁰⁰ *McCarty*, 765 P.2d at 1220 (quoting *Bowen v. Maynard*, 799 F.2d 593, 612 (10th Cir. 1986) (Seymour, J.)).

E. Testifying as an Expert or Witness

In an effort to gain a tactical advantage during final argument the State's attorney may dispense with the formality of taking an oath and proceed to practically present himself as a witness before the jury. Distinguish this category from the previously discussed "personal beliefs and opinions" category.¹⁰¹ These remarks are not prefaced with "I think" or "I believe" language. Instead, the prosecutor inserts himself into the role of a State's witness. In a classic example rebutting defense counsel's argument that burglars do not ring doorbells, one prosecutor stated:

[W]hen you are in law enforcement and you are sitting in enough cases, you learn a lot about this stuff and you learn that that is not the way criminals always work [I]t is very common for burglars to go around and check out places and see if anybody is at home before they go in and do their deeds because they don't want to be doing this stuff when people are home. So, it is very common to go around ringing the door bell and knocking on the door.¹⁰²

The reviewing court found this argument to improperly assert that he had "special knowledge acquired through his experience in law enforcement."¹⁰³ In effect, he presented himself to the jury as an expert witness.¹⁰⁴

A prosecutor also crosses the line into impermissible argument when he presents himself as a witness to facts of the prosecution's case. In these circumstances, he does not testify from his peculiar expertise, but rather as a witness filling in missing facts to the prosecution's case. For example, when the credibility of a State's witness was in issue, a prosecutor explained what he had told the witness.

Now at this point Sherman Dean has been trying to make a deal, saying look I'm willing to give you all this stuff but it's got to be worth something to you, could you dismiss, could you give me this sentence. Nothing, Sherman, nothing, we don't need you, you are a dirty liar, and he said he got mad at me because I told him again repeatedly that if anybody else had offered him

¹⁰¹ See *supra* text accompanying notes 35-55.

¹⁰² *State v. Vigue*, 420 A.2d 242, 246 (Me. 1980).

¹⁰³ *Id.* at 247.

¹⁰⁴ *Id.*

anything they were lying, that they didn't have the authority, and if you want to take a chance on it you go on, but if you lie, Sherman, you are going in the hole, you are going to be that much worse off, and if you hold back one thing on anybody, I don't care if it is your mother and father, if it is your little sixteen year old boy, that is going to prison, if you're not ready to tell everything don't tell anything at all.

And so he got upset, and he expected a little deal or tradeouts here and there, and nobody would deal, but he decided to do it anyway, he had nothing to lose and something to hope for.¹⁰⁵

Predictably, the circuit court held that the attorney was "not privileged to testify in the guise of a closing argument."¹⁰⁶

V. Inflammatory Remarks

The use of inflammatory argument employs a unique and serious risk. By appealing to the passions and prejudices of the jury, the prosecution introduces anger and fear into the deliberative process of determining guilt or innocence. This leads to irrational decisionmaking based on emotions rather than facts.

A. Law-and-Order Appeals

Prosecutors may emphasize to the jury the larger problem of crime. It is usually permissible to mention the "importance of the case" by referencing the consequences associated with the particular crime.¹⁰⁷ The best description of when these arguments become error is found in *United States v. Solivan*.¹⁰⁸

The fairness or unfairness of comments appealing to the national or local community interests of jurors in a given instance will depend in great part on the nature of the community interest appealed to, and its relationship to, and the nature of, the wider social-political context to which it refers. The

¹⁰⁵ *United States v. Wiley*, 534 F.2d 659, 664 (6th Cir. 1976).

¹⁰⁶ *Id.* (citing *United States v. Peak*, 498 F.2d 1337, 1339 (6th Cir. 1974)).

¹⁰⁷ *United States v. Ramos*, 268 F.2d 878, 880 (2d Cir. 1959).

¹⁰⁸ 937 F.2d 1146, 1157 (6th Cir. 1991) (holding that the prosecutor's comments made during closing arguments were grossly prejudicial to the defendant).

correlation between the community interest comments and the wider social-political context to a large extent controls the determination of whether an appeal is deemed impermissible because it is calculated to inflame passion and prejudice. The Supreme Court . . . framed the inquiry to incorporate both the purpose and effect of the comments. . . . [I]n the light of contemporaneous events which had great impact on the emotions and perceptions of jurors, the remarks "could only have . . . arouse[d] passion and prejudice."¹⁰⁹

Thus a reviewing court attempts to place these comments in perspective by looking at their context. The great danger in allowing these comments is that the jury may vote to convict believing "they will assist in the solution of some pressing social problem."¹¹⁰

The first category of law-and-order appeals is the State's use of "send a message" comments to the jury.¹¹¹ In one child abuse case, a prosecutor argued that abuse "happens in our society" and "you can't turn your back on these children."¹¹² The appellate court found this to have exceeded the parameters of summation and was "intended to coerce or urge the jury to send a message to the children of the world 'that we will protect you.'"¹¹³ On the other hand, comments such as "send a message to these drug dealers"¹¹⁴ have been held to be non-reversible error when a timely objection was made and a curative instruction followed.¹¹⁵ A court will allow these prejudicial arguments if they are in response to a defense argument. In *United States v. Bascaro* the State told the jurors that they would "send out a very loud and clear message to other people of a similar persuasion."¹¹⁶ The appellate court allowed this argument because the defense attorney had referred to the Government's case as a "circus."¹¹⁷

¹⁰⁹ *Solivan*, 937 F.2d at 1152 (quoting *Viereck v. United States*, 318 U.S. 236, 247, 63 S. Ct. 561, 566, 87 L. Ed. 734, 741 (1943)).

¹¹⁰ *Id.* at 1153 (quoting *United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984)).

¹¹¹ See James Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send A Message" With Their Verdict?*, 22 AM. J. CRIM. L. 565 (1995).

¹¹² *State v. Peterson*, 530 N.W.2d 843, 848 (Minn. Ct. App. 1995).

¹¹³ *Id.*

¹¹⁴ *United States v. Sanchez-Sotelo*, 8 F.3d 202, 211 (5th Cir. 1993).

¹¹⁵ *Id.*

¹¹⁶ 742 F.2d 1335, 1352 (11th Cir. 1984).

¹¹⁷ *Bascaro*, 742 F.2d at 1353.

Another tried and true technique of the prosecution is to analogize the trial to a war. In this scenario the defendant is regarded as the enemy. In one federal drug case, a prosecutor gave a vivid description of this war.

“But thank God at that time we had the Coast Guard on board the [U.S.S.] SIMMS. . . . Because not only they are [sic] protecting us; they are protecting the people, they are protecting the youth, they are protecting other societies.

That is why, ladies and gentlemen of the jury, they were in the drug interdiction. To save you all from the evil of drugs. Because the defendants are not soldiers in the army of good. They are soldiers in the army of evil, in the army which only purpose [sic] is to poison, to disrupt, to corrupt.”¹¹⁸

Although this constituted error, yet another case upholds war analogies if the defense invites such a response. It appears that criticism of the State’s case serves as an invitation for the prosecution to employ this language. In *United States v. Smith*, the defense compared the Government’s case to an atomic bomb.¹¹⁹ This reference allowed the Government to emphasize the war on drugs and say the defendant was “symbolic of the enemy.”¹²⁰

The most prejudicial form of argument in the law-and-order arsenal is the imparting of fear to the jury. The personalization of fear to jurors is infinitely more reversible than generalized appeals to enforce society’s laws. This was conveyed in a death penalty case in Florida when a prosecutor said, “If you do not electrocute this defendant, this man may come back here and kill all of you.”¹²¹ A slightly more subtle example was used in a Missouri trial when the district attorney argued, “Now it would have been just the same if one of you had been standing outside the tavern and they came out and they saw you and shot you.”¹²² Both of these examples demonstrate how the prosecution instills fear in the jury by asking them to assume the role of the victims.

The tactic of using fear is often used in trials of violent crimes. It appears regularly in sexual assault and rape cases when the State moves from the subdued tone of a law-and-order appeal to a more aggressive tone of

¹¹⁸ *Arrieta-Agessot v. United States*, 3 F.3d 525, 527 (1st Cir. 1993).

¹¹⁹ 918 F.2d 1551, 1562 (11th Cir. 1990).

¹²⁰ *Smith*, 918 F.2d at 1562.

¹²¹ *Grant v. State*, 194 So. 2d 612, 615 (Fla. 1967).

¹²² *State v. Paxton*, 453 S.W.2d 923, 926 (Mo. 1970).

anger. In *State v. De Pauw* the prosecutor may have been calling for mob justice when he said, "What would you do if you found that your child had been violated? . . . I know that you, too, who are fathers here, you would do the same thing."¹²³ These types of crimes are particularly susceptible to victim substitution. Another example of this was an argument that included, "It could be my daughter, [i]t could be your daughter, it could be anybody's daughter, it could be my wife, [i]t could be somebody else's wife."¹²⁴ Thus, reversible error is often predicated on this prejudicial fear tactic some prosecutors employ.

B. Name Calling

Calling the defendant an insulting or demeaning name during final summation has become more commonplace than one might suppose. By employing descriptive terms such as "blackhearted traitor"¹²⁵ or "trash,"¹²⁶ the prosecutor labels the defendant as a person who is without a conscience and truly despicable to ordinary law-abiding citizens. More often than not, these characterizations are permissible because the evidence at trial supports such an inference or deduction. Although many of these epithets are allowed, it remains clear that they are used to arouse the jury's passion and prejudice.

The first instance when name calling becomes impermissible is when the comments are not supported by evidence. An example of this occurred when a prosecutor labeled the defendant a "fugitive."¹²⁷ This was found to be error because there was no supporting evidence in the record.¹²⁸ The court recognized that the argument was inflammatory, irrelevant, and error because of the lack of an evidentiary foundation.¹²⁹

¹²³ 243 Minn. 375, 376, 68 N.W.2d 223, 225 (1955).

¹²⁴ *State v. Jones*, 266 Minn. 523, 524, 124 N.W.2d 727, 727-28 (1963).

¹²⁵ *Cf. Stephan v. United States*, 133 F.2d 87, 98 (6th Cir. 1943) (distinguishing that the defendant was actually charged with treason and that the statement was made without objection in connection with evidence tending to show that the defendant was a traitor).

¹²⁶ *Roberts v. State*, 571 P.2d 129, 136 (Okla. Crim. App. 1977).

¹²⁷ *United States v. Goodwin*, 492 F.2d 1141, 1147 (5th Cir. 1974).

¹²⁸ *Id.*

¹²⁹ *Id.*

Some courts recognize a great danger when there is a lack of supporting evidence. The risk of unduly influencing the jury was stated eloquently in *Hall v. United States*:¹³⁰

This type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises—succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government.¹³¹

This consideration has led appellate courts to find error with a prosecutor's inflammatory remarks when there is simply too great a possibility of prejudice. Even an admonishment or instruction by the court may be ineffective in erasing the effects of the argument. In an Illinois rape prosecution, the State "referred to the defendant as a pervert, a weasel and a moron; told the jury that the defendant, who raped his mother's friend, would rape a dog and would rape each and every member of the jury."¹³² Another court found error in a prosecutor's characterization of a defendant as a "doper," a "marijuana expert man," and a "homosexual."¹³³ The court found the repeated references to the defendant being homosexual as particularly prejudicial.¹³⁴

Name calling also includes the deliberate association or comparison of the defendant to a known rogue or criminal of the past. This forensic technique has met with various measures of disapproval from higher courts. A Florida court held that a characterization of the defendant as a "young Mr. Hitler" was improper, but it refused to reverse the verdict due to the compelling nature of the evidence.¹³⁵ The Oklahoma Court of Criminal Appeals modified a defendant's sentence from thirty to fifteen years in response to a district attorney's remarks comparing the defendant to

¹³⁰ 419 F.2d 582 (5th Cir. 1969).

¹³¹ *Hall*, 419 F.2d at 587.

¹³² *People v. Garreau*, 27 Ill. 2d 388, 391, 189 N.E.2d 287, 289 (1963) (holding that instructing the jury to disregard the prejudicial statement may not be sufficient to remove the effect of such statements).

¹³³ *Tobler v. State*, 688 P.2d 350, 354 (Okla. Crim. App. 1984).

¹³⁴ *Id.*

¹³⁵ *Copertino v. State*, 726 So. 2d 330, 334 (Fla. Dist. Ct. App. 1999).

Charles Manson, Al Capone, and John Dillinger.¹³⁶ The court speculated that the jury “may well have been swayed to return a more severe penalty than they would have given otherwise.”¹³⁷ Regardless of the appellate courts’ disapproval of these comparisons, the practice continues.

The most flagrant example of name calling occurs when the State attempts to dehumanize the defendant. An example of this technique can be seen in *Gore v. State*.¹³⁸ In that summation the prosecutor told the jury, “[T]here’s a lot of things I can say or can’t say, but . . . one thing the Judge can’t ever make me say [is] . . . that’s a human being.”¹³⁹ The court correctly observed that the “prosecutor lost sight of his professional responsibility.”¹⁴⁰ In addition to calling defendants non-human, prosecutors have used the terms “rat,” “dog,” and “animal” to dehumanize defendants.¹⁴¹ A Colorado court summed up the inherent prejudice by observing: “Such terminology is impermissibly derogatory and inflammatory. These statements not only improperly dehumanize the defendant but incorrectly focus the jury’s determination of the case . . . onto the defendant’s supposed non-human status.”¹⁴² Admittedly, it is a close call whether Hitler or a rodent is less human, but this author votes for the latter.

C. Sympathy and Prejudice

A common forensic ploy of many prosecutors is to reinforce the natural instincts of jurors. It is commonplace for a jury to experience sympathy for the victim of a crime. It is also certain that every person on the jury has particular biases, prejudices, and predispositions. Every court in this nation qualifies jurors by insisting that they lay their own prejudices aside and decide the case based solely on the evidence presented. Thus, arguments that ask jurors for victim sympathy or that reinforce biases have no place in the courtroom. In fact, they are repugnant to the jurors’ oaths.

¹³⁶ *Meggett v. State*, 599 P.2d 1110, 1114 n.3 (Okla. Crim. App. 1979).

¹³⁷ *Id.* at 1114.

¹³⁸ 719 So. 2d 1197 (Fla. 1998).

¹³⁹ *Gore*, 719 So. 2d at 1201.

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., *People v. Hernandez*, 829 P.2d 394, 396 (Colo. Ct. App. 1991) (stating “courts have uniformly condemned as improper a prosecutor using such terms as ‘rat,’ ‘dog,’ or ‘animal,’ to describe a defendant”).

¹⁴² *Id.*

Having stated the above, the goal is to recognize such impermissible arguments in action. The first indication of a victim-sympathy comment is the prosecutor focusing on the aftereffects of the crime—*not* on whether the defendant committed the crime. Also, the argument will not be directed to the motivation of the accused. In many instances the jury is presented with a moral question of whether what happened is just. An example of this approach is seen in *Powell v. State*.¹⁴³ In that death penalty case the district attorney stated: “Is there any rightness to her, where she’s at, in the grave, allowing him to live in the sun, receive his meals every day, lay on clean sheets every night, think about ways to manipulate the system until his next visit or letter[?] Is that right[?]”¹⁴⁴ In another case, the Government argued that the accused was “taking advantage of a poor person,” “taking advantage of children,” and “taking advantage of a mother’s ability to provide for their [necessities].”¹⁴⁵ The court found that these comments, in the context of Christmastime and substantial employee layoffs, “had the ability to mislead the jury as well as ignite strong sympathetic passion for the victims.”¹⁴⁶

The opposite of a sympathy argument is one that appeals to the prejudices of the jury. Typically, the prosecutor identifies the accused with an unpopular group. That group may be based on race, religion, class or any other number of subjects. In addition, the State will either attempt to connect some undesirable trait with the group, or will ask the jurors to view the accused from the perspective of a biased viewpoint.

The undesirable trait or associated innuendo is often found in cases where racial prejudice is injected. In *United States v. Hernandez* the State remarked that the verdict “will send a clear message to Cuban drug dealers.”¹⁴⁷ The court found this to be error but refused to reverse the conviction.¹⁴⁸ The central question in these cases is whether “the argument shifts its emphasis from evidence to emotion.”¹⁴⁹ Therefore, the State may inject an occasional racial remark if it otherwise makes an intelligent and straightforward presentation. A persistent use of racial terms that under-

¹⁴³ 995 P.2d 510 (Okla. Crim. App. 2000).

¹⁴⁴ *Powell*, 995 P.2d at 539.

¹⁴⁵ *United States v. Payne*, 2 F.3d 706, 711 (6th Cir. 1993).

¹⁴⁶ *Id.* at 712.

¹⁴⁷ 865 F.2d 925, 927 (7th Cir. 1989).

¹⁴⁸ *Hernandez*, 865 F.2d at 928.

¹⁴⁹ *United States v. Doe*, 284 U.S. App. D.C. 199, 208, 903 F.2d 16, 25 (1990).

mined a prosecution can be found in *United States v. Sanchez*.¹⁵⁰ The Assistant United States Attorney asserted that, if the defendant wanted to better the lives of Mexican-Americans, “he should have enough machismo and chicannismo to take that stand and tell you the truth.”¹⁵¹ The circuit court held that these and other remarks were “unwarranted inferences or insinuations calculated to prejudice the defendant.”¹⁵²

Asking the jury to view the accused or his defense from a biased viewpoint is a tricky situation. First, few experienced prosecutors would be so bold as to do this overtly. Instead, the State attempts to demonstrate that the jury is representative of a group of commonsense, truthful and law abiding persons who share the same values. An appeal is then made for these values to be enforced in this case. For instance, when a religion clause defense was raised in a marijuana prosecution, a prosecutor argued:

And all this other stuff, I submit, is just hogwash. It's just an attempt to come down here to Laredo, Texas and get a federal jury to believe that because he has got a Ph.D. and because he has got a 3,000-acre mansion in Upper New York where they experiment all the time, that he is not subject to the laws of the United States of America. And I say to you respectfully and sincerely that is not but hogwash, that Dr. Leary, like everybody else, high, low, black, white—any color—are subject to the laws equally, of the United States.¹⁵³

This constitutes an apt example of discrediting a minority religious viewpoint by appealing to majoritarian views regarding religion.

Another famous case from the World War II era included one of the most notorious appeals to patriotism ever given to a jury.

In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.

This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of crime, just as much as they are relying upon the protection of the Men who man

¹⁵⁰ 482 F.2d 5 (5th Cir. 1973).

¹⁵¹ *Sanchez*, 482 F.2d at 8.

¹⁵² *Id.* at 9 (quoting *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962)).

¹⁵³ *Leary v. United States*, 383 F.2d 851, 864 n.13 (5th Cir. 1967).

the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.

As a representative of your Government I am calling upon every one of you to do your duty.¹⁵⁴

In addition to using patriotism, appeals have been made to juries asking them to classify defendants with respect to their wealth,¹⁵⁵ as taxpayers,¹⁵⁶ and as parents.¹⁵⁷ Each distinct group carries its peculiar set of biases. If the prosecution can successfully appeal to these dormant instincts, it may arouse the jury to convict in order to protect the shared values inherent to the groups. The obvious danger is that any doubts in the case will be resolved against the accused because he is not a member of the group.

Conclusion

The foregoing classifications of improper arguments comprise an understandable organization of the vast majority of various prosecutorial tactics employed in criminal cases. These are recurring issues that are present in every jurisdiction in this country. The most important measure any attorney can take is to learn to recognize these errors when they occur. Once such techniques are known, the defense attorney may choose to use a motion in limine, object, or simply ignore the remark. The choice of strategy is peculiar to the case, and will vary accordingly. In any event, the use of these prejudicial and improper methods continues to cast serious doubt on the final verdicts of juries in many instances. In addition, the intentional and persistent use of them causes a lack of respect and trust in professional prosecutors.

¹⁵⁴ *Viereck v. United States*, 318 U.S. 236, 247 n.3, 63 S. Ct. 561, 566 n.3, 87 L. Ed. 734, 741 n.3 (1943).

¹⁵⁵ *United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980) (stating the prosecutor's intent to "appeal to class prejudice" was improper).

¹⁵⁶ *Taglianetti v. United States*, 398 F.2d 558, 566 (1st Cir. 1968) (stating the prosecutor's statement that the government witnesses were "laboring . . . to protect the taxpayers from people who are cheating on their income tax" was improper).

¹⁵⁷ *Washington v. State*, 668 S.W.2d 715, 719 (Tex. Ct. App. 1983) (reversing based on the prosecutor's improper reference to a non-existent Christmas card from the deceased to his daughter, which was discussed in order to appeal to the jurors' emotions).