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## Combating Prosecutorial Misconduct in Closing Arguments

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# COMBATING PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENTS

MICHAEL D. CICCHINI\*

*Prosecutorial misconduct in closing arguments is rampant. Prosecutors make improper arguments because it is a highly effective, yet virtually risk-free, strategy. That is, even if the defense lawyer quickly identifies and objects to the misconduct, the jury has already heard the improper argument, the available remedies are toothless, and the offending prosecutor rarely suffers any consequences. This Article proposes an alternative approach for combating this problem. Rather than waiting to object until after the prosecutor makes the improper argument, defense counsel should consider a more aggressive strategy: the pretrial motion in limine. This motion seeks a pretrial order to prevent the misconduct before it occurs, and in cases where the prosecutor violates the order, it establishes a framework for addressing the misconduct in a meaningful way.*

*This preemptive strategy has several advantages over the conventional, reactionary approach. First, even if the motion in limine fails to deter the misconduct, it alerts the trial judge to the improper arguments before the prosecutor makes them. Second, it preserves the issue for meaningful trial-court review, outside of the jury's presence, without defense counsel having to raise difficult and risky objections in the middle of closing arguments. Third, the motion-in-limine approach also provides a framework for developing meaningful remedies for the misconduct. These include providing the opportunity to draft thoughtful and effective curative instructions and affording time for client consultation before requesting the more serious remedy of a mistrial. And fourth, in the event a mistrial is declared, the motion-in-limine approach may even protect the defendant from re-prosecution.*

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### *Introduction*

When a prosecutor makes improper closing arguments to a jury, he or she violates the defendant's due process and other constitutional rights. Yet, despite the prosecutor's supposed role as "minister of justice," rampant prosecutorial misconduct in closing argument still exists. Anecdotal reports, appellate court decisions, and even published studies demonstrate that such misconduct has become the norm rather than the exception.

Prosecutors abuse the closing argument process for two primary reasons. First, they know that improper arguments are highly *effective*, stirring jurors' emotions and inviting them to convict for reasons other than proof beyond a reasonable doubt. Second, and equally important, prosecutors have learned that this form of misconduct is virtually *risk free*: the difficulty

defense lawyers face in quickly identifying and immediately responding to improper arguments typically results in the prosecutor's misconduct going unchecked and the state gaining an illegal advantage without repercussion. Moreover, even when the defense lawyer is able to quickly identify and object to the misconduct, doing so may cause more harm than good. Further, the available remedies are often ineffective.

Worse yet, the conventional, reactionary approach to improper argument only encourages this form of prosecutorial misconduct. This Article therefore proposes a more aggressive strategy for combating—and possibly even deterring—prosecutorial misconduct in closing arguments: the pretrial motion in limine.

Part I discusses the importance of closing arguments and the widespread nature of prosecutorial misconduct in this phase of the criminal trial. Part II takes the first step in combating this form of misconduct by helping the defense lawyer identify and understand many common forms of improper argument. Part III examines the numerous problems with the conventional, after-the-fact approach to dealing with prosecutorial misconduct, including the risks associated with objecting in the middle of closing arguments and the general ineffectiveness of the available remedies when an objection is sustained.

Part IV of this Article then outlines the alternative approach to combating this form of prosecutorial misconduct. Instead of waiting for the improper argument and then objecting after the jury hears it, defense counsel should anticipate and preempt the misconduct via a pretrial motion in limine. This motion-in-limine approach educates the trial judge about the various forms of improper argument, seeks a pretrial order prohibiting these arguments before the prosecutor can make them, and protects the defendant in the event the prosecutor violates the court's order. If granted, the pretrial motion in limine relieves defense counsel from having to raise risky, mid-argument objections to the misconduct, yet still preserves the issue for trial- and appellate-court review. The motion in limine also establishes a framework for developing meaningful remedies for the prosecutor's unethical behavior. It provides defense counsel and the trial judge the opportunity to craft effective curative instructions and affords defense counsel sufficient time to consult with the defendant before requesting the serious remedy of a mistrial. Further, in the event the court grants a mistrial request, the motion-in-limine approach may even protect the defendant from a retrial.

Appendix A provides a sample motion in limine, and Appendix B provides sample curative instructions tailored to specific types of improper

arguments. Such instructions can, in some cases, provide an adequate remedy for the prosecutor's misconduct.

### *I. Closing Arguments to the Jury*

Closing arguments are “often viewed as the most important part of the trial, providing the attorneys with their last opportunity to convince the jury of the defendant’s guilt or innocence.”<sup>1</sup> More specifically, the closing argument allows the attorneys “to sum up the evidence within a narrative framework to help the jury understand and interpret the evidence.”<sup>2</sup> This includes arguing about the “reasonable inferences to be drawn from the evidence,” the “credibility and demeanor of witnesses,” and the “credibility of evidence generally.”<sup>3</sup> The attorneys may also “help the jury understand the issues by applying the evidence to the law.”<sup>4</sup> In the rebuttal portion of the closing argument, the prosecutor may “respond to arguments of [defense] counsel.”<sup>5</sup>

With regard to criminal prosecutions, courts have stated that the prosecutor “occupies a semijudicial position,”<sup>6</sup> and the rules of professional conduct have grandly ordained the prosecutor as “minister of justice.”<sup>7</sup> Consequently, “a prosecutor’s duty, above being an advocate for the State, is to ensure that a defendant is afforded a fair trial.”<sup>8</sup> Yet, despite these grand titles and lofty standards, prosecutorial misconduct is rampant in closing argument, its variety limited only by the prosecutor’s imagination

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1. Michael Lyon, *Avoiding the Woodshed: The Third Circuit Examines Prosecutorial Misconduct in Closing Argument in United States v. Wood*, 53 VILL. L. REV. 689, 689 (2008) (citing Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 113 (1994)).

2. Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 320 (2015) (citing Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 643 (1972)).

3. J. Thomas Sullivan, *Prosecutor Misconduct in Closing Argument in Arkansas Criminal Trials*, 20 U. ARK. LITTLE ROCK L.J. 213, 219 (1998) (first citing *Richmond v. State*, 899 S.W.2d 64 (Ark. 1999); then citing *Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996)).

4. *Terry v. State*, 668 So. 2d 954, 963 (Fla. 1996).

5. Bowman, *supra* note 2, at 320 (citing Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Arguments: An Examination of Federal and State Cases*, 28 OHIO N.U. L. REV. 67, 73 (2001)).

6. *Roach v. State*, 146 So. 240, 240 (Fla. 1933).

7. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2017).

8. Claire Gagnon, *A Liar by Any Other Name? Iowa's Closing Argument Conundrum*, 55 DRAKE L. REV. 471, 478 (2007) (citing *State v. Graves*, 668 N.W.2d 860, 876 (Iowa 2003)).

and boldness.<sup>9</sup> In many cases, improper prosecutorial arguments violate a defendant's due process rights<sup>10</sup> and, depending on the particular argument, other constitutional rights.<sup>11</sup>

A prosecutor often commits this form of misconduct because, by the end of the jury trial, he or she "may have become so devoted to winning the case . . . that his or her emotions intrude and result in a 'win at all costs' closing argument not based on the facts brought out during trial."<sup>12</sup> One explanation for this behavior is that "[c]onfirmation bias leads prosecutors to be overconfident in their conclusions about the guilt of particular defendants."<sup>13</sup> This process is often set in motion when the prosecutor's office first receives a referral from law enforcement and, despite having limited information, concludes that the suspect is guilty.<sup>14</sup> Then, throughout the case, the prosecutor focuses on information that confirms this preexisting determination of guilt while discounting—or even ignoring—information that contradicts it.<sup>15</sup>

Regardless of the underlying explanation, prosecutorial misconduct in closing argument can be incredibly harmful. "Although argument does not constitute evidence and the jury is instructed not to consider it as such, the use of dramatic, compelling, or even inflammatory argument reflects a perception that argument is a valuable ingredient of the deliberative process. . . ."<sup>16</sup> And scientific evidence supports this perception: "Empirical research on the 'recency effect' suggests that people tend to remember best

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9. See *infra* Part II.

10. See, e.g., *State v. Graves*, 668 N.W.2d 860, 867 (Iowa 2003); *State v. Singh*, 793 A.2d 226, 232 (Conn. 2002).

11. See, e.g., *Griffin v. California*, 380 U.S. 609, 615 (1965) (finding that the prosecutor's comment on the defendant's decision not to testify was improper and violated the Fifth Amendment); *State v. Jackson*, 444 S.W.3d 554, 589 (Tenn. 2014) (same); *State v. Jorgensen*, 754 N.W.2d 77, 90 (Wis. 2008) (stating that the prosecutor's argument about facts not adduced at trial violated defendant's Sixth Amendment right of confrontation).

12. Candice D. Tobin, *Prosecutorial Misconduct During Closing Argument: Florida Case Law*, 22 NOVA L. REV. 485, 488 (1997).

13. Bowman, *supra* note 2, at 329 (citing Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 371).

14. See *id.* (citing Findley & Scott, *supra* note 13, at 329–30) ("The information provided to prosecutors may be incomplete because the police investigation may have been shaped by tunnel vision.")

15. See *id.* (citing Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & L. 315, 316 (2009)) ("Because of confirmation bias, people unwittingly select and interpret information to support their preexisting beliefs.")

16. Sullivan, *supra* note 3, at 214.

and be influenced by the *latest event* in a sequence more than by earlier events.”<sup>17</sup> Because jurors enter deliberations with closing arguments—especially the prosecutor’s rebuttal—still ringing in their ears, those words could have more impact than the actual evidence presented much earlier in the case.<sup>18</sup>

Although other empirical research demonstrates that some jurors will have made up their minds by the time closing argument begins,<sup>19</sup> such findings do not minimize the harmful effects of the prosecutor’s misconduct. Even though some jurors may have already decided the defendant’s guilt, the prosecutor’s closing argument provides “ammunition for them to use in the jury room ‘so that they can become an extension of the advocate.’”<sup>20</sup>

Further, prosecutorial misconduct may be as frequent as it is harmful. As far back as 1987, for example, one judge conceded that prosecutorial misconduct in closing argument is “chronicled with alarming regularity.”<sup>21</sup> Nonetheless, he maintained that the “majority of prosecutors . . . desire to see that justice is done rather than to add another conviction to their record.”<sup>22</sup> But attributing the misconduct to only a few bad apples was probably a naïve claim, even in 1987. Today, any criminal defense lawyer who adopts such a trusting approach does so at his or her client’s peril. In my own experience, the *majority* of prosecutors routinely make improper arguments to the jury—indeed, prosecutorial misconduct in closing argument seems to be the rule rather than the exception. Moreover, some forms of improper argument are deployed with such frequency, and by so many different prosecutors, that there is reason to speculate that such arguments may be a part of the prosecutors’ training. And much of the empirical evidence on the pervasiveness of such misconduct supports this

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17. Bowman, *supra* note 2, at 344 (emphasis added) (citing Ryan Patrick Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 59 OKLA. L. REV. 479, 518 (2006)).

18. See Welsh White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 AM. CRIM. L. REV. 1147, 1149 (2002) (“[I]n most cases, the prosecutor’s final closing argument will be the last words that the . . . jury hears from either attorney.”).

19. See Gagnon, *supra* note 8, at 474.

20. Bowman, *supra* note 2, at 343 (quoting H. Mitchell Caldwell et al., *The Art and Architecture of Closing Argument*, 76 TUL. L. REV. 961, 972 (2002)).

21. Frank D. Celebrezze, *Prosecutorial Misconduct: Quelling the Tide of Improper Comment to the Jury*, 35 CLEV. ST. L. REV. 237, 238 (1987).

22. *Id.* at 247.

anecdotal evidence.<sup>23</sup> Therefore, the well-prepared criminal defense lawyer must enter each jury trial *expecting* the prosecutor to strike “foul blows.”<sup>24</sup>

The reason for this miserable state of affairs is twofold. First, prosecutors know they are likely to get away with this form of misbehavior, as “misconduct in jury argument proves to be one of the most difficult problems to address for criminal defense counsel.”<sup>25</sup> This is because defense lawyers are unable to recognize many forms of improper argument and, even when they do, the misconduct typically happens too quickly to mount a thoughtful and effective response.<sup>26</sup>

And second, appellate courts have proven to be highly tolerant of this form of prosecutorial misconduct. For example, in *Briggs v. State*, the defendant’s appellate lawyer argued that the Florida Court of Appeals had repeatedly warned prosecutors that a particular type of argument was unethical and constituted misconduct.<sup>27</sup> As such, the lawyer asked the court to make good on its *seven previous warnings* to prosecutors and order a new trial—one where the defendant Briggs could be tried free of improper argument.<sup>28</sup>

The court’s response to the lawyer’s request was the same as its response in the previous seven cases cited by the appellate lawyer: “*If* [the improper argument] continues, the appellate courts will be compelled, as appellant’s counsel argues, to fashion a special remedy and reverse convictions so obtained to provide an effective means of deterring further misconduct.”<sup>29</sup> Despite this further admonishment, however, the court again failed to act in a meaningful way to protect Briggs (and other future defendants) from

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23. See, e.g., Bowman, *supra* note 2, at 332 (discussing an empirical study demonstrating pervasive prosecutorial misconduct in California criminal trials); Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 120 (1999) (discussing evidence of “‘prosecutorial recidivism’—the tendency of the same prosecutor or office to engage in misconduct repeatedly, even in the face of admonishments from the court”).

24. Bowman, *supra* note 2, at 312 (citing the landmark case of *Berger v. United States*, 295 U.S. 78 (1935), noting the “striking gap” between “the strong rhetoric of *Berger* and . . . the realities of prosecutors’ behavior,” and explaining how *Berger*’s condemnation of prosecutorial misconduct is “routinely cited but largely ignored”).

25. Sullivan, *supra* note 3, at 214.

26. See Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335, 340-42 (2007) (discussing the challenges facing defense lawyers when attempting to deal with trial misconduct generally).

27. *Briggs v. State*, 455 So. 2d 519, 521-22 (Fla. Dist. Ct. App. 1984).

28. *Id.* at 522.

29. *Id.* (emphasis added).



prosecutorial misconduct. Prosecutors do not fear such tired judicial mantras, though, as evidenced the court's own admission that "for over 30 years such prosecutorial tactics have been disapproved of, yet they continue to occur."<sup>30</sup> In the absence of meaningful action to prevent such misconduct, prosecutors have accurately interpreted the court's eighth warning as yet another idle threat in a very long line of idle threats.

A California appellate court dealt with prosecutorial misconduct by using similarly empty warnings. After repeated incidents of misconduct by the same prosecutor in several cases, the court bemoaned:

[I]t is disheartening, to say the least, to learn that [the prosecutor] takes 'pride' in our admonitions, apparently because we did not reverse the judgment rendered. We most earnestly urge counsel to reconsider her approach *lest in the future* it becomes necessary for us to reverse otherwise sustainable convictions . . .<sup>31</sup>

The problem for California defendants, however, is the same as that faced by Florida defendants: the future never comes.

For many decades, other courts throughout the country have dealt similarly with the problem of prosecutorial misconduct, issuing myriad warnings to prosecutors to stop making improper closing arguments.<sup>32</sup> However, as in Florida and California, these judicial threats are nearly always empty and free of consequence for the offending prosecutors.

While most appellate judges timidly ask prosecutors to abide by the rules of ethics and trial procedure, one judge has recognized that this "attitude of helpless piety is, I think, undesirable."<sup>33</sup> Such an attitude is indeed "undesirable" for three reasons. First, it demonstrates that appellate courts are unable to control the prosecutorial monster they have helped create, thus exposing the courts' ineffectiveness (or, at bare minimum, unwillingness) to put an end to the conduct. Second, and more significantly, such "helpless piety" does nothing for the defendants who were victimized by the

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30. *Id.*

31. *People v. Congious*, No. B0202709 (Cal. Ct. App. Dec. 4, 1987) (emphasis added), quoted in *Cicchini*, *supra* note 26, at 348.

32. *See, e.g.*, *United States v. Vargas*, 583 F.2d 380 (7th Cir. 1978) ("Unfortunately, such improprieties are not rare grounds for appeal in this Circuit, and neither are our . . . cautions to the government in such cases.") (examining numerous cases involving improper arguments).

33. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

prosecutor's misconduct. And third, it certainly does nothing to prevent the victimization of future defendants.

Given the current state of affairs, what, if anything, can criminal defense lawyers do at the trial-court level to protect their clients? Rather than waiting until closing statements to react to improper arguments made by the prosecutor, defense lawyers should take preemptive measures in order to effectively battle this form of misconduct—one that, all too often, has come to be expected.<sup>34</sup>

## II. Recognizing Improper Arguments

Battling prosecutorial misconduct in closing argument begins with learning what constitutes an improper argument. Part I of this Article set forth the bounds of a legally proper argument.<sup>35</sup> In theory, then, anything outside of those bounds is improper. But such a formulation is not easily applied in practice. Therefore, the following sections provide concrete examples of improper arguments grouped into general categories, the goal of which is to make it easier for the criminal defense lawyer to recognize prosecutorial misconduct when he or she hears it at trial.

It is important, however, to keep three things in mind. First, this Article makes no attempt to list all examples—or even to identify all categories—of improper argument. The variations of misconduct in closing arguments are far too numerous to be easily catalogued in a single article. Second, while there *is* broad agreement across jurisdictions as to what constitutes an improper argument, the determination sometimes depends on the law of the specific federal circuit, state, or federal district within a state. And third, for some types of prosecutorial argument, what qualifies as improper may depend upon the facts of the particular case.<sup>36</sup>

Given this, every defense lawyer must become familiar with the law applicable to his or her case and, equally important, must understand how that law applies to different factual scenarios. Keeping these caveats in mind, what follow are examples of *common*—but often *improper*—closing arguments.

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34. See *infra* Part III.

35. See *supra* text accompanying notes 1-5.

36. For a single case that highlights the importance of a facts-and-circumstances analysis and also demonstrates differences between the law of two jurisdictions, see *Freeman v. Lane*, 962 F.2d 1252, 1254-56 (7th Cir. 1992).

*A. Testifying: You're Damned if You Do*

As late as the 1960s, some prosecutors were able to win convictions by preventing defendants from testifying at trial.<sup>37</sup> Today, however, courts recognize a defendant's constitutional right to testify in his or her own defense.<sup>38</sup> And to ensure this right has real meaning, courts often instruct juries that "you should not discredit the testimony *just because the defendant is charged with a crime.*"<sup>39</sup> Yet prosecutors have developed arguments to accomplish exactly what the law prohibits: they urge juries to disregard the defendant's testimony simply because he or she is the defendant. For example, one prosecutor argued to the jury:

"[W]hat's her interest, bias or prejudice? Well, she's the Defendant here, she stands a chance of getting convicted. That's one very large reason she should have of trying to slant her testimony, of trying to shift the blame away. It's not pleasant to be convicted, especially at her age."<sup>40</sup>

In a different case, the prosecutor similarly argued:

"[W]hat is his interest, bias or prejudice? Well, he's the one on trial here. You recall his testimony. He's a 17 year old male attending [high school], getting ready to enter into adulthood. Do you think he'd want to go through the rest of his life with a conviction[?]"<sup>41</sup>

In both cases, the Illinois court held that this type of argument was improper as it "implied that the defendant lied simply because of his [or

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37. *See* *Ferguson v. Georgia*, 365 U.S. 570, 571 (1961) ("In this case, a jury . . . convicted the appellant of murder, and he is under sentence of death. After the State rested its case at the trial, the appellant's counsel called him to the stand, but the trial judge sustained the State's objection to counsel's attempt to question him.").

38. *See, e.g.,* *Rock v. Arkansas*, 483 U.S. 44, 62 (1987) (finding that a "rule excluding all posthypnosis testimony infringers impermissibly on the right of a defendant to testify on his own behalf"); *see also* Timothy P. O'Neill, *Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for an On-the-Record Waiver*, 51 U. PITT. L. REV. 809, 809 (1990) ("[T]he Supreme Court has directly held that a criminal defendant has a constitutional right to testify at her trial.").

39. WIS. J.I. CRIM. 300 (2016) (emphasis added).

40. *People v. Crowder*, 607 N.E.2d 277, 280 (Ill. App. Ct. 1993).

41. *People v. Watts*, 588 N.E.2d 405, 407 (Ill. App. Ct. 1992). Apparently, age is a no-win factor for a defendant; whether young or old, the prosecutor will spin it into evidence of perjury.

her] status as a defendant.”<sup>42</sup> In other words, arguing that a defendant’s testimony should be discredited, dismissed, or ignored because he or she is the defendant is, in substance, the equivalent of preventing him or her from testifying in the first place—something the Supreme Court has already deemed unconstitutional.<sup>43</sup> The prosecutor must not be allowed to accomplish the same end by different means.

Worse yet, this prosecutorial argument violates an even more important constitutional principle: the presumption of innocence. This can be demonstrated in three simple but irrefutable steps. First, in any criminal case involving the defendant’s testimony, the prosecutor takes the position that the defendant is guilty, but the defendant testifies that he or she is innocent. Second, to argue that the defendant is lying (or slanting his or her testimony or shifting blame) because of his or her status as a defendant *necessarily* implies that the defendant is guilty. That, after all, is the whole point of the prosecutor’s argument. And third, to argue that a person is guilty merely because he or she has been charged with a crime is blatantly unconstitutional, as such arguments “diminish the defendant’s fundamental right to the presumption of innocence.”<sup>44</sup>

Whether based on the defendant’s right to testify or his or her right to a presumption of innocence, arguments that the defendant’s testimony should be disregarded based solely on his or her status as the defendant are improper; defense counsel must be able to recognize when the prosecutor is engaging in misconduct by making such arguments.

### *B. Testifying: You’re Damned if You Don’t*

For a variety of reasons, many defendants choose to exercise their constitutional right to remain silent at trial. “It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him.”<sup>45</sup> And the law is clear: a defendant “has a right to a jury instruction that his silence is not evidence of his guilt.”<sup>46</sup> Yet, in cases where defendants elect to remain silent, prosecutors are quick to spin this

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42. *Id.*; cf. *People v. Armstrong*, 655 N.E.2d 1203, 1205-06 (Ill. App. Ct. 1995) (“We respectfully disagree with our esteemed colleagues [who decided *Crowder* and *Watts*]. . . . Surely the fact that the defendants were charged . . . constituted a bias affecting the credibility of these defendants.”).

43. *See Ferguson v. Georgia*, 365 U.S. 570 (1961).

44. *Crowder*, 607 N.E.2d at 280.

45. *Griffin v. California*, 380 U.S. 609, 613 (1965).

46. Sharon R. Gromer, *Fifth Amendment—The Right to a No “Adverse Inference” Jury Instruction*, 72 J. CRIM. L. & CRIMINOLOGY 1307, 1307 (1981).

silence to the government's advantage.<sup>47</sup> Modern prosecutors normally do not *explicitly* argue that a defendant's silence at trial means that he or she is guilty. Such a bold claim would be a blatant (but not necessarily reversible) error.<sup>48</sup> Instead, prosecutors "seem to keep coming up with arguments which can have a double meaning,"<sup>49</sup> thus maintaining the thrust of the message, while at the same time giving the abusive prosecutors plausible—or in many cases, implausible—deniability.

Improper comments on the defendant's decision not to testify appear in seemingly infinite variety. In one recent case, a prosecutor began rebuttal argument "by walking across the court room, facing Defendant, and declaring in a loud voice, while raising both arms to point at and gesture toward Defendant, 'Just tell us where you were! That's all we are asking, Noura!'"<sup>50</sup>

In a more subtle example, another prosecutor argued to a jury that "God forbid you should believe a police officer whose testimony *went uncontradicted by these Defendants*."<sup>51</sup> Similarly, another prosecutor argued that there were only two people present for an alleged sexual assault, and the "rape victim was the *only person to have testified* concerning events occurring in the room where . . . [the] defendant had raped her."<sup>52</sup>

In perhaps the height of craftiness, another prosecutor argued to the jurors that they "should *not* take into consideration in any way the fact that [the] defendant did not testify," which the court held was a disguised but

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47. This Article addresses only improper arguments regarding the defendant's decision to remain silent at trial. It does not address *pretrial* silence, the admissibility of which could turn on whether the defendant testifies at trial and whether the pre-trial silence occurred before or after *Miranda* warnings. See Sandra Guerra Thompson, *Evading Miranda: How Seibert and Patane Failed to "Save" Miranda*, 40 VAL. U. L. REV. 645, 647 (2006) (discussing the admissibility of pre-*Miranda* silence).

48. See Sullivan, *supra* note 3, at 230-31 n.98 (discussing the Court's use of the "harmless error" test as a way to uphold convictions despite prosecutorial comments on the defendant's silence).

49. *Spry v. State*, 664 So. 2d 41, 41-42 (Fla. Dist. Ct. App. 1995).

50. *State v. Jackson*, 444 S.W.3d 554, 585 (Tenn. 2014) (finding argument improper and reversible error).

51. *Knight v. State*, 672 So. 2d 590, 591 (Fla. Dist. Ct. App. 1996) (emphasis added) (finding argument improper and reversible error).

52. Sullivan, *supra* note 3, at 232 (emphasis added) (discussing *Bailey v. State*, 697 S.W.2d 110 (Ark. 1985) (finding argument improper and reversible error)); see also *Freeman v. Lane*, 962 F.2d 1252, 1254 (7th Cir. 1992) (finding argument improper and reversible error because the defendant was the only person who could have rebutted the state's evidence).

“deliberate attempt to call attention to defendant’s failure to testify.”<sup>53</sup> Regardless of the form of the argument, however, any direct, indirect, or even disguised comment on the defendant’s silence violates the defendant’s due process rights and the Fifth Amendment privilege against self-incrimination and are therefore improper.

*C. Liar, Liar (and other Name Calling)*

Prosecutors sometimes argue that defendants are not believable simply because they are charged with a crime. Other times, however, prosecutors are more direct and simply call the defendant (or other defense witness) a liar or brand the person with equally harmful labels.

In some jurisdictions, calling the defendant a liar is, at least in theory, *per se* improper as it is considered an inflammatory label.<sup>54</sup> In other jurisdictions, prosecutors may get away with such name-calling if it is closely tied to evidence adduced at trial. For example, when “the witness told four different stories” when testifying, it may be proper to discuss those conflicting stories and then argue that the witness is “the biggest liar in [the] [c]ounty.”<sup>55</sup> That is, it may be permissible “to call the defendant or a witness a ‘liar’ if conflicts in evidence make such an assertion a fair inference.”<sup>56</sup>

Prosecutors are often creative and build upon the words “lie” or “lying” or “liar.” One prosecutor went well beyond the pale in closing argument when discussing the defendant’s testimony:

Joseph Goebbels, who was a propaganda minister for Germany back at the time of Adolf Hitler, had a theory. He believed that you should lie to the people but that you shouldn’t lie with small lies because you can get caught in small lies. What you should do is you should lie big, come up with a big lie because that’s something that you might be able to have the people buy is the big lie. Of course, at that time it was that the Jews were

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53. Spiegelman, *supra* note 23, at 138 n.89 (discussing *United States v. Roberts*, 119 F.3d 1006 (1st Cir. 1997) (finding argument improper and, when combined with other errors, reversible error)).

54. *See* Gagnon, *supra* note 8, at 483-84 (discussing how Iowa’s supposed “bright line test” is “not all that bright”); *see also* *O’Callaghan v. State*, 429 So.2d 691, 696 (Fla. 1983) (stating that it is “unquestionably improper” to call the defendant a liar).

55. *Chandler v. Moore*, 240 F.3d 907, 914 (11th Cir. 2001).

56. *People v. Starks*, 451 N.E.2d 1298, 1305 (Ill. App. Ct. 1983); *see also* *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987) (finding that the prosecutor may call defendant a liar if supported by the trial evidence).

responsible for everything that was wrong in the world and they should be exterminated. Well, the defense in this case is nothing but a big lie.<sup>57</sup>

Most prosecutors aren't brash enough to invoke Nazi Germany and then strain to find a way to associate the defendant with it. Many prosecutors will, however, brand the defendant with other negative labels in addition to that of liar. Depending on the facts of the case and the nature of the prosecutor's argument, name-calling such as "dope pusher,"<sup>58</sup> "hoodlum,"<sup>59</sup> and "unpredictable animal"<sup>60</sup> could very well be considered inflammatory, improper, and even reversible error.

#### *D. Disparaging the Defense Lawyer*

When prosecutors aren't criticizing the defendant or the defendant's witnesses, they are often disparaging the defendant's lawyer. This type of argument is improper because it "can prejudice the defendant by . . . inducing the jury to give greater weight to the government's view of the case."<sup>61</sup>

Attacks on defense counsel can take several forms, beginning with criticism disguised as compliment. For example, in a classic case of false flattery, one prosecutor "backhandedly compliment[ed] defense counsel on his skill in confusing the alleged victim of a sexual assault when cross-examining her," and then distinguished the dishonorable goals of the defense lawyer from the noble objectives of "the government and the judge."<sup>62</sup> More commonly, prosecutors go after defense counsel via a "more direct" route.<sup>63</sup> Instead of arguing about the evidence, many prosecutors have attacked "the personal integrity of defense counsel by suggesting that counsel was not being truthful."<sup>64</sup> Not mincing words, one prosecutor told

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57. *Washington v. State*, 687 So. 2d 279 (Fla. Dist. Ct. App. 1997).

58. *Mays v. State*, 571 S.W.2d 429, 430 (Ark. 1978).

59. *Hall v. United States*, 419 F.2d 582, 587 (5th Cir. 1969).

60. *State v. McGregor*, 244 So. 2d 846, 846 (La. 1971).

61. *United States v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001).

62. Spiegelman, *supra* note 23, at 136 n.83 (discussing *United States v. Frederick*, 78 F.3d 1370 (9th Cir. 1996) (finding argument improper and, when combined with other errors, reversible error)).

63. Sullivan, *supra* note 3, at 246 (discussing indirect and direct attacks on defense counsel by the prosecutor).

64. *Briggs v. State*, 455 So. 2d 519, 520 (Fla. Dist. Ct. App. 1984) (finding argument improper but also harmless error).

the jury that the defense lawyer “is either confused or she’s lying or trying to mislead you.”<sup>65</sup>

Such misconduct in closing argument “evidences an excessive preoccupation with obtaining a conviction at any cost.”<sup>66</sup> And when prosecutors employ this strategy, “the state’s closing argument may cause one to wonder who is on trial, the defendant or the defense counsel.”<sup>67</sup> In perhaps the most extreme (and literal) example of putting the defense lawyer on trial, one prosecutor in an incest case “suggested that defense counsel was also guilty of incest.”<sup>68</sup>

Another variation on this anti-defense-lawyer theme does not attack the defense lawyer as an individual, but instead attacks his or her role in the criminal justice system. For example, one prosecutor argued that, while the prosecutor’s job is to “determine whether I believe a person is guilty and whether I think [the prosecution is] just,” the “defense counsel’s job is to get his client off the hook. That’s his only job here, not to see justice is done but to see that his client is acquitted.”<sup>69</sup> This common twist on this form of improper argument allows prosecutors to kill two birds with one stone: anointing themselves as justice-seekers while at the same time branding defense lawyers as obfuscators.<sup>70</sup>

Prosecutors continue to make these and similar arguments even though courts have repeatedly stated that such “disparaging remarks directed at defense counsel are reprehensible.”<sup>71</sup> In a broader sense, such remarks also “detract from the dignity of judicial proceedings.”<sup>72</sup> As such, regardless of the prosecutor’s angle, all forms of argument directed at defense counsel should be considered improper.

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65. *State v. Lyles*, 996 S.W.2d 713, 716 (Mo. Ct. App. 1999) (finding argument improper but not preserved at the post-conviction level and not sufficient to reverse under the higher standard of plain error).

66. *Briggs*, 455 So. 2d at 520.

67. *Tobin*, *supra* note 12, at 495.

68. *See id.* at 495-96 n.78; *see also* *Douglass v. State*, 184 So. 756, 757 (Fla. 1938).

69. *State v. Mayo*, 734 N.W.2d 115, 121 (Wis. 2007) (finding argument improper but not properly preserved at trial and not sufficient to reverse under the ineffective assistance of counsel standard, plain error standard, or interests of justice standard).

70. *See, e.g.,* *United States v. Friedman*, 909 F.2d 705, 708-09 (2d Cir. 1990) (arguing that the role of the defense lawyer is to “try to get them off, perhaps even for high fees”); *Wilson v. State*, 938 S.W.2d 57, 58 (Tex. Crim. App. 1996) (arguing that defense counsel wishes “that you turn a guilty man free” and “he can wish that because he doesn’t have the obligation to see that justice is done”); *People v. Hunt*, 242 N.W.2d 45, 47 (Mich. Ct. App. 1976) (arguing that “defense counsel’s job was ‘to get his man acquitted’”).

71. *United States v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001).

72. *Id.*



### E. Vouching and Personal Opinion

Vouching is likely the most common form of improper argument, but its numerous variations can make it difficult to identify. In general, a prosecutor vouches when he or she gives a personal opinion about the defendant's guilt or about a particular piece of evidence.<sup>73</sup> This can be problematic, as "[r]esearch consistently shows that jurors inherently find prosecutors to be more credible than defense counsel."<sup>74</sup> Therefore, "it is improper . . . for a prosecutor to express a personal belief in the guilt of the accused, or in the veracity of the state's witnesses."<sup>75</sup>

Although it occurs with some frequency, "[m]ost courts conclude that it is misconduct for prosecutors to make 'I' statements such as 'I think' or 'I believe.'"<sup>76</sup> Some obvious examples of such blatant vouching include, "I think the defendant is guilty," or, "I believe the victim testified truthfully." Some courts will let prosecutors get away with vouching, however, if the "I think" or "I believe" statements are properly disguised. Examples might include, "I think *the evidence* in this case shows the defendant is guilty," or "I think the *physical evidence* proves the victim told the truth." Therefore, whether this type of argument is improper is depends on how the language is parsed.<sup>77</sup>

In most cases, prosecutors express their personal opinion of the defendant's guilt *indirectly* by giving their opinion that the government's witnesses testified truthfully and therefore the jury should believe them. Prosecutors indirectly vouch for many types of government witnesses, but they most commonly do so for the police. That is, prosecutors make "inappropriate attempt[s] to persuade the jury that the police officer's testimony should be believed simply because the witness is a police officer."<sup>78</sup>

While offering a personal opinion is, by itself, improper, many prosecutors compound this offense by bolstering their opinions with reference to matters outside of the record. One prosecutor, for example, bolstered his personal opinion of the defendant's guilt by explaining to the jury, "I look up police reports. . . . I determine whether I believe a person is

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73. See Bowman, *supra* note 2, at 321.

74. *Id.* at 322-23.

75. Tobin, *supra* note 12, at 503.

76. Bowman, *supra* note 2, at 321-22.

77. See Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 PEPP. L. REV. 243, 307-08 (2002) (discussing cases where the prosecutor's personal opinions were permitted).

78. *Cisneros v. State*, 678 So. 2d 888, 890 (Fla. Dist. Ct. App. 1996).

guilty and whether I think it's just. I also have the discretion . . . to dismiss the charges if I think they're unjust, if they didn't happen, if it's not provable."<sup>79</sup>

While vouching for several police officers, another prosecutor argued that the police witnesses must be believed because, before they can become police officers, they "take oaths to follow the law and so do not 'stick' people with charges."<sup>80</sup> The prosecutor specifically argued that, during their induction ceremonies, "Officer Gammon took an oath to uphold the laws" and "Detective Arkins took the same oath."<sup>81</sup> Therefore, in order to acquit the defendant, the prosecutor contended, the jurors would have to believe these police witnesses consciously violated their oaths, as well as their oaths at trial, and "lied on the stand."<sup>82</sup> Such vouching, especially when based on facts not in evidence, constitutes misconduct by the prosecutor.

#### F. Prosecutor "Testimony"

When prosecutors aren't vouching for the state's witnesses or evidence, they sometimes offer their own testimony, thus creating evidence out of thin air. Although the law is clear that "counsel has no right to create evidence or to misstate the facts"<sup>83</sup> and that any "[a]rgument on matters not in evidence is improper,"<sup>84</sup> prosecutors often "testify" in closing argument nonetheless.

The most egregious example of prosecutor testimony occurs when a prosecutor argues facts that he or she knows to be false. For example, in one case a prosecutor argued to the jury that the defendant "never denied [committing] the crime until he got on the witness stand."<sup>85</sup> This might have been a proper argument had there been evidence at trial of the defendant's pre-arrest and pre-*Miranda* silence. But in this case, the prosecutor "knew

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79. *State v. Mayo*, 2007 WI 78, ¶ 16, 301 Wis. 2d 642, 734 N.W.2d 115 (alterations in original).

80. *United States v. Cornett*, 232 F.3d 570, 573 (7th Cir. 2000).

81. *Id.*

82. *Id.*

83. *State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993); *see also* *United States v. Donato*, 99 F.3d 426 (D.C. Cir. 1996) (reversing in part for prosecutor misstating evidence); *United States v. Forlorma*, 94 F.3d 91 (2d Cir. 1996) (reversal for prosecutor's repeated, incorrect claims about the evidence); *Bowman*, *supra* note 2, at 323 ("For example, prosecutors commit misconduct when they exaggerate what the testimony shows, including forensic evidence.").

84. *State v. Neuser*, 528 N.W.2d 49, 54 (Ct. App. Wis. 1995) (quoting *State v. Albright*, 298 N.W.2d 196, 203 (Wis. Ct. App. 1980)).

85. *State v. Weiss*, 2008 WI App 72, ¶ 15, 312 Wis. 2d 382, 752 N.W.2d 372.

better” because she had two different police reports detailing how the defendant *had* denied committing the crime long before he took the witness stand.<sup>86</sup> The argument was therefore improper, as “[p]rosecutors may not ask jurors to draw inferences that they know or should know are not true.”<sup>87</sup>

In other cases, prosecutors argue facts that *might* be true but prevent the introduction of evidence proving or disproving the facts and deny defense counsel the opportunity to challenge the facts by waiting to discuss them until closing arguments. This tactic violates both due process and the right of confrontation: “Testimony from a prosecutor is difficult enough to overcome, but it is impossible for a defendant to test or counter a prosecutor’s ‘testimony’ when the defendant is denied his right to confront the prosecutor as a witness.”<sup>88</sup>

In one example of this tactic, a defendant testified he was out-of-town “at the Luxor Hotel in Las Vegas at the time” in question.<sup>89</sup> Instead of presenting contrary evidence at trial, the prosecutor waited until closing argument and “testified” that he knew the defendant was *not* at the Luxor because, the prosecutor said, “I was able to have members of my staff telephone the Luxor,” thus implying that the defendant had lied.<sup>90</sup> In a different case—one alleging child sexual assault—a prosecutor argued that, because the defendant “had been sexually abused” herself as a child, she was “more likely to have committed the alleged sexual assaults in this case.”<sup>91</sup> This prosecutorial testimony was a twist on the “battering parent syndrome,” but “was improper . . . because it was unsupported by expert testimony” at trial.<sup>92</sup>

The above examples are relatively easy for defense counsel to recognize. Sometimes, however, prosecutors do a better job of disguising their factual assertions as argument. For example, one prosecutor argued that the defendant in a drug case was able to post his \$10,000 bond because he “could go out the next day and make \$10,000 up on one transaction.”<sup>93</sup> This was improper because, during the evidence portion of trial, the prosecutor did not “even attempt to prove that [the defendant] had received *any* money

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86. *Id.*

87. *Id.*

88. *State v. Jorgensen*, 2008 WI 60, ¶ 38, 310 Wis. 2d 138, 754 N.W.2d 77.

89. *Cicchini*, *supra* note 26, at 353.

90. *Id.*

91. *State v. Pulizzano*, 456 N.W.2d 325, 335 (Wis. 1990).

92. *Id.* at 336.

93. *United States v. Vargas*, 583 F.2d 380, 386 (7th Cir. 1978).

as a result of *any* [drug] deals”—not even the alleged delivery with which the defendant was charged.<sup>94</sup>

In another case, a defendant was charged with arson, and the government had seized his clothing to test for gasoline.<sup>95</sup> Defense counsel properly argued that the test came back negative, thus pointing to the defendant's innocence. The prosecutor, however, responded “by speculating that the reason for that fact could be that the defendant had destroyed the clothes” he wore when committing the crime.<sup>96</sup> The court held that such argument “was improper because it suggests a course of conduct by the defendant . . . for which there was no evidence.”<sup>97</sup>

In a closely related tactic, prosecutors may instead misuse a piece of evidence that *was* presented at trial. One amazingly creative prosecutor, for example, argued that a defense *witness's* prior conviction—a conviction admitted into evidence only to impeach that witness's credibility<sup>98</sup>—was somehow evidence that the *defendant* was guilty of the crime for which he was on trial.<sup>99</sup> Regardless of whether the prosecutor is creating evidence out of thin air or misusing real evidence that was introduced at trial, both forms of argument are prejudicial and improper.

### G. Misstating the Law

Applying the law to the facts of the case is proper argument; misstating the law when doing so, however, is not. Prosecutors have misstated nearly every imaginable legal standard, including the law of affirmative defenses<sup>100</sup> and of lesser-included crimes.<sup>101</sup> But the height of sophistry can be found in prosecutors' misstatements of the burden of proof.

Prosecutors commonly attempt to lower the government's burden of proof, thus raising the odds of winning a conviction. For example, one Washington prosecutor argued that the jury's duty in reaching its verdict was to “search for the truth.”<sup>102</sup> The appellate court, however, rightly stated that this argument “misstates the jury's duty and sweeps aside the State's burden.”<sup>103</sup> Or, as one federal court explained, “‘seeking the truth’ suggests

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94. *Id.* (emphasis added).

95. *State v. Singh*, 793 A.2d 226, 243 (Conn. 2002).

96. *Id.*

97. *Id.* (emphasis added).

98. *See* FED. R. EVID. 609.

99. *United States v. Mitchell*, 1 F.3d 235 (4th Cir. 1993).

100. *See, e.g., State v. Bougneit*, 294 N.W.2d 675 (Wis. Ct. App. 1980).

101. *See, e.g., State v. Neuser*, 528 N.W.2d 49 (Wis. Ct. App. 1995).

102. *State v. Berube*, 286 P.3d 402, 411 (Wash. Ct. App. 2012).

103. *Id.*

determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a *preponderance of evidence* standard."<sup>104</sup>

Similarly, a California prosecutor argued that the reasonable doubt standard is one "you use every day in your lives when you make important decisions, [including] decisions about whether you want to get married."<sup>105</sup> The appellate court, however, held that such a statement "trivializes the reasonable doubt standard."<sup>106</sup> Further, the "marriage example is also misleading since the decision to marry is often based on a standard far less than reasonable doubt, as reflected in statistics indicating 33 to 60 percent of all marriages end in divorce."<sup>107</sup>

To make matters worse, these misstatements of law are sometimes incorporated into the trial judge's instruction to the jury on reasonable doubt. In Wisconsin, for example, the often-challenged pattern jury instruction uses both the analogy to decision-making in the "important affairs of life"<sup>108</sup> and, worse yet, literally instructs the jury "*not* to search for doubt" but instead to "search for the truth."<sup>109</sup> Regardless of whether the prosecutor's argument parrots the trial judge's instruction, however, arguments that falsely attempt to lower the burden of proof are still improper. Returning to the previous examples from Washington, the appellate court found the prosecutor's argument to "search for the truth" improper despite the court's pattern jury instruction equating beyond a reasonable doubt with "an abiding belief in the truth of the charge."<sup>110</sup> Similarly, in California, the appellate court found the prosecutor's argument "equat[ing] proof beyond a reasonable doubt to everyday decision-making in a juror's life" improper despite the trial judge's instruction to the jury to do the same.<sup>111</sup>

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104. *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994) (emphasis added).

105. *People v. Nguyen*, 40 Cal. App. 4th 28, 35 (1995).

106. *Id.*

107. *Id.*

108. WIS. J.I. CRIM. 140 (2016).

109. *Id.* (emphasis added); see also Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICH. L. REV. 1139 (2016) (demonstrating empirically that Wisconsin's pattern jury instruction on the burden of proof lowers the burden below the reasonable doubt standard and is the equivalent of giving no burden of proof instruction whatsoever).

110. Cicchini & White, *supra* note 109, at 1147 n.34 (quoting *State v. Pirtle*, 904 P.2d 245, 261 (Wash. 1995)).

111. *People v. Johnson*, 119 Cal. App. 4th 976, 980 (2004).

Prosecutors also seek to diminish the burden of proof by presenting the jury with a false dichotomy: in order to find the defendant not guilty, you “would have to find that [the state’s witnesses] are lying about the evidence they presented to you . . . . It’s really that black and white.”<sup>112</sup> Of course, such arguments suffer from two fatal flaws. First, “testimony may be in direct conflict for reasons other than a witness’ intent to deceive,” the most obvious of which, of course, is that a witness may merely be mistaken.<sup>113</sup> And second, such prosecutorial arguments actually sidestep the burden of proof itself:

[I]t of course does not follow as a matter of law that in order to acquit [the defendant] the jury had to believe that the agents had lied. If the jurors believed that the agents *probably* were telling the truth and that [the defendant] probably was lying . . . it would have been proper to return a verdict of not guilty because the evidence might not be sufficient to convict defendant beyond a *reasonable doubt*. To tell the jurors that they had to choose between the two stories was error.<sup>114</sup>

In other cases, instead of merely lowering the burden of proof, prosecutors often try shifting it to the defendant—regardless of whether the defendant presented evidence at trial. Just as prosecutors can spin a defendant’s decision to testify or to remain silent into evidence of guilt,<sup>115</sup> so too can they spin the defendant’s entire defense. When the defendant decides not to present any evidence and instead attacks the strength of the government’s case, prosecutors have shifted the burden by asking the jury, “How many witnesses did the defense put on for your consideration?”<sup>116</sup> Conversely, when the defendant decides to call witnesses, prosecutors have shifted the burden by improperly arguing that “the defendant has the same responsibility [as the government] and that is to present a compelling case.”<sup>117</sup>

Finally, another prosecutorial twist simply asks the jury to dispense with the burden of proof altogether, arguing that the “burden of proof beyond a reasonable doubt is a shield for the *innocent* . . . not a barrier to conviction

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112. *United States v. Cornett*, 232 F.3d 570, 574 (7th Cir. 2000).

113. *State v. Singh*, 793 A.2d 226, 238 (Conn. 2002).

114. *United States v. Vargas*, 583 F.2d 380, 387 (7th Cir. 1978) (emphasis added).

115. *See supra* Sections II.A, II.B.

116. *Adams v. State*, 566 S.W.2d 387 (Ark. 1978).

117. *United States v. Roberts*, 119 F.3d 1006, 1011 (1st Cir. 1997).

for the *guilty*.”<sup>118</sup> Therefore, the argument continues, because the jury “knows” the defendant is guilty, it should automatically convict, even when the prosecutor is, technically, unable to prove it.<sup>119</sup>

#### *H. Straw Men*

When a prosecutor sets up a straw man, he or she makes an argument, attributes that argument to defense counsel, and then demonstrates that the argument is invalid. Thus, the prosecutor gives the impression that, because he or she clearly won the debate, the jury should convict. The point that often eludes the jury, however, is that the prosecutor was merely arguing with him or herself.

A common version of a straw man argument tracks closely with the false dichotomy prosecutors use to diminish the burden of proof. For example, when a defendant argues that a police officer was mistaken in his or her identification of the defendant as the perpetrator, prosecutors will often distort the argument:

While defense attorneys try and say, well, we’re not saying the police are *lying*; *what else are they saying?* There’s no other reasonable explanation, and it kind of frustrates me knowing and working in this field and knowing these officers; and you know them now too. You know them. They work hard. They do a tough job. They come in here to testify a lot of times. They work long, long hours. You weigh their testimony against the defendant’s.<sup>120</sup>

Fortunately, the appellate court saw through this argument: “[W]e cannot ignore the prosecutor’s *self-imposed* frustration at *his own . . . suggestion* that testifying police officers may have lied.”<sup>121</sup> That is, defense counsel never once suggested the officers were lying; rather, the prosecutor merely created a straw man. But “[o]nce the prosecutor’s rhetorical straw man was created . . . it had to be eliminated.”<sup>122</sup> And the prosecutor eliminated it by

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118. *Floyd v. Meachum*, 907 F.2d 347, 351 (2nd Cir. 1990) (emphasis added).

119. This argument is especially compelling, but just as improper, in states like Wisconsin where judges amazingly instruct juries “not to search for doubt” but instead “to search for the truth.” *Wis. J.I. CRIM.* 140 (2016).

120. *State v. Smith*, 2003 WI App 234, ¶ 12, 268 Wis. 2d 138, 671 N.W.2d 854 (emphasis added).

121. *Id.* at 859 (emphasis added).

122. *Id.*

referencing matters “not in the record” and by vouching “for the credibility of the police witnesses”—both of which “prejudiced” the defendant.<sup>123</sup>

When straw man arguments are made in the prosecutor’s first argument to the jury, it is possible—though time consuming—for defense counsel to simply expose this sophistry in his or her own closing argument. But when the prosecutor sandbags defense counsel by making this improper argument in rebuttal, then the trial judge may have to be called upon to cure the prejudice.

### *I. Sweet Emotion*

A prosecutor is not permitted to ask the jury to convict the defendant for any reason other than proof beyond a reasonable doubt. Nonetheless, prosecutors often resort to improper emotional appeals to win convictions. The countless examples of this type of prosecutorial misconduct make it impossible to catalog them all here. There are, however, three types of emotional arguments commonly made by prosecutors: invoking sympathy for the alleged victim, instilling fear of the consequences for failing to convict, and pandering to jurors’ biases and prejudices.

With regard to sympathy-based arguments, prosecutors often attempt to win a conviction by pitting the alleged victim against the defendant. In one case, “at the conclusion of the prosecutor’s closing argument, he urged the jury to ‘show [the defendant] the same mercy shown to the victim on the day of her death.’”<sup>124</sup> In other cases, prosecutors will whip up even more emotion by asking the jurors to step into the shoes of the alleged victim. For example, one “prosecutor made an objectionable ‘golden rule’ argument stating, ‘It’s a gun. It’s a real gun. It’s a gun with a laser on it. Just imagine how terrifying this laser would be *if it was on your chest?*’”<sup>125</sup>

Equally dangerous is the prosecutorial argument that invokes fear in the context of societal issues. That is, prosecutors often urge jurors to convict because of what will happen to society if they acquit. For example, one prosecutor urged the jury to convict the defendant of a drug crime not based on evidence, but because “[d]rugs are corrupting our society. Drugs are

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123. *Id.* at 860.

124. Tobin, *supra* note 12, at 501 (quoting *Rhodes v. State*, 547 So. 2d 1201, 1206 (Fla. 1989)).

125. Montz, *supra* note 77, at 304 (quoting *DeFreitas v. State*, 701 So. 2d 593, 601 (Fla. Dist. Ct. App. 1997)).



destroying our children. You must consider the significance of what we are talking about.”<sup>126</sup>

As the previous example demonstrated, children are an especially useful tool for invoking fear in the jury. Another prosecutor argued that the jury should convict not because there was evidence the defendant committed the child-sex crime with which he was charged, but rather to prevent hypothetical, future crimes: “I don’t know how many more small children we are going to allow him to . . . .”<sup>127</sup> Hitting even closer to home, another prosecutor urged jurors to convict a defendant in order to “send ‘a message to those folks’ who might want to molest [your] neighbors’ children, [your] own children or grandchildren.”<sup>128</sup>

Despite the effectiveness of using children to instill fear in a jury, perhaps the most effective way to invoke fear is to argue that the jurors will *personally* be put in harm’s way if they acquit the defendant. In a not-so-subtle example of this argument, one prosecutor told the jurors “that gun is still out there. If you say not guilty, [the defendant] walks right out the door, *right behind you*.”<sup>129</sup>

Finally, in addition to invoking sympathy and fear, prosecutors may also improperly rely on deeply ingrained racial and class biases to win convictions. For example, one prosecutor argued that a jury should convict a Jamaican defendant because “what is happening . . . is that Jamaicans are coming in, they’re taking over the retail sale of crack . . . . It’s a lucrative trade. The money, the crack, the cocaine that is coming into the city is being taken over by people just like [the defendant].”<sup>130</sup> And, biases can run in both directions. Another prosecutor improperly argued that, if the jury failed to convict the defendant, “she was rich and would thumb her nose at small Martin County and say, ‘Well, we really pulled one over [on] those guys.’”<sup>131</sup>

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126. Anthony Flores, *You Can’t Say That, or Maybe You Can: An Analysis of Michigan Prosecutor Closing Argument Law*, 88 U. DET. MERCY L. REV. 273, 280 (2010) (paraphrasing *People v. Duncan*, 260 N.W.2d 58, 62-63 n.6 (Mich. 1977)).

127. *Magar v. State*, 836 S.W.2d 385, 387 (Ark. App. 1992) (upholding denial of mistrial request where defense counsel’s objection terminated the improper argument and trial judge issued curative instruction).

128. Sullivan, *supra* note 3, at 244-45 (quoting *King v. State*, 877 S.W.2d 583, 585 (Ark. 1994)).

129. *N. Mar. I. v. Mendiola*, 976 F.2d 475, 486 (9th Cir. 1992) (emphasis added).

130. *United States v. Doe*, 903 F.2d 16, 24 (D.C. Cir. 1990).

131. Tobin, *supra* note 12, at 493 (internal quotation marks omitted) (quoting *Ryan v. State*, 457 So. 2d 1084, 1088 (Fla. Dist. Ct. App. 1984)).

*J. Uninvited Response*

Prosecutors often commit misconduct in their rebuttal closing, theorizing that their improper arguments were invited by defense counsel and are therefore justified. This “invited response” doctrine is grossly misunderstood and frequently abused. First, in order for a prosecutor’s otherwise improper argument to have any chance of finding safe haven as an invited response, defense counsel must first have made his or her own *improper* argument.<sup>132</sup> Consider an example where, through cross-examination at trial, defense counsel established that the police never questioned an eyewitness at the crime scene. Further, counsel established that the police never tested the physical evidence that was collected from the crime scene. Then, in closing argument, counsel argued that the police conducted a shoddy investigation, the state’s evidence cannot be trusted, and the evidence that was presented does not constitute proof beyond a reasonable doubt.

This is a *proper* defense argument.<sup>133</sup> And while such an argument certainly “invites” the prosecutor to respond by citing any trial evidence that pointed to guilt, the prosecutor may not invoke the so-called (and poorly-named) invited response doctrine to justify making an *improper* argument.<sup>134</sup>

Continuing with the above example, assuming there was no supporting testimony at trial, the prosecutor may not argue to the jury (whether true or not) that the police did not talk to the eyewitness because he or she was afraid of the defendant and refused to cooperate. Similarly, the prosecutor may not argue that the police did not send the physical evidence for testing due to a six-month backlog at the crime lab. Such arguments invoke facts not in evidence, are improper, and were certainly not invited by defense

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132. See Bowman, *supra* note 2, at 372 (noting that the invited response doctrine is applicable only “[i]f the prosecutor’s misconduct was provoked by defense counsel’s own improper argument”) (citation omitted); Lyon, *supra* note 1, at 700 (“The prosecution may not . . . invoke the doctrine in an ‘offensive’ fashion; that is, it cannot use invited response as a springboard.”).

133. See *Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (“A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant.” (quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986))).

134. See *United States v. Severson*, 3 F.3d 1005, 1014 (7th Cir. 1993) (explaining that defense counsel’s argument that the witness was lying to get the benefit of his plea bargain did not invite the prosecutor’s response that the witness was testifying truthfully because “the government would not tolerate untruthful testimony”).

counsel's proper arguments that the evidence failed to establish proof beyond a reasonable doubt.

Second, even in cases where defense counsel *does* first make an improper argument, some jurisdictions hold that the prosecutor is not allowed to hide in the weeds, say nothing, and then launch into his or her own improper argument in rebuttal. Rather, the prosecutor may be required to object to defense counsel's improper argument and seek a curative instruction from the court.<sup>135</sup> And this makes sense: just as defense counsel's failure to object to improper argument generally waives the issue of prosecutorial misconduct on appeal, so too should the prosecutor's failure to object waive the issue of defense counsel's improper argument for purposes of invited response.

Third, even when the invited response doctrine does excuse a prosecutor's improper argument, the doctrine still has its limits. The prosecutor's argument must have been "a necessary and reasonable" response to defense counsel's improper argument.<sup>136</sup> Further, prosecutor rebuttal arguments that implicate constitutional rights—such as a comment on the defendant's right to remain silent at trial—are even less likely to be justified as an invited response.<sup>137</sup>

Finally, even when the prosecutor makes otherwise proper arguments in rebuttal, it is important to remember that the purpose of rebuttal is to "respond to arguments of opposing counsel."<sup>138</sup> Just because defense counsel argued that the state did not prove guilt beyond a reasonable doubt, the prosecutor should not have license to cite matters not raised by defense counsel merely because those matters point to the defendant's guilt. If the word "rebuttal" could be interpreted that broadly, it would lose all meaning. Rather, the scope of rebuttal argument should be much narrower: "rebuttal shall be limited to matters raised by any adverse party in argument."<sup>139</sup>

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135. See *United States v. Young*, 470 U.S. 1, 13 (1985) (holding that the prosecutor's argument was *not* justified by invited response doctrine as "the prosecutor at the close of defense summation should have objected to the defense counsel's improper statements with a request that the court give a timely warning and curative instruction to the jury").

136. William Timothy Allen, III, Comment, *The Paradox of the Prosecutor: Justice Versus Conviction During Closing Argument*, 34 LA. L. REV. 746, 758 (1974) (internal quotations omitted).

137. *Id.*

138. Bowman, *supra* note 2, at 320.

139. WIS. STAT. § 805.10 (2017).

Consequently, any rebuttal that goes beyond the specific arguments or facts raised by defense counsel should be considered improper sandbagging.<sup>140</sup>

### *III. The Reactionary Approach*

Having identified several categories and examples of improper argument, the next question is: What does the criminal defense lawyer do about it? Following the conventional approach, most lawyers simply wait until the prosecutor commits the misconduct and then react to it. Under this approach, defense counsel must “contemporaneously object” to the misconduct, which then “gives the trial court the first opportunity to correct potential injustice by invoking an immediate cure and forestalling future harm.”<sup>141</sup> Most jurisdictions follow the “fundamental rule” that relief “will not be considered in the absence of an appropriate objection in the trial court.”<sup>142</sup> Unfortunately, objecting to prosecutorial misconduct, while a necessary step under the conventional approach, can be difficult and risky. And once the defense lawyer objects, the objection, by itself, is rarely sufficient.

#### *A. The Decision to Object*

To begin, even if defense counsel goes into a jury trial familiar with most types of improper argument, objecting in the heat of battle is not easy. When under the stress of the situation, it is often “difficult for defense counsel to quickly identify the problem and raise an objection in seconds at trial. Even if defense counsel is troubled by the prosecutor’s comments, these conditions make it difficult for defense counsel to articulate their objections quickly.”<sup>143</sup>

Even if the defense lawyer quickly identifies an improper argument and is capable of articulating the appropriate objection, this does not necessarily mean that he or she *should* object. “Deciding whether to object during closing argument is one of the most difficult strategic decisions counsel faces during trial.”<sup>144</sup> Objecting can be costly.

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140. See, e.g., *Grassmyer v. State*, 429 N.E.2d 248 (Ind. 1981) (holding that a prosecutor may argue in “greater detail” about a topic raised by defense counsel, but that sandbagging is not proper).

141. *United States v. Roberts*, 119 F.3d 1006, 1013 (1st Cir. 1997).

142. *Wicks v. State*, 606 S.W.2d 366, 369 (Ark. 1980).

143. *Bowman*, *supra* note 2, at 356 (footnote omitted).

144. R. GEORGE BURNETT ET AL., *WISCONSIN TRIAL PRACTICE* § 9.64 (2001).

[T]he conventional wisdom within the field of trial advocacy is that attorneys should not object during closing arguments unless things are terrible. . . . [C]ounsel may be concerned about irritating the judge or jury by interrupting opposing counsel, which can heighten jurors' general tendencies to favor prosecutors over defense counsel. More specifically, defense counsel may be concerned about the jury's likely reaction if her objection is overruled. A trial court decision to overrule an objection . . . may actually encourage the jury to rely on those comments.<sup>145</sup>

Further, trial judges typically overrule objections, often because they do not know the law or may not even be listening to the arguments. And while it would be logical for defense counsel to think that his or her job is done when an objection is overruled, the defense lawyer may actually be on the hook for the trial judge's error.

In one case, for example, even though the trial court overruled defense counsel's objection to improper argument, an appellate court "summarily dismissed the defendant's appeal, holding that the issue was waived because defense counsel failed to move for a mistrial."<sup>146</sup> Of course, the appellate court did not say how the trial judge could have granted a mistrial (or awarded any other remedy) after *overruling* the underlying objection. Fortunately, many jurisdictions follow the far more rational approach that, "[i]f the trial court overrules the objection, no further step should be required of defense counsel . . . because the trial court has [already] ruled that no misconduct has occurred."<sup>147</sup>

In other cases—particularly where the trial judge does not understand the law or was not listening to the arguments—the judge may refuse to sustain *or* overrule defense counsel's objection. Instead, he or she may simply utter

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145. Bowman, *supra* note 2, at 358 (footnote omitted) (internal quotations omitted). The defense lawyer's concern about drawing further attention to objectionable information is legitimate and supported by empirical evidence. See Shari S. Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1592 (2012) (discussing and citing an empirical study on the effect of an overruled objection).

146. Cicchini, *supra* note 26, at 355 (footnote omitted).

147. Sullivan, *supra* note 3, at 256; see also *State v. Cockrell*, 741 N.W.2d 267, 274, n. 14 (Wis. Ct. App. 2007) ("[W]hen the court sustains the objection, without a request for a mistrial all [the court] can assume is that the defendant was satisfied with the court's ruling and curative measure, and that he had no further objections. This rationale does not apply when the court has overruled the objection, as it did here.") (citations and internal quotations omitted).

a general-purpose platitude, such as, “I’m not going to talk about this. I’m going to let the jury decide this case on the instructions I’ve given you.”<sup>148</sup> Similarly, the judge may utter the true but meaningless statement that closing arguments “are not the evidence.”<sup>149</sup>

And just as defense lawyers may be on the hook when the trial judge erroneously overrules an objection, so too can defense counsel be blamed when the trial judge neglects to formally rule on the objection and instead skirts the issue with platitudes and truisms. One appellate court held that because the defense lawyer “did not pursue the matter and thus failed to get a ruling on his objection . . . [h]e may not now pursue the matter on appeal.”<sup>150</sup> Of course, the appellate court did not explain how the defense lawyer would have been able to demand—in the middle of arguments and in front of the jury—that the judge do his or her job and rule on the objection. Fortunately, some jurisdictions again follow a more rational approach, finding that “[i]f there is no ruling [by the trial judge], counsel should consider the objection overruled.”<sup>151</sup>

Worse yet, even winning the battle could mean losing the war when it comes to objecting to a prosecutor’s closing argument: “[T]he defense attorney’s [objection], even if sustained by the court, may have exactly the opposite effect from the one intended. It may call attention to the prosecutor’s improper remarks and reemphasize them in the jurors’ minds.”<sup>152</sup>

### *B. The Problem of Remedies*

Even in the case where everything goes right—that is, defense counsel recognizes the improper argument and quickly objects, and the judge sustains the objection—the defense lawyer’s job has just begun. “[I]f trial counsel fails to move for additional relief, the action of the trial court in sustaining the objection will result in counsel obtaining all relief requested.”<sup>153</sup> However, a sustained objection, by itself, usually will not be sufficient relief. At best, it may terminate the improper argument before the

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148. *Dunlap v. State*, 728 S.W.2d 155, 162 (Ark. 1987).

149. *Jordan v. Hepp*, 831 F.3d 837, 849 (7th Cir. 2016) (holding that generic instruction that arguments “are not the evidence” was insufficient, as it did not “identify the prosecutor’s remarks as improper statements that should be disregarded” and was not “given contemporaneously with, or immediately after, the prosecutor’s inappropriate comments”).

150. *Dunlap*, 728 S.W.2d at 162.

151. BURNETT ET AL., *supra* note 144, § 6.29.

152. Alschuler, *supra* note 2, at 649.

153. Sullivan, *supra* note 3, at 250-51.

jury feels its full impact.<sup>154</sup> But a sustained objection does nothing more. It is not even clear how a jury would interpret the judge's ruling of "sustained." Is the prosecutor's argument sustained? Or is the objection sustained? And if the objection is sustained, what is the jury to think or do?

Given the inadequacy of a sustained objection, defense counsel must request an appropriate remedy. Curative instructions from the judge to the jury<sup>155</sup> and mistrial declarations<sup>156</sup> represent the two most common remedies for improper arguments. Other possible remedies include permitting defense counsel to present a rebuttal argument or even reopening the case to permit rebuttal evidence. However, these alternatives are "not generally considered by trial judges"<sup>157</sup> and are therefore not addressed in this Article.

### *1. Curative Instructions*

For many types of improper arguments, a curative instruction is potentially helpful. For example, assume a prosecutor misstates the burden of proof by arguing that, because the state's evidence is more believable than the defendant's, the jury must convict. In this case, a curative instruction from the court may eliminate any prejudice. Such an instruction could remind jurors that the burden of proof is *not* the preponderance of evidence, and that "[i]f the jury has a reasonable doubt, then it must find the defendant not guilty *even if it thinks that the charge is probably true.*"<sup>158</sup>

However, even assuming the trial judge was paying attention to the prosecutor's argument and is also well-educated on the law, devising an effective curative instruction on the spot in the middle of closing arguments is not an easy task. Thus, when trial judges sustain objections, they

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154. *See Hepp*, 831 F.3d at 849.

155. *See, e.g., State v. Rockette*, 2006 WI App 103, 294 Wis. 2d 611, 718 N.W.2d 269 (upholding conviction because the trial judge "issued a curative instruction to the jury" after the prosecutor's improper argument).

156. *See, e.g., United States v. Roberts*, 119 F.3d 1006, 1016 (1st Cir. 1997) (vacating conviction for trial court's failure to declare a mistrial).

157. Sullivan, *supra* note 3, at 252-53 (arguing that because a mistrial often places a high burden on the defendant rather than on the offending prosecutor, the trial court should consider "a range of corrective measures" including allowing defense counsel to present rebuttal evidence or argument).

158. VT. MODEL CRIM. J.I., at CR04-101 (2005) (emphasis added) (citing *State v. Giroux*, 531 A.2d 403, 406 (Vt. 1989)).

typically resort to the generic mantra that “the words of the attorneys . . . are not evidence and must not be considered by you as evidence.”<sup>159</sup>

But this type of curative instruction doesn’t actually cure anything. Rather, there are at least three problems with it. First, the instruction lumps both attorneys together, even though it was the prosecutor, not the defense lawyer, who committed the misconduct. Second, the instruction does nothing to “identify the prosecutor’s remarks as improper statements that should be disregarded.”<sup>160</sup> And third, telling the jury that arguments are not evidence completely misses the point because “[t]he issue was not the introduction of improper *evidence*, but rather the impact of improper *argument*.”<sup>161</sup>

Even a good curative instruction is not always sufficient; some types of improper argument “may be too clearly prejudicial” for even a well-crafted “curative instruction to mitigate their effect.”<sup>162</sup> For example, when a prosecutor argues, directly or indirectly, that the defendant’s failure to testify is evidence of guilt, any curative instruction would “likely serve[] to emphasize” the improper argument rather than mitigate it.<sup>163</sup> Similarly, when the prosecutor inflames the jury’s passions by arguing that, if they fail to convict, the defendant could victimize them or their families,<sup>164</sup> even the *best* curative instruction cannot un-ring the bell.

## 2. *Mistrial*

In cases where a curative instruction is of little or no value, defense counsel can alternatively request a mistrial. But “[w]hether to grant a mistrial lies within the sound discretion of the trial court.”<sup>165</sup> One mistrial framework, for example, requires the trial judge to assess the impact of the prosecutor’s improper argument on the trial as a whole by weighing the following factors:

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159. *Jordan v. Hepp*, 831 F.3d 837, 849 (7th Cir. 2016) (holding that this generic instruction was not sufficient to cure the prejudice).

160. *Id.*

161. *Cicchini*, *supra* note 26, at 352.

162. *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974).

163. *State v. Jackson*, 444 S.W.3d 554, 592 (Tenn. 2014) (holding improper argument not curable with an instruction).

164. *See, e.g.*, *N. Mar. I. v. Mendiola*, 976 F.2d 475, 486 (9th Cir. 1992) (finding prejudicial error based on the prosecutor’s argument that “[T]hat gun is still out there. If you say not guilty, he walks right out the door, right behind you”).

165. *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894.



1) the nature and seriousness of the prosecutorial misconduct; 2) whether the prosecutor's statements were invited by conduct of defense counsel; 3) whether the trial court's curative] instructions to the jury were adequate; 4) whether the defense was able to counter the improper arguments through rebuttal; and 5) the weight of the evidence against the defendant.<sup>166</sup>

Under this particular test, the case for a mistrial will be strongest when, in a relatively close trial, the prosecutor repeatedly made improper arguments, particularly if they infringed constitutional rights such as due process, the right against self-incrimination, or the right of confrontation. The case for a mistrial will be strengthened if the prosecutor committed the misconduct in rebuttal, particularly when the arguments were not invited by any improper argument made by the defense counsel. The case will be strengthened even further when the impact of the prosecutor's misconduct cannot be mitigated by a curative instruction or when the judge gives an instruction not sufficiently tailored to the misconduct.

But even when a mistrial is granted, the typical prosecutor will simply retry the defendant, often with a battle-tested and stronger case the second time around. Whether a prosecutor can retry the defendant relies on a common, if bizarre, test:

[T]he Supreme Court of the United States held that the defendants' double jeopardy protections only extend to cases where the prosecutor's misconduct was committed "in order to goad the [defendant] into requesting a mistrial." . . .

Under *Kennedy*, therefore, if the prosecutor merely intended to harass the defendant, overreach, or obtain a conviction by improper means, the prosecutor is rewarded by being able to retry the defendant in a second trial or even in subsequent trials.<sup>167</sup>

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166. *United States v. Cheska*, 202 F.3d 947, 950 (7th Cir. 2000); *see also Sigarroa*, 674 N.W.2d at 903 ("The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial.").

167. Cicchini, *supra* note 26, at 357 (quoting *Oregon v. Kennedy*, 456 U.S. 667, 673-75 (1982)). Some states may employ a differently worded, more favorable legal standard. *See, e.g., Ex parte Peterson*, 117 S.W.3d 804, 817 (Tex. Crim. App. 2003) ("Did the prosecutor engage in that conduct with the intent to goad the defendant into requesting a mistrial (*Kennedy* standard) or with conscious disregard for a substantial risk that the trial court would be required to declare a mistrial (*Bauder* standard)?"); *State v. Jenich*, 288 N.W.2d 114, 122 (Wis. 1980) ("[I]f a defendant's motion for mistrial is prompted by prosecutorial or

This test presents a problem for defendants because it is nearly impossible to satisfy,<sup>168</sup> which often has the perverse effect of encouraging, rather than deterring, improper arguments. As a result, when prosecutors commit misconduct in closing argument and a mistrial is granted, they are nearly always rewarded with a do-over.<sup>169</sup>

Further, a retrial could be incredibly costly for a defendant in terms of time, money, or both. When a defendant is paying for defense counsel's fees (as opposed to being represented by a public defender), the costs of a second trial can be staggering and financially ruinous. When a defendant is indigent and unable to post bail, he or she will likely remain in custody pending the retrial, the practical result of which is that, in many cases, the defendant essentially serves the sentence for the crime, even when the state fails to win an actual conviction.<sup>170</sup>

For these reasons, a defendant might not want a mistrial, instead preferring "to proceed with resolution of the case by the empaneled jury rather than starting over with a new jury."<sup>171</sup> In other words, although a "[m]istrial is the only remedy certain to ensure that the prejudicial conduct will not taint the ultimate verdict . . . its application may unfairly burden the defendant."<sup>172</sup>

To make matters even more complicated, courts vary as to when and how defense counsel must request a mistrial. For example, at least one court seems to require counsel to request a mistrial *first*, even though, if granted, such a remedy could carry serious consequences for the defendant. Then, "upon denial of mistrial, counsel may properly request an admonition to the

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judicial misconduct which was intended 'to provoke' defendant's motion or was otherwise 'motivated by bad faith or undertaken to harass or prejudice' the defendant or to 'afford the prosecution a more favorable opportunity to convict' the defendant, double jeopardy does bar further prosecution.").

168. See, e.g., *Kennedy*, 456 U.S. at 688 (Stevens, J., concurring) ("It is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant.") (footnote omitted).

169. See Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 894-95 (1998).

170. Ironically, one judge believes that, even though it was the government's misconduct, not defense counsel's, that caused the problem to begin with, appellate courts are justified in their "unwillingness to impose on society the added expense of money and resources involved in a retrial." See *Celebrezze*, *supra* note 21, at 244-45.

171. Sullivan, *supra* note 3, at 252.

172. *Id.*

jury.”<sup>173</sup> And if counsel first requests an admonition to the jury, he or she may be waiving the right to request a mistrial at a later time.<sup>174</sup>

The more rational approach is to allow defense counsel to begin with less extreme requests, such as a request for a curative instruction. Then, after consultation with the client, and after considering the cumulative impact on cases with multiple instances of improper argument, defense counsel may additionally move for a mistrial before the jury returns its judgment.<sup>175</sup> If counsel fails to do so, then the court will assume that he or she “was satisfied with the court’s ruling and curative measure.”<sup>176</sup>

### C. *The Risk of Not Objecting*

As demonstrated above, the law governing objections, rulings, and remedies is chaotic. Even under the best conditions, objecting to prosecutorial misconduct can be meaningless, if not harmful, for the defense. However, the risks of not objecting may be even greater.

To demonstrate this, assume that a prosecutor makes an improper closing argument. To avoid drawing further attention to the argument, and to avoid the risk that the judge will overrule an objection, defense counsel makes a snap decision not to object. In this case, the defendant probably “waives the right to appeal on that specific point because the trial judge [did] not have an opportunity to offer a curative instruction and there is no record created for appeal.”<sup>177</sup>

More specifically, when the defendant’s appellate lawyer later complains of the improper argument, he or she will set in motion a rather bizarre legal standard. Despite the prosecutor’s duty as a so-called “minister of justice,”<sup>178</sup> the improper argument will no longer be analyzed as prosecutorial misconduct. Instead, all blame for the prosecutor’s unethical behavior will be shifted to defense counsel under an ineffective assistance of counsel framework.<sup>179</sup>

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173. *Id.* at 255.

174. *Id.*

175. *See* State v. Rockette, 2006 WI App 103, 294 Wis. 2d 611, 718 N.W.2d 269.

176. *Id.* at 278; *see also* Sullivan, *supra* note 3, at 228 (“The trial court sustained defense counsel’s objection and admonished the jury to disregard the statements, and the court of appeals noted that defense counsel had failed to request a stronger admonition or other relief.”).

177. Flores, *supra* note 126, at 279.

178. *See supra* Part I.

179. *See* Jordan v. Hepp, 831 F.3d 837, 848 (7th Cir. 2016) (“In Jordan’s trial, [defense counsel] failed to object to any of the prosecutor’s improper statements. Our first question is

This is bad news for both the defense lawyer and the defendant. First, and rather perversely, it is the *defense lawyer* who will be held to answer for the prosecutor's intentional misconduct.<sup>180</sup> As such, defense counsel will have to explain his or her thought process behind the snap judgment not to object to the improper argument.<sup>181</sup> Often, this explanation must be given months or even years after the trial—long after defense counsel's memory of the prosecutor's misconduct has faded.

Second, if defense counsel remembers his or her thought process behind the decision not to object, the court will deem nearly any explanation to have been a reasonable trial strategy, and the ineffective assistance of counsel claim will fail.<sup>182</sup> Conversely, if the defense lawyer cannot remember the incident, and therefore cannot testify about the split-second decision he or she made months or even years earlier, any error will likely be deemed harmless.<sup>183</sup> Either way, the probable result is the same: the defendant loses and obtains no relief for the prosecutor's unethical behavior.

The news only gets worse from there for the defendant. In cases where defense counsel decided not to object to the improper argument, the defendant's appellate lawyer may also choose to pursue an "interest of justice," "fundamental error," or "plain error" type of argument when challenging the prosecutor's misconduct. One author framed the test this way: "Without a proper and timely objection . . . reversal on appeal will only occur if . . . the outcome at trial would have seriously affected the fairness, integrity, or public reputation of the proceeding."<sup>184</sup> But this conception doesn't adequately describe the near impossibility of succeeding under this legal standard, as many courts add an additional hurdle to plain

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whether that failure rendered [defense counsel's] performance ineffective under *Strickland*.").

180. See *DeFreitas v. State*, 701 So. 2d 593, 602 (Fla. Dist. Ct. App. 1997) ("[D]efense counsel has the duty to remain alert to [improper argument] in fulfilling his responsibility to see that his client receives a fair trial. . . . [T]his court is not inclined to excuse counsel for his failure in this regard.").

181. See *Jordan*, 831 F.3d at 850 ("We instruct the district court to hold a hearing . . . to allow the parties to present evidence about whether [defense counsel] had a strategic reason for failing to object the prosecution's improper vouching . . .").

182. See *State v. Mayo*, 2007 WI 78, ¶ 63, 301 Wis. 2d 642, 734 N.W.2d 115, 131 (Wis. 2007) ("Defense counsel's lack of objections on [numerous improper arguments] was found by the circuit court to involve defense strategy, which this court will not now second-guess.").

183. See *id.* at 130.

184. Flores, *supra* note 126, at 283.

error review. When the defense lawyer “fail[s] to object to the remarks when they were made, the plain error standard additionally requires that [the defendant] ‘establish not only that the remarks denied him a fair trial, but also that the outcome of the proceedings would have been different absent the remarks.’”<sup>185</sup>

And yet, other appellate courts seem to imply that even unfairness combined with harm is not enough. Because these courts are highly tolerant of prosecutorial misconduct, “[p]lain error review is ordinarily limited to ‘blockbusters’ and does not ‘consider the ordinary backfires—*whether or not harmful to a litigant’s cause*—which may mar a trial record.”<sup>186</sup> And, if we have learned anything thus far, it is that improper argument is so common that it *is* “ordinary.” Courts, therefore, nearly always reject plain error challenges.<sup>187</sup> The result, once again, is that the defendant obtains no relief for the prosecutor’s misconduct.

#### *IV. A Simple Plan*

As demonstrated above, reacting to prosecutorial misconduct after the fact via a contemporaneous objection is often ineffective. Therefore, defense counsel should consider formulating a plan for dealing with improper remarks long before the prosecutor utters them in closing argument.

##### *A. Plan Objectives*

Defense counsel’s plan for dealing with improper closing arguments should, ideally, accomplish several objectives. First, the plan should deter the prosecutor from making improper arguments in the first place by putting the prosecutor on the defensive. The plan should “have a chilling effect on closing argument rhetoric,” and should make the prosecutor “[f]earful of reprisal” for making improper arguments.<sup>188</sup>

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185. *United States v. Anderson*, 303 F.3d 847, 854 (7th Cir. 2002) (citation omitted).

186. *United States v. Roberts*, 119 F.3d 1006, 1014 (1st Cir. 1997) (emphasis added) (citation omitted).

187. *See Mayo*, 734 N.W.2d at 119 (Wis. 2007) (“[A]lthough there was improper prosecutorial argument . . . such misconduct did not so infect the trial with unfairness as to constitute a denial of [the defendant’s] due process rights, thus warranting a new trial, either as plain error or in the interest of justice.”); Sullivan, *supra* note 3, at 248 (discussing the near impossibility of obtaining relief under the “doctrine of fundamental error which would afford review of unreserved error”).

188. Gagnon, *supra* note 8, at 485.

Second, in the event the prosecutor is not deterred, the plan should educate the trial judge by describing what the prosecutor is likely to argue and explaining why such argument is improper. This way, the trial judge is alert and engaged during closing arguments, making it more likely he or she will recognize an improper argument in the first place—a prerequisite if the defendant is to obtain any meaningful relief.

Third, the plan should adequately preserve the prosecutor's misconduct for meaningful judicial review during trial and, if necessary, at post-conviction hearings and on appeal. Thus, the plan should prevent the shifting of blame from the prosecutor to defense counsel (via the ineffective assistance of counsel framework) and should prevent the courts from sidestepping the issue by applying the plain error framework, which, as noted above, is incredibly difficult to satisfy. Moreover, given the demanding and potentially harmful nature of the normally required contemporaneous objection, the plan should preserve the prosecutor's misconduct for judicial review without defense counsel having to object in the middle of closing arguments.

Fourth, the plan should provide defense counsel and the trial court with an opportunity to develop *effective* curative instructions for the prosecutor's misconduct. Just as it is difficult for defense counsel to identify improper arguments and instantly formulate an objection in the heat of battle, so too is it difficult for even a well-educated and attentive trial judge to craft a meaningful curative instruction on the spot.

Fifth, in the event that curative instructions are not sufficient to cure the prosecutor's misconduct, the plan should give defense counsel the opportunity to consult with the defendant *before* requesting the serious and costly remedy of a mistrial. In cases with multiple improper arguments, it should also give the trial judge the opportunity to assess the cumulative impact of the misconduct before ruling on the mistrial motion.

Finally, in the event a mistrial is requested and declared, the plan should lay a foundation for defense counsel to later argue that double jeopardy protections prevent the state from re-prosecuting the defendant in a second trial.

#### *B. Pretrial Motion in Limine*

In order to accomplish the above objectives, the battle must be won before it is fought—that is, before closing arguments begin. A motion in

limine, which is filed before trial and seeks an advanced ruling on an issue likely to arise during the trial, can accomplish this goal.<sup>189</sup>

Motions in limine promote trial efficiency, and their use has expanded in recent years.<sup>190</sup> Given the disruption caused at trial by prosecutorial misconduct in closing arguments and the dearth of suitable remedies once the misconduct occurs, the issue of “[i]mproper prosecutorial arguments” is undoubtedly “appropriate for a motion in limine.”<sup>191</sup> More specifically, if defense counsel “suspect[s] that the prosecutor intends to make improper statements during closing argument, [defense counsel] should consider filing a motion in limine before [trial] asking the trial judge to *preclude the prosecutor from making those arguments*.”<sup>192</sup> If this motion is granted, it could solve the biggest problem facing defense counsel at trial: in many jurisdictions, as long as “the motion alert[s] the trial court to the same issue of fact or law that arises at trial,” then “the motion in limine relieves the party from having to object.”<sup>193</sup>

This makes sense, of course, as the very purpose of raising the issue *before* trial is to avoid having to object and draw more attention to the improper argument *during* trial.<sup>194</sup> To require an objection at trial to something already raised in a motion in limine would put counsel “in a classic ‘Catch 22’ position. By not objecting, [counsel] is held to waiver. By objecting, [counsel] draws the jury’s attention to the very prejudicial [argument] that the trial court had already ruled [improper].”<sup>195</sup> As one court stated, because the purpose “of the contemporaneous objection rule is fairness, we will not apply the rule to permit such an unfair dilemma.”<sup>196</sup>

In jurisdictions where the motion in limine, if granted, serves as a legally valid substitute for the contemporaneous objection, this approach should also satisfy another objective: it preserves the prosecutor’s misconduct for meaningful review at all levels including during post-conviction hearings

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189. See Celebrezze, *supra* note 21, at 245 (“[D]efense counsel could offer a motion *in limine* prior to closing argument if it is anticipated that the prosecutor is bent on making improper remarks.”).

190. See, e.g., *State v. Wright*, 2003 WI App 252, 268 Wis. 2d 694, 673 N.W.2d 386.

191. L. MICHAEL TOBIN, WISCONSIN CRIMINAL DEFENSE MANUAL ch. 5, at 156 (5th ed. 2011) (citing numerous improper arguments and supporting case law).

192. 2 JULIE RAMSEUR LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL, TRIAL § 33.7(C) (2d ed. 2012) (emphasis added).

193. *State v. Bergeron*, 470 N.W.2d 322, 325 (Wis. Ct. App. 1991).

194. See *State v. English-Lancaster*, 2002 WI App 74, ¶ 8, 252 Wis. 2d 388, 642 N.W.2d 627.

195. *Id.* at 631.

196. *Id.* (citation omitted).

and on appeal. And the motion in limine will serve to focus the attention of post-conviction counsel and the courts on the prosecutor's misconduct, rather than on the defense lawyer's failure to properly react to the improper arguments.

In order to accomplish the objectives related to remedies, however, the motion in limine must go beyond merely asking the court to order the prosecutor not to make certain types of improper arguments. Rather, the motion must assume the prosecutor will violate the court's order and should therefore propose a course of action with regard to the two most common remedies: curative instructions and a mistrial.

As previously discussed, many types of improper arguments can be adequately addressed by curative instructions. In order to allow sufficient time to draft instructions tailored to the specific prosecutorial offense, though, the motion should request a hearing for that purpose outside the jury's presence. The hearing should be held after the prosecutor's rebuttal argument and before the court issues its final instructions to the jury. Then, to allow defense counsel an opportunity to consult with the defendant before requesting a mistrial, the motion should preserve the right to request the mistrial until after the court's final instructions to the jury and before the jury returns its verdict.

Finally, in the event the court grants a mistrial motion, the previously filed motion in limine may also help accomplish the final objective discussed above: offering protection when the prosecutor attempts to retry the defendant. Although highly state specific, the test for whether the prosecutor may retry the defendant may hinge on whether the prosecutor goaded defense counsel into requesting the mistrial.<sup>197</sup> If so, then retrial is barred. This high standard is a much easier to satisfy when defense counsel previously put the prosecutor on notice via the motion in limine that improper arguments would provoke a mistrial request.

### *C. Trial Procedure*

After filing a motion in limine, defense counsel must also have a plan for the trial itself. This requires researching the applicable procedural laws including, for example, any timing requirements for requesting the available remedies. At a minimum, defense counsel should be prepared for the following three steps.

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197. *See supra* Section III.B.2.



### *1. Decide Whether to Object*

In many jurisdictions, assuming the trial judge granted the motion in limine before trial and the prosecutor violated the court's order by making an improper argument, no contemporaneous objection by defense counsel should be required. There are still several scenarios, however, where defense counsel *will* be required to object. First, when the trial judge denied the motion as being premature, refused to rule on the motion, or responded to the motion in a vague way—for example, by stating that the lawyers will be expected to follow the rules during closing arguments—defense counsel will be required to object to the prosecutor's misconduct as it occurs. In this case, the motion in limine will have failed to fulfill one of its objectives: to relieve defense counsel of the duty to object in the middle of closing arguments. Simply filing the motion in limine, however, will still accomplish many other objectives.

Second, even if the judge granted the motion in limine, defense counsel will still be held to the contemporaneous-objection rule when the prosecutor makes an improper argument that was *not* identified in the motion. This is so because the judge did not have the opportunity to order the prosecutor not to commit that particular brand of misconduct.<sup>198</sup>

Third, even when defense counsel has identified a particular type of improper argument in the motion in limine and the judge granted the motion, counsel may still want to object in cases where the objection might terminate the argument before the prosecutor completes a full windup and delivery. Therefore, the motion in limine should preserve counsel's right to object, even though the motion in limine relieves counsel of the obligation to object.

### *2. Request a Post-argument Hearing*

Assume, then, that the prosecutor makes an improper argument to the jury, regardless of whether defense counsel (a) identified the issue in the motion in limine, which the court granted; or (b) contemporaneously objected at trial. The next step, after the state's rebuttal argument, is to quickly request a conference to be held outside the jury's presence and before the court gives its final instructions to the jury. At this conference,

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198. This is, of course, absurd; imagine a defendant arguing that he should not be prosecuted for, say, theft, because no one ever specifically told him not to commit that particular crime. Nonetheless, this is why motions in limine should be worded broadly to foreclose categories of improper argument, rather than highly specific versions of such arguments.

defense counsel should identify the prosecutor's improper argument and propose curative instructions to be included with the court's final, pre-deliberation instructions. Curative instructions will vary dramatically based on the prosecutor's specific form of misconduct.<sup>199</sup>

### 3. Consider a Mistrial Motion

Once the jury receives its final instructions (including any curative instructions) and begins its deliberations, defense counsel must next discuss with the defendant the possibility of a motion for a mistrial. The “[m]istrial is the *only remedy* certain to ensure that the prejudicial conduct will not taint the ultimate verdict”; obtaining this remedy, however, “may unfairly burden the defendant.”<sup>200</sup> During the discussion, defense counsel should explain the possibility—or likelihood—of retrial as well as other consequences including a lengthy delay, continued incarceration, additional attorney's fees and other trial expenses, and, most significantly, the possibility of the state developing a stronger case for the second trial.

Not requesting a mistrial, however, also has consequences that defense counsel should explain. Most significantly, the appellate court will likely decide that the defendant was happy with merely receiving a sustained objection and curative instruction, if any, and decided to roll the dice on the verdict. Counsel should be sure to explain that, in this scenario, the defendant's post-conviction counsel may be forced to seek relief through the difficult-to-satisfy plain-error framework.

Any mistrial motion should be tailored to the specific jurisdiction's multi-factor mistrial test. Additionally, to support any future motion that the prosecutor should be barred from retrying the defendant, counsel may wish to state that: (1) the prosecutor was put on notice via the pretrial motion in limine—regardless of whether the court granted it—that a particular argument was improper and would provoke a mistrial request; (2) the prosecutor decided to make that improper argument despite such notice; and (3) the prosecutor has therefore provoked defense counsel into requesting a mistrial.<sup>201</sup>

### D. Other Mistrial-Related Issues

With regard to mistrial motions, two highly jurisdiction-specific issues arise that defense counsel should research, consider, and discuss with the

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199. Sample curative instructions for many types of improper arguments are provided in Appendix B.

200. Sullivan, *supra* note 3, at 252 (emphasis added).

201. See *supra* Section III.B.2.

defendant *before* trial, and even before filing a motion in limine: who has the power to request a mistrial, and when must the court rule on a mistrial request?

First, if the lawyer and the client disagree on whether to request a mistrial, with whom does the decision rest? Most attorneys, trial judges, and even appellate courts do not know the answer. In one case, a trial judge offered the defendant the opportunity for a mistrial, and “told him that while the decision was his, he should seriously consider his attorney’s advice.”<sup>202</sup> After lengthy consultation with defense counsel, the defendant elected not to follow his attorney’s advice to request a mistrial and instead proceeded to verdict; the defendant was convicted.<sup>203</sup>

On appeal, the defendant argued that this was a strategic decision that should have been left to counsel. Such a decision, the defendant argued, did not fall into the category of fundamental decisions that are reserved for the client, such as whether to enter a plea or go to trial and, if there is a trial, whether to testify.<sup>204</sup> The court stated that it was “an intriguing and sophisticated” question as to whether defense counsel or the defendant “should be permitted to make a mistrial decision.”<sup>205</sup> The court never truly disagreed with the defendant, thereby implying that the decision might actually rest with counsel, as the defendant had argued on appeal. The court, however, dispensed with the issue by employing the doctrines of “waiver” and “judicial estoppel.”<sup>206</sup>

But even if the mistrial decision is, in theory, left to the lawyer, it is often—probably always—intertwined with decisions that are left to the defendant. For example, the defendant has the constitutional right to counsel of choice. But what if the defendant could not afford to pay his lawyer for a second trial and would instead have to obtain state- or court-appointed counsel for the retrial? In that case, wouldn’t a mistrial request implicate a constitutional right? And shouldn’t the decision whether to ask for a mistrial be left to the defendant?

Similarly, many defendants are unable to post bail and therefore must remain incarcerated during their cases—a key reason that a defendant has a constitutional right to a speedy trial. But what if, due to court congestion, unavailable witnesses, or some other reason, a mistrial would result in a long delay? In that case, wouldn’t a mistrial request implicate yet another

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202. *State v. Washington*, 419 N.W.2d 275, 276 (Wis. Ct. App. 1987).

203. *Id.*

204. *Id.* at 276-77.

205. *Id.* at 277.

206. *Id.*

constitutional right? And, once again, shouldn't the decision whether to ask for a mistrial be left to the defendant?<sup>207</sup>

For these situations, one appellate court offered valuable advice, which may prove useful for defense attorneys: "Faced with the dilemma of this disagreement between client and attorney, the trial court did the *only prudent thing*. It urged [the defendant] to follow the attorney's advice, [and] advised [the defendant] that his lawyer was the person better equipped to make this decision."<sup>208</sup>

Second, while defense counsel's motion for a mistrial likely must be made before the jury returns its verdict (or sooner in some jurisdictions), when must the court *rule* on the motion? In some states "a trial court may declare a mistrial up to the point the jury's verdict is accepted. A jury's verdict is not accepted until it is received in open court, the results announced, the jury polled, if requested, and the judgment entered."<sup>209</sup> Such timing would be ideal for the defendant. If jury verdict is "not guilty," defense counsel simply withdraws the mistrial motion and instead moves for judgment on the verdict. This timing removes the risks associated with asking for a mistrial.

While this may seem like an unfair advantage for the defendant, it is actually the only fair way to proceed. After all, it was the prosecutor's misconduct—not that of the defendant or defense counsel—that provoked the mistrial motion in the first place. Why should the prosecutor's improper behavior force the defendant to choose between two unattractive alternatives: a tainted verdict or a costly retrial? Fairness and efficiency require that the jury be allowed to return its verdict before any determination is made as to whether a mistrial and potential retrial are even necessary.<sup>210</sup>

The question then becomes whether defense counsel has any influence over the timing of the court's ruling. Counsel may consider coupling a mistrial motion with the request that the court defer its ruling until after the

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207. See *State v. Jenich*, 288 N.W.2d 114, 123 (Wis. 1980) (discussing the defendant's "valued right" to secure a verdict from the first tribunal" rather than to request a mistrial).

208. *Washington*, 419 N.W.2d at 277 (emphasis added).

209. *State v. Reid*, 479 N.W.2d 572, 574 (Wis. Ct. App. 1991) (emphasis added); see also *Gainer v. Koewler*, 546 N.W.2d 474, 477 (Wis. Ct. App. 1996) (stating that the trial judge "decided to take the motion under advisement" and deferred ruling until "[a]fter the verdict and at the postverdict hearings").

210. Many thanks to attorney Thomas Aquino, a fellow member of the Wisconsin Association of Criminal Defense Lawyers, for alerting me to the case of *Gainer v. Koewler*, the possibility of the trial judge taking a mistrial motion under advisement, and the potential strategy of asking the trial judge to do so.

jury returns its verdict, stressing the fairness- and efficiency-based arguments set forth above. Alternatively, counsel may wish to propose such timing in the motion in limine itself, thus obtaining an advance ruling on the issue. Such a ruling would, in turn, allow counsel to more freely request a mistrial as there would be no risk to the defendant in doing so.

But would a trial court be less likely to grant a mistrial request after the jury returns a guilty verdict? And would an appellate court later turn defense counsel's request for a deferred ruling against the defendant, finding that it somehow qualified or even negated the motion itself? After all, courts have demonstrated, beyond any doubt, that they will break clean through the boundaries of logic, reason, and fairness in order to affirm defendants' convictions.

#### *Conclusion*

Prosecutorial misconduct in closing argument is rampant. Unfortunately, defense lawyers' conventional, reactionary approach to the problem is often ineffective and sometimes even exacerbates the harm. Rather than following this ineffective approach, exposing the defense to potentially damaging objections in front of the jury, defense counsel should utilize a preemptive motion in limine to combat improper arguments before they are ever made. Doing so may prevent the prosecutor from making improper arguments in the first place and will alert the trial judge to the likelihood of prosecutorial misconduct. Most importantly, in cases where a preemptive motion in limine is granted and subsequently violated, the order will establish a framework for addressing the misconduct in meaningful ways, including providing the opportunity to draft thoughtful and effective curative instructions, affording time for client consultation before requesting the more serious remedy of a mistrial, and, in the event a mistrial is declared, potentially protecting the defendant from re-prosecution.

## APPENDIX A: MOTION IN LIMINE

The following is a sample motion in limine. Defense counsel should tailor all motions in limine, and all in-court strategies, to the jurisdiction's applicable substantive and procedural law and to the facts of the particular case. Further, counsel should ensure that all sources (below) are accurate, applicable, and have not been superseded by new law.

If defense counsel believes a particular judge will *not* be receptive to this preemptive approach and lengthy motion in limine, counsel may still wish to file a much shorter motion without the introductory material, without seeking relief from the contemporaneous objection rule, and without itemizing the types of improper argument.<sup>211</sup>

[State Name]

[County Name]

[People or State or Commonwealth]

v.

[Defendant's Name]

[Case No.]

DEFENDANT'S NOTICE OF MOTION AND MOTION IN LIMINE RE:  
PROSECUTOR'S CLOSING ARGUMENTSNotice of Motion

[Date, time, and place of hearing]

Motion

The Defendant, appearing specially by [his / her] attorney and reserving the right to challenge the Court's jurisdiction, moves the Court for the entry of orders as requested and pursuant to the authorities below.

Improper closing arguments by prosecutors have become the norm in criminal trials. For several reasons, "prosecutorial recidivism—the tendency of the same prosecutor or office to engage in misconduct

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211. A shorter version might read as follows. "The defendant moves the Court for the entry of an order that, if the prosecutor makes an improper closing argument of any kind: (1) the words 'objection, improper argument' are sufficient to identify and preserve the issue for the Court's review; (2) the Court will, upon a timely request by defense counsel, hold a hearing outside the jury's presence before deliberations begin to discuss possible curative instructions; and (3) in addition to any curative instructions issued by the Court, the defendant may request a mistrial at any time before the jury returns its verdict." Applicable legal authorities should also be included.

repeatedly, even in the face of admonishments from the [appellate] court”—is widespread. Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. App. Prac. & Process 115, 116 (1999).

Although it is generally considered defense counsel’s responsibility to protect his or her client from a prosecutor’s misconduct in closing argument, there is also “an affirmative duty placed upon the trial court to object on its own motion.” Warshafsky & Crivello, TRIAL HANDBOOK FOR WISCONSIN LAWYERS, § 34:09 (3d ed.).

The problem, however, is that a prosecutor’s improper closing argument often poses difficulties for defense counsel and the trial court. On the one hand, objecting to improper argument is not only difficult to do in the heat of a jury trial, but “may serve only to repeat and attract attention to the improper remark, and thereby compound the prejudicial effect.” *Id.*

On the other hand, though, not objecting fails to preserve the issue on its merits, often resulting in a time-consuming “ineffective assistance of counsel” hearing and, in some cases, an even more time-consuming second trial. *See, e.g., State v. Weiss*, 752 N.W.2d 372 (Wis. Ct. App. 2008) (reversing conviction due to prosecutor’s improper argument about facts not in evidence).

In sum, prosecutors routinely make improper closing arguments because they are highly effective, difficult to counter, and rarely, if ever, punished. Therefore, “the bar and, particularly, the bench, should be aware of the phenomenon and *take measures designed to increase the risks for those attorneys who persist in this strategy.*” *Gainer v. Koewler*, 546 N.W.2d 474, 478 (Wis. Ct. App. 1996) (emphasis added) (discussing counsel’s improper closing argument and violation of pretrial orders).

The defendant therefore seeks to address these matters preemptively to (1) deter the prosecutor from making improper arguments in the first place, (2) promote general trial efficiency, (3) avoid potentially counterproductive, harmful objections during closing arguments, (4) greatly reduce the likelihood of costly and time-consuming post-conviction hearings and a subsequent retrial, and (5) put the prosecutor on notice that improper argument *will provoke a mistrial request by the defendant.*

Therefore:

1. The defendant moves the Court to order the prosecutor not to engage in the forms of improper argument set forth below in motion in limine number five.
2. The defendant moves the Court to order that, if the prosecutor engages in such forms of argument, the defendant’s objection is preserved

based on this motion in limine and without the need for a contemporaneous objection at trial.

- a. When defense counsel raises an issue in a pretrial motion in limine, to require an additional objection at trial would place defense counsel “in a classic Catch-22 position. By not objecting, [counsel] is held to waiver. By objecting, [counsel] draws the jury’s attention *to the very [argument] that the trial court had already ruled [improper]*. Recalling that one of the purposes of the contemporaneous objection rule is fairness, *we will not apply the rule to permit such an unfair dilemma.*” *State v. English-Lancaster*, 642 N.W.2d 627 (Wis. Ct. App. 2002) (emphasis added).
  - b. Therefore, when defense counsel moves in limine to preclude the prosecutor from making an improper argument at trial, *and the court grants the motion*, counsel is relieved “from having to object to the same issue of fact or law that arises at trial.” *State v. Bergeron*, 470 N.W.2d 322, 325 (Wis. Ct. App. 1991).
  - c. Finally, despite being relieved of the *obligation* to object, defense counsel still has the *right* to object to improper argument when doing so would be in the best interests of the defendant, for example, where an objection might terminate an improper argument before the jury is able to feel its full impact.
3. The defendant moves the Court, if defense counsel so requests at the conclusion of the prosecutor’s rebuttal argument, to hold a conference outside the jury’s presence and before it receives its final instructions from the Court. The purpose of the conference is to discuss remedies for any improper arguments made by the prosecutor, including but not limited to the remedy of curative instructions.
    - a. Many instances of improper arguments—including, for example, arguments that misstate the burden of proof—can be adequately addressed by a curative instruction from the court.
    - b. However, pattern instructions and generic curative instructions that merely state the obvious—for example, that “the words of the attorneys . . . are not evidence and must not be considered by you as evidence”—are *not* legally sufficient to cure the prejudicial impact of improper argument. *Jordan v. Hepp*, 831 F.3d 837, 849 (7th Cir. 2016).
    - c. Therefore, a post-argument, pre-jury deliberation conference will allow the court and defense counsel to craft effective curative instructions that are tailored to the specific improper arguments.



4. The defendant moves the Court to order that, in addition to any curative instructions issued by the Court, the defendant's right to request a mistrial as a remedy for improper argument is preserved and may be exercised at any time before the jury returns its verdict. More specifically:
  - a. Some types of improper argument "may be too clearly prejudicial" for even a well-crafted "curative instruction to mitigate their effect[.]" *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974). However, a mistrial may result in a retrial, which can be costly for a defendant both in terms of his money and, when unable to post bail, his liberty. That is, even though a "[m]istrial is the only remedy certain to ensure that the prejudicial conduct will not taint the ultimate verdict . . . its application may unfairly burden the defendant." J. Thomas Sullivan, *Prosecutor Misconduct in Closing Argument in Arkansas Trials*, 20 U. ARK. LITTLE ROCK L. REV. 213, 219 (1998).
  - b. Given the severity of the mistrial remedy from the defendant's standpoint, counsel should not request a mistrial until after careful consultation with the client. This can be accomplished after jury begins its deliberations and before it returns its verdict to the Court. Wisconsin law even holds that counsel may "move for a mistrial before the jury returns its judgment." *State v. Rockette*, 718 N.W.2d 269, 277 (Wis. Ct. App. 2006).
  - c. This motion in limine will also serve to put the prosecutor on notice that improper arguments, including those set forth below, *will provoke the defendant's request for a mistrial and may bar the state from retrying the defendant*. "[I]f a defendant's motion for mistrial is prompted by prosecutorial or judicial misconduct which was intended 'to provoke' defendant's motion or was otherwise 'motivated by bad faith or undertaken to harass or prejudice' the defendant or 'to afford the prosecution a more favorable opportunity to convict' the defendant, double jeopardy does bar further prosecution." *State v. Jenich*, 288 N.W.2d 114, 123 (Wis. 1980).
5. Finally, the defendant moves the Court for a pretrial order that the prosecutor not engage in the following forms of argument:
  - a. If the defendant testifies, argument that the defendant has a motive to lie because [he or she] is charged with a crime and/or is facing a criminal conviction.

- i Such an argument would render meaningless the defendant's constitutional right to testify in his or her own defense, and would contradict the Court's instruction to the jury that "[t]he defendant has testified in this case, and you should not discredit the testimony just because the defendant is charged with a crime." Wis. Crim. J.I. 300.
  - ii Such an argument is improper because it "impl[ies] that a defendant is presumed to lie simply because of her status as a defendant" and because it "diminish[es] the defendant's fundamental right to the presumption of innocence." *People v. Crowder*, 607 N.E.2d 277, 280 (Ill. App. Ct. 1993).
- b. If the defendant does not testify, direct or indirect comment on the defendant's silence during and/or before trial.
- i First, "comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which the Fifth Amendment outlaws." *Griffin v. California*, 380 U.S. 609, 614 (1965). This includes "indirect comments, including references to 'uncontroverted' testimony, when . . . the only one who could have controverted it was the defendant who remained silent throughout trial." *United States v. Cotnam*, 88 F.3d 487, 493-94 (7th Cir. 1996).
  - ii Second, when the defendant does not testify, his/her silence before trial, whether pre- or post-Miranda, is not admissible and comment thereon would also violate the Fifth Amendment. *State v. Mayo*, 734 N.W.2d 115, 127 (Wis. 2007).
- c. If the defendant testifies, accusations that the defendant "lied" or is "a liar," or other inflammatory name-calling. Branding the defendant a liar is inflammatory name-calling that usurps the jury's role and duty "to weigh the testimony of witnesses" and decide witness credibility. Wis. Crim. J.I. 300. Similarly, other name calling is "not relevant" and "highly prejudicial." *State v. Jorgensen*, 754 N.W.2d 77, 88 (Wis. 2008) (reversing conviction for prosecutor's argument that defendant was "chronic alcoholic").
- d. Disparaging defense counsel or counsel's role in the criminal justice system. For example, the argument that "defense counsel's job is to get his client off the hook," and similar arguments, are "improper and deserving of condemnation." *State v. Mayo*, 734 N.W.2d 115, 121-22 (Wis. 2007). *See also United*

*States v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001) (“disparaging remarks directed at defense counsel are reprehensible” and could lead “the jury to believe that the defense’s characterization of the evidence should not be trusted”).

- e. Vouching, including the expression of a personal opinion about a witness’s truthfulness or the guilt of the defendant.
  - i First, “A lawyer shall not in trial . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused.” Wis. SCR 20:3.4(e).
  - ii Second, it is also improper to vouch for a witness by referencing matters not in evidence. For example, it is improper to vouch for police-officer witnesses by telling the jury, “They work hard. They do a tough job. . . . They work long, long hours. You weigh their testimony against the defendant’s.” *State v. Smith*, 671 N.W.2d 854 (Wis. Ct. App. 2003).
- f. Argument that incorporates facts not presented in the evidentiary portion of trial. “[I]t is improper for a prosecutor to provide the jury with information, which allows the jury to consider facts not in evidence when determining guilt.” *State v. Jorgensen*, 754 N.W.2d 77, 88 (Wis. 2008) (reversing conviction for prosecutorial misconduct, including prosecutorial “testimony” in closing argument that the defendant was unable to cross-examine).
- g. Argument that misstates the law, including but not limited to the state’s burden of proof.
  - i For example, arguing that the jury should “search for the truth” is improper because it “misstates the jury’s duty and sweeps aside the State’s burden.” *State v. Berube*, 286 P.3d 402, 411 (Wash. Ct. App. 2012). “[S]eeking the truth’ suggests determining whose version of events is more likely true, the government’s or the defendant’s, and thereby intimates a preponderance of evidence standard.” *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994). This distinction is accurately captured by Vermont’s instruction to its jurors stating that, if they have a reasonable doubt, they must find the defendant “not guilty even if [they]

- think that the charge is probably true.” Vt. Crim. Jury Instructions, Reasonable Doubt.
- ii Even prosecutors admit that jury trials are not searches for the truth. For example, when a defendant is acquitted at trial and the state later tries to use the facts underlying that acquittal as “other acts” evidence in a subsequent trial, prosecutors have argued, and Wisconsin courts have held, that “an acquittal *only establishes that there was a reasonable doubt* in the jury’s mind as to whether the defendant committed the prior crime, not that the defendant is innocent.” *State v. Landrum*, 528 N.W.2d 36, 41 (Wis. Ct. App. 1995) (emphasis added).
  - h. Argument that creates “straw men” or misstates the defendant’s theory of defense. For example, when the defense argues that the police-officer witnesses were mistaken about the perpetrator’s identity, the prosecutor is not allowed to misstate this defense by arguing, “While defense attorneys try and say, well, we’re not saying the police are lying; what else are they saying?” This straw-man argument improperly expresses “the prosecutor’s self-imposed frustration at his own . . . suggestion that testifying police officers may have lied.” *State v. Smith*, 671 N.W.2d 854, 858 (Wis. Ct. App. 2003) (reversing conviction).
  - i. Argument that invokes the emotions of the jurors or directly or indirectly invites them to decide the case on matters outside of the evidence. Arguments “appealing to the jurors’ emotions and inviting the jury to consider the social consequences of its verdict” are improper. *United States v. Morgan*, 113 F.3d 85, 90 (7th Cir. 1997). More broadly, “[c]omments that invite conviction for reasons other than because the defendant was proven guilty beyond a reasonable doubt are improper.” *United States v. Severson*, 3 F.3d 1005 (7th Cir. 1993).
  - j. In rebuttal, argument that goes beyond the scope of the defense counsel’s closing argument.
    - i First, the prosecutor’s rebuttal argument is narrow in scope: “rebuttal shall be limited to matters raised by [defense counsel] in argument.” WIS. STAT. § 805.10 (2017).
    - ii Second, improper arguments are not justified—and in fact are most harmful—in the rebuttal portion of closing. And for the prosecutor to justify improper argument under the “invited response” doctrine, all of the following must be true: (1) there first was an improper argument by defense counsel; (2) the

prosecutor “objected to the defense counsel’s improper statements with a request that the court give a timely warning and curative instruction to the jury”; and (3) the curative instruction was insufficient. *United States v. Young*, 470 U.S. 1, 13 (1985) (holding prosecutor’s improper argument was not an invited response due to failure to object to defense counsel’s improper argument).

[Defense counsel’s signature block]

[Defense counsel’s bar number]

[Defense counsel’s contact information]

## APPENDIX B: CURATIVE INSTRUCTIONS

The following are examples of curative instructions for improper arguments. The instructions can be used as a template, but must be crafted to the particular argument and the applicable law in the case at hand.

A. Curative instruction for prosecutor's argument that the defendant's testimony should be discredited because he or she is charged with a crime and/or facing a penalty.

“The defendant testified in this case and denied the allegation. The prosecutor argued or implied that you should disregard the defendant's testimony because [he or she] is charged with a crime and stands to be convicted. This argument is not valid. If the argument were valid, then every defendant who denied the charges against him would be guilty merely because the prosecutor filed a criminal complaint. That is not the law. The prosecutor's argument was therefore not proper, and you must disregard it entirely. As I previously instructed you, the defendant is presumed innocent. You must not discredit [his or her] testimony just because [he or she] is charged with a crime, and you may not convict [him or her] unless, after your deliberations, you find that the state proved every element of the charged crime beyond a reasonable doubt.”

B. Curative instruction for prosecutor's comment on the defendant's decision not to testify.

This type of improper argument does not lend itself well to a curative instruction, as the argument directly implicates a fundamental constitutional right and an instruction would merely draw additional attention to the defendant's decision to remain silent. In these cases, while crafting a curative instruction is possible, a mistrial request should be considered.

C. Curative instruction for prosecutor calling the defendant a liar or other derogatory names.

“During closing argument, the prosecutor called the defendant a liar and implied that you should accept that conclusion and discredit the defendant's testimony. The prosecutor's comment was not proper, and you must disregard it. Issues of witness credibility are for you, the jury, to decide.”

OR

“During closing argument, the prosecutor called the defendant a [name here]. The prosecutor's name-calling was not proper, and that kind of tactic is demeaning not only to the defendant but also to the Court and to these proceedings. You must disregard the prosecutor's comment and base your

decision on the evidence or lack of evidence in this case, applying the burden of proof of beyond a reasonable doubt as I have instructed you.”

D. Curative instruction for prosecutor’s disparaging remarks about defense counsel.

“During closing argument the prosecutor said that defense counsel [describe derogatory comment]. This argument is not proper. It is demeaning not only to defense counsel but also to the Court and to these proceedings. The defense lawyer is a critical part of our criminal justice system. The state has a tremendous power and resources to pursue convictions, and one of the defense lawyer’s roles is to vigorously challenge the state’s case to protect his or her client from conviction unless the state can prove guilt beyond a reasonable doubt. We all benefit from a system where defense lawyers vigorously defend their clients. You must therefore disregard the prosecutor’s comments entirely, and you must reach your verdict after a careful consideration of the evidence or lack of evidence in this case, applying the burden of proof of beyond a reasonable doubt as I have instructed you.”

E. Curative instruction for prosecutor’s vouching.

This form of misconduct is so varied, and includes both direct and indirect forms of vouching, that any curative instruction must be specifically tailored to the particular improper argument.

F. Curative instruction for prosecutor’s argument incorporating facts not in evidence.

“In closing argument the prosecutor said [describe prosecutor ‘testimony’]. However, the purpose of closing argument is for the lawyers to discuss evidence that was introduced at trial. The prosecutor’s statement that [describe prosecutor ‘testimony’] was never introduced at trial, and the defense lawyer had no chance to cross-examine it or to present evidence to disprove it. You must therefore disregard the prosecutor’s statements on this matter and instead base your verdict only on the evidence or the lack of evidence from the trial.”

G. Curative instruction for prosecutor misstating the burden of proof.

“The prosecutor argued that [describe prosecutor argument]. This argument misstates the burden of proof. The law, as I have instructed you, is as follows. You must start with the presumption that the defendant is innocent of the charge against him. The state has the burden to prove each

and every element of the charged crime beyond a reasonable doubt. Even if, after your deliberations, you conclude that the allegation against the defendant is *probably* true, that is *not* proof beyond a reasonable doubt and you must therefore find the defendant *not* guilty.”

H. Curative instruction for the prosecutors’ straw-man arguments and/or misstating the defendant’s theory of defense.

“The prosecutor argued to you that [describe prosecutor argument], and then attributed this argument to defense counsel. That was not proper. Defense counsel never argued that [describe prosecutor’s argument]. You must therefore disregard the prosecutor’s comments. The theory of the defense in this case is [describe actual theory of defense]. You must return a verdict of not guilty unless, after your deliberations, you find that the state proved every element of the charged crime beyond a reasonable doubt.”

I. Curative instruction for prosecutor arguments invoking juror emotions.

This type of improper argument does not lend itself well to a curative instruction, as it is particularly difficult to “un-ring the bell” once emotions have been stirred. For example, prosecutor arguments that society, children, or even the jurors themselves will be at risk of harm if the defendant is acquitted are highly damaging. In these cases, while crafting a curative instruction might be possible, a mistrial request should seriously be considered.

J. Curative instruction for prosecutor arguments going beyond the scope of rebuttal.

1. If the prosecutor went beyond the scope of rebuttal but merely repeated an otherwise proper argument made in his or her first closing argument, a curative instruction is not likely to be effective; further, trial judges may be unwilling to give an instruction under these circumstances.

2. If the prosecutor went beyond the scope of rebuttal by making a *new*, but *otherwise proper*, argument, an instruction explaining the purpose of rebuttal, combined with a directive to disregard the prosecutor’s comment, may be effective.

3. If the prosecutor went beyond the scope of rebuttal by making an *improper* argument, the curative instruction would include the language in Instruction J.2., above, and the instruction’s substance would depend on the specific form of improper argument (see Instructions A.–I., above).