SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – FELONY BRANCH

UNITED STATES	:	
	:	Case No. ______
v.	:	Hon __________
	:	Trial Date: ______
______________________	:	

MOTION *IN LIMINE* FOR ORDER PROHIBITING MISCONDUCT DURING CLOSING ARGUMENT AND INCORPORATED MEMORANDUM OF POINT AND AUTHORITIES IN SUPPORT THEREOF

Defendant ____________, hereby moves this Honorable Court for an order enforcing his right to a fundamentally fair trial, by directing the prosecutors in this case not to engage in prosecutorial misconduct in closing argument. This motion is based upon the First, Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution, the law in the District of Columbia, the attached memorandum of points and authorities and exhibits, and the entire file in this matter.

I.
INTRODUCTION

A. GRANTING THE INSTANT MOTION IS AN APPROPRIATE MEASURE TO PREVENT IMPROPER ARGUMENT BY THE PROSECUTOR.

This Court should enter an order *in limine* barring the prosecution from engaging in the types of misconduct identified below and requiring it to abide by the requirements imposed on prosecutors by the Constitution, the laws of the District of Columbia , and various professional ethical canons. The Court of Appeals for the Ninth Circuit has explained that "[t]he whole purpose of a motion *in limine* is to prevent the opposing side from asking a question or making comments in opening statements or otherwise bringing before the jury some fact which the movant believes will damage his case by the mere mention of it." *Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982).

Similarly, *McCormick on Evidence* §52, at 74 (4th ed. 1992), notes that the "purpose of such motions may be to insulate the jury from exposure to harmful inadmissible evidence or to afford a basis for strategic decisions." As described below, prosecutorial misconduct in argument violates the Constitution as well as local law and prejudices jurors against the accused. Entering an order *in limine* would assist in avoiding violations of these rights by prohibiting prosecuting attorneys from making improper arguments.

Entering the motion *in limine* would fulfill the role trial judges must play in safeguarding the constitutional rights of defendants at criminal trials. Courts have long stressed that trial judges bear the responsibility for preventing prosecutorial misconduct. In *United States v. Young*, 470 U.S. 1, 10 (1985), the Supreme Court wrote, "[w]e emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; 'the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.'" (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)); *see also Mahorney v. Wallman*, 917 F.2d 469, 473 (10th Cir. 1990) (explaining that trial judge should have acted to prevent improper argument instead of overruling the defense's objections, which gave the prosecution's argument an "official imprimatur"). The Supreme Court has also stressed that "prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Greer v. Miller*, 483, U.S. 756, 765 (1987).

Like federal courts, the District of Columbia Court of Appeals has long recognized and stressed that trial judges are ultimately responsible for preventing improper argument by prosecutors. In *Thomas v. United States*, 557 A.2d 1296, 1304 (D.C. 1989), the court took the step of condemning "mild judicial action in the face of misconduct, emphasizing the need for 'prompt and decisive action by the trial court." Similarly, in other jurisdictions, courts have emphasized that "[t]he district judge is in an especially well-suited position to control the overall tenor of the trial. He can order the offending statements to cease and can instruct the jury in such a manner as to erase the taint of improper remarks that are made." *Yates v. State*, 103 Nev. 200, 205-206, 734 P.2d 1252,

1256 (1987); *see also*; *State v. Moss*, 376 S.E.2d 569, 574 (W. Va. 1988) (trial court erred in failing to intervene sua sponte to correct improper argument). The *ABA Standards for Criminal Justice* similarly provide that "'[i]t is the responsibility of the [trial] court to ensure that final argument to the jury is kept within proper, accepted bounds.'" American Bar Association, *ABA Standards for Criminal Justice*, Standards Relating to Prosecution Function, Standard 3-5.8 (3d ed. 1993) (citations omitted).

Given the breadth and persistence of prosecutorial misconduct in closing arguments evidenced by the number of District of Columbia cases devoted to this issue, entering and enforcing such an order is the only adequate means of insuring the fundamental fairness of the proceeding and the reliability of any resulting conviction. Entering an order *in limine* would also reduce the burden of litigation over this issue on this jurisdiction's highest court and in post-conviction litigation.[1] The District of Columbia Court of Appeals has consistently expressed frustration about improper arguments and remarks by the prosecution, noting both the severe consequences for the defendant and the cost society must shoulder as a result.[2]

---

[1] By filing this motion, the defense preserves the issue of prosecutorial misconduct in argument for appeal. The commission of misconduct during closing argument often places couunsel for the defendant in a position in which nothing counsel does will adequately protect the defendant's rights. If counsel objects, he or she runs the risk of drawing attention to, and reinforcing, the prejudicial effect of the misconduct, thus giving the prosecutor a further reward for committing the misconduct. Courts have acknowledged that interrupting a prosecutor's argument to object can draw attention to an offensive argument. *See, e.g., United States v. Young*, 470 U.S. 1, 13-14 ("[I]nterruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously."); *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979) ("[O]bjection to these extremely prejudicial comments [by the prosecutor] would serve only to focus the jury's attention on them."); *United States v. Grayson*, 166 F.2d 863, 871 (2d Cir. 1948) ("[T]o raise an objection to [improper] testimony - - and more, to have the judge tell the jury to ignore it - - often serves but to rub it in.") (Frank, J., concurring). Similarly, objections followed by curative instructions risk both drawing attention to and exacerbating a prosecutor's unconstitutional argument. The Supreme Court has recognized, for instance, that a curative instruction to objectionable remarks can compound the error in the eyes of the jury. *See, e.g., Bruton v. United States*, 391 U.S. 123, 129 (1968) (citing a study finding that "the limiting instruction actually compounds the jury's difficulty in disregarding" inadmissible evidence). By filing this motion *in limine*, the defendant should be considered to have made an objection to each and every kind of misconduct specified herein, without the necessity of risking further prejudice by objecting at the time of the misconduct, and to have invoked the court's sua sponte duty to grant a mistrial.

[2] E.g., *Freeman v. United States*, 689 A.2d at 585 ("It was inappropriate for the

Prosecutorial misconduct is unique among constitutional violations at trial because it results from the prosecutor's unilateral action. The easiest way to avoid the constitutional problems arising from misconduct is for the prosecutor to refrain from committing misconduct. The caselaw cited below establishes the representative kinds of misconduct that the prosecutor should not commit. This court should therefore enter an order directing the prosecutors not to commit misconduct, the prosecutors should obey that order, and no further litigation over this issue should be necessary.

B. ENTRY OF AN ORDER *IN LIMINE* IS NECESSARY BECAUSE OF THE PERSISTENT PATTERN OF MISCONDUCT ENGAGED IN BY THE U.S. ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA.

Entry of the order *in limine* is not only appropriate but it is necessary as well. The United States Attorney's Office for the District of Columbia has a history and practice of violating the constitutional rights of defendants through the commission of prosecutorial misconduct, which continues to this day. *E.g.*, *Chatmon v. United States*, 801 A.2d 92, 95, 98-102 (D.C. 2002)(reversing and remanding for new trial where prosecutor "needlessly displayed" "graphic and inflammatory color photographs of [decedent's] body" and admonished jury to return a verdict it could "live with"); *Plummer v. United States ,* 813 A.2d 182, 190 (D.C. 2002) (finding improper for prosecutor to imply in closing that gang violence was motivation for murder)*; Freeman v. United*

---

prosecutor to suggest to the jury that they should send a message to the community by convicting appellants."); *McGriff v. United States*, 705 A.2d 282, 289 (D.C. 1997)(comment about sending a message plainly should not have been made; government should not ask juries to send message because that is not their job); *Bowman v. United States*, 652 A.2d 64, 71 (D.C. 1994) ("This court has stated repeatedly that an attorney must not ask a jury to send a message to anyone, and we now expressly hold that urging the jury to tell someone something is likewise improper, and for the same reason. Juries are not in the message sending business."); *Thomas v. United States*, 619 A.2d 20, 24-25 (D.C. 1992), *affirmed*, 650 A.2d 183, 196 (D.C. 1994)(en banc)("this court has repeatedly condemned prosecutorial requests that the jurors send a message either to the defendant or to the community . . Such an appeal was clearly improper . . . the function of the jury is to determine the facts based on the evidence presented. The jurors are not empanelled to send messages on behalf of their community."); *Dyson v. United States*, 450 A.2d 432, 438-39 (D.C. 1982)(appeals to community conscience constitute prosecutorial misconduct); *Reed v. United States*, 403 A.2d 725, 729-31 (D.C. 1979)(same, and noting that appeals to community conscience may be "central to the very issue for the jury to determine appellant's guilt or innocence").

States, 689 A.2d 575, 585 (D.C. 1997) (finding misconduct where prosecutor implied that appellants had been participants in prior shooting involving complainant); *Carpenter v. United States*, 635 A.2d 1289, 1296 (D.C. 1993) (ordering new trial where prosecutor made frequent references to assault on a government witness, implying that accused participated in the assault when no record evidence supported that conclusion); *Coreas v. United States*, 565 A.2d 594, 604 (D.C. 1989)(reversing conviction based on the "totality of . . . several instances of . . . misconduct" where the prosecutor insinuated that a witness lied, contended that defendant "tailored" his testimony in response to testimony from the medical examiner and implored jury to "send a message"); *Villacres v. United States*, 357 A.2d 423, 425-26 (D.C. 1976) (reversing conviction and ordering new trial because prosecuting attorney's references to defendant's demeanor in the courtroom and expression of "personal evaluations and opinions" "was so egregious as . . . to require reversal").

C. THE GOVERNMENT CANNOT LEGITIMATELY OBJECT TO THE ENTRY OF AN ORDER *IN LIMINE* DIRECTING THE PROSECUTORS TO CONFORM THEIR ARGUMENT TO THE DICTATES OF THE LAW.

Given the unique role prosecutors play in the criminal justice system, the government cannot legitimately oppose this Motion or raise any objection to the entry of an order *in limine*. Local and federal law, as well as professional ethical standards, not only prohibit prosecutors from committing the type of misconduct described below, but also, obligate them to assist in protecting the constitutional rights of people facing trial. The United States Supreme Court has held that the prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). The Ninth Circuit explained in *Commonwealth of*

the Northern Mariana Islands v. Mendiola, 976 F.2d 475, 486 (9th Cir. 1992), *overruled on other grounds by, George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997), that "[i]t is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial." *See also Hawthorne v. United States*, 476 A.2d 164, 173 (D.C. 1984); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) ("The proper role of the criminal prosecutor is not simply to obtain a conviction, but to obtain a fair conviction."); National District Attorneys Association, *National Prosecution Standards*, Rule 1.1 (2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished.").

Prosecutors cannot look to the standards applicable to other lawyers to determine the propriety of their conduct, remarks, and argument. The Ninth Circuit has stressed that:

> Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers. While lawyers representing private parties may -indeed, must - do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules.

United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993); *see also* American Bar Association, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958) ("The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client.").

Given the obligation prosecutors have to respect the rights of accused persons under well-established federal and local law, the government has no legitimate basis for opposing entry of the order *in limine* sought by the defendant: The government cannot contend that its prosecutors have a right to commit the misconduct described below; nor can it legitimately contend that the court should not enter an order which is consistent with the law the prosecutors are obligated to follow. This Court cannot assume that the prosecutors will comply with their obligations in this regard, or credit any self-serving assertions by the prosecutors that an order *in limine* is unnecessary because they are aware of their ethical obligations. As the host of published cases repeatedly condemning the same forms of misconduct demonstrate, the fact that courts have condemned an argument as misconduct provides no assurance that prosecutors will not make it.

D. ENTRY AND ENFORCEMENT OF AN ORDER *IN LIMINE* IS REQUIRED TO ENSURE THAT THE DEFENDANT'S CONSTITUTIONAL RIGHTS ARE ACTUALLY, AND NOT MERELY HYPOTHETICALLY, ENFORCED.

In light of the historical practices of the United States Attorney for the District of Columbia, the defendant and this Court must consider the measures to take should the prosecutor nevertheless commit misconduct. That analysis must take into account the intentional character of any such misconduct. While courts sometimes find misconduct to be non-prejudicial on the ground that it was unintentional or inadvertent, *see, e.g., Turner v. Johnson*, 106 F.3d 1178, 1188 (5th Cir. 1997); *United States v. Manning*, 56 F.3d 1188, 1199 (9th Cir. 1995), that cannot be the case here: The defendant has compiled below caselaw illustrating the kinds of misconduct the prosecutor is prohibited from committing; the prosecutors in this case thus cannot claim that any misconduct they commit is a result of ignorance or inadvertence.

There are several reasons militating in favor of a mistrial *sua sponte* should the prosecutor make an impermissible comment in spite of the filing of this motion. First, the government's knowing, deliberate and intentional attempt to bolster a weak case by depriving the defendant of a fair trial, prior to the entry of the verdict requires a mistrial *sua sponte*. As noted above, it is primarily the trial court's obligation to respond to misconduct before it. *Thomas v. United States*, 557 A.2d 1296, 1304 (D.C. 1989). Any act of misconduct in this case must be recognized for what it will be: A deliberate and intentional attempt to violate the defendant's right to a fundamentally fair trial and a reliable sentence; and an acknowledgment of the weakness of the prosecution's case by attempting to win the case by impermissible means. "By resorting to wrongful devices, [the party] is said to give ground for believing that he thinks his case is weak and not to be won by fair means." *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 922 (3d Cir. 1985) (quoting McCormick, *Handbook of the Law of Evidence* § 273 at 660 (2d ed. 1972)); *see also United States v. Metcalf*, 435 F.2d 754, 758 (9th Cir. 1970) (characterizing commission of misconduct as result of "the careless zeal of a prosecutor conscious of the weakness of the case").

In the habeas corpus context, the United States Supreme Court recognized in *Brecht v.*

Abrahamson, 507 U.S. 619, 638 n.9 (1993):

> [T]he possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. [Citation].

The Court of Appeals for the Ninth Circuit has characterized this type of error as a "hybrid" which is "declared to be incapable of redemption by actual prejudice analysis. The integrity of the trial, having been destroyed, cannot be reconstituted by an appellate court." *Hardnett v. Marshall*, 25 F.3d 875, 879 (9th Cir. 1994), *cert. denied*, 513 U.S. 1130 (1995).[3] The defendant here has provided the government and the court with the caselaw establishing what the prosecutors cannot do, and the defendant has done all he can to prevent misconduct from occurring. If the prosecutors attempt to bolster their case by committing misconduct anyway, they should not be heard to argue that any response less than an immediate mistrial would be an adequate remedy for their intentional and deliberate attempt to deprive the defendant of a fair trial. A mistrial is also necessary to prevent the United States from obtaining the further benefit of rubbing in the misconduct by objection and instruction. *See* note 1, above. Having polluted the trial by prejudicing the jury, the government cannot properly seek to gain the benefit of having that jury, which it has deliberately poisoned, render a verdict.[4]

Second, the integrity of the court is at stake where the prosecutor commits misconduct in

[3] While the District of Columbia Court of Appeals has indicated that even intentional and contemptuous prosecutorial misconduct is not necessarily reversible, it has not analyzed the effect of the supremacy clause of the federal constitution, or of *Brecht*, on that issue. Federal law does not countenance such toleration of bad faith, intentional misconduct that violates the federal constitution. *Compare, e.g., Brecht*, 507 U.S. at 628 n. 9; *Oregon v. Kennedy*, 456 U.S. 667, 678 (1982) (misconduct intended to goad defendant into seeking mistrial); *Miller v. Pate*, 386 U.S. 1, 6-7 (1967) (deliberate misrepresentation of evidence at trial invalidated conviction).

[4] At minimum, any commission of misconduct would have to be analyzed under the *Chapman* standard of prejudice applicable to further constitutional errors. *Chapman v. California*, 386 U.S. 18 (1967). This standard requires the prosecution, and not the defendant, to prove beyond a reasonable doubt that its intentional commission of misconduct would not "contribute to the verdict." *Id*. at 24. If the prosecutor is so desperate to obtain a conviction that he commits misconduct after the filing of this Motion, this court can only infer that the prosecutor considered the misconduct necessary to achieve his aim, and thus that it could not be shown, beyond a reasonable doubt, to be non-prejudicial.

argument. By providing the relevant case authorities to this court in advance of argument, the defendant has also ensured that this court can satisfy its duty to intervene *sua sponte* to prevent or sanction misconduct. This court is therefore not in the position of being asked to consider the permissibility of government arguments in the absence of cited authority. Further, because this court, as well as the United States, is on notice as to what constitutes misconduct, this court must fulfill its duty to respond to the prosecutor's misconduct. If the court fails to intervene *sua sponte*, or fails to sustain defense objections to misconduct, it thereby places its imprimatur on the misconduct; and it invests the prosecutor's violation of the defendant's constitutional rights with the weight and authority of the court, thus necessarily making that misconduct prejudicial. *See Bollenbach v. United States*, 326 U.S. 607, 612 (1946) ("'[T]he influence of the trial judge on the jury is necessarily and properly of great weight,' [citation] and jurors are ever watchful of the words that fall from him."). If the court refuses to sustain a proper objection to the prosecutor's deliberate and intentional misconduct, based upon the settled case law cited in this motion, it will violate its own duty to enforce the law evenhandedly against the prosecution.

Third, since a reversal would be required on appeal, granting a mistrial sua sponte will lessen the burden of litigation on the Court of Appeals. A refusal by the court to enforce the law against the prosecution at the proper instance of a defendant would demonstrate judicial bias in favor of the prosecution and thus require reversal. *See, e.g.*, *Mahorney v. Wallman*, 917 F.2d 469, 473 (10th Cir. 1990) (failure of court to act in response to improper argument gave prosecutor's argument "official imprimatur"). Since trial before an impartial tribunal is a fundamental element of due process of law under the Fifth Amendment, such a refusal would be prejudicial *per se*. <u>Tumey v. Ohio</u>, 273 U.S. 510, 535 (1927); *see Neder v. United States*, 525 U.S. 928, (1998). Finally, curative instructions cannot adequately repair the damage impermissible arguments inflict on the constitutional rights of the criminally accused. As the Supreme Court explained in *Bruton*, 391 U.S. at 129 n. 3, "'[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.'" (quoting *Krulewitch v. United States*, 336 U.S. 440, 453

(1949) (Jackson, J., concurring); *see also Throckmorton v. Holt*, 180 U.S. 552, 567 (1901) ("[T]here may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error."); *United States v. Garza*, 608 F.2d 659, 666 n. 7 (5th Cir. 1979) ("[A]s this Court observed in overturning a conviction because of improper prosecutorial comment, despite a corrective instruction, once such statements are made, the damage is hard to undo: 'Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'") (quoting *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962)); *Government of Virgin Islands v. Toto*, 529 F.2d 278, 282 (3d Cir. 1976) (holding that curative instruction could not cure the violation of the defendant's right to a presumption of innocence). The District of Columbia Court of Appeals has expressed similar sentiments about the efficacy of limiting instructions. *Patton v. United States*, 633 A.2d 800, 810 (D.C. 1993); *Van Ness v. United States*, 568 A.2d 1079, 1083 (D.C. 1990); *Thompson v. United States*, 546 A.2d 414, 424-25 (D.C. 1988); *Clark v. United States*, 593 A.2d 186, 192-93 & n. 8 (D.C. 1991); *Campbell v. United States*, 391 A.2d 283, 287 (D.C. 1978).

To the extent that the prosecutor may commit misconduct that is only marginally covered by the cited case law, this court should intervene to protect the defendant's rights by instructing the jury in terms that address the real effect of the misconduct. An instruction merely to disregard misconduct would not be adequate and would likely exacerbate the effect of the misconduct. See note 1, above. Only an instruction that explains to the jury what has actually occurred – that is, that the prosecutor has attempted to influence the jury by impermissible and unconstitutional means, and that it would be a violation of the jurors' duty to consider in any way the substantive basis of the misconduct in its decision – would arguably correct the harm. Thus, if a court concludes that it can cure misconduct by giving a cautionary instruction, the court "should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's

remarks." *People v. Bolton*, 23 Cal. 3d 208, 589 P.2d 396, 400 n. 5 (1970). In *Bolton*, the prosecutor's argument insinuated that the defendant had a criminal record when in fact he did not. The court in *Bolton* indicated that a cautionary instruction sufficient to counterbalance such an argument could take this form:

> "Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks."

Id.

To the extent that the prosecutors in this case may commit any misconduct not clearly within the categories of misconduct explicitly identified in this motion, the defendant submits that only an instruction similar in form to the one described in *Bolton* could adequately correct the harm such misconduct would cause.

E. **CONCLUSION**.

The defendant has shown that this court should issue an order *in limine* directing the prosecutors not to commit misconduct in argument. Such an order is an appropriate use of a ruling *in limine*; it is not objectionable by the government; it is necessary in light of the government's pattern and practice of committing misconduct; and it is imperative in order to furnish actual protection, rather than mere lip-service, to the defendant's rights. Accordingly, this court should issue an order *in limine* prohibiting the prosecutors from committing any of the kinds of misconduct discussed in section II, below, and any other form of misconduct, and enforce that order as requested above.

II.

EXAMPLES OF IMPERMISSIBLE ARGUMENT

To safeguard the fairness of the defendant's trial and protect the specific constitutional rights to which he is entitled, the defendant sets forth some of the improper arguments a prosecutor is forbidden from making by the Constitution, and the laws and ethical rules of the District of Columbia. This list represents some of the most common improper arguments the prosecutor can make and is by no means exhaustive. The defendant presents these examples of improper arguments to inform the Court of his unequivocal objection to them in advance of trial. By making this motion, the defendant also preserves any available objections to the improper arguments the prosecutor may make before the Court and the jury in this case.

A. ARGUMENTS INFRINGING SPECIFIC CONSTITUTIONAL RIGHTS

A prosecutor may not under any circumstances make a comment that violates the specific constitutional rights the accused enjoys under the Bill of Rights and the Fifth Amendment's Due Process Clause. The Supreme Court has held that "[w]hen specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

- *Darden v. Wainwright*, 477 U.S. 168, 182 (1986) ("The prosecutor's argument [may] not ... implicate other specific rights of the accused such as the right to counsel or the right to remain silent")
- *Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990) (explaining that a lower standard applies for the grant of the federal writ of habeas corpus where "the impropriety complained of effectively deprived the defendant of a specific constitutional right")

The following sections identify some, but not all, of the arguments which would violate the defendant's specific constitutional rights. The arguments below also violate the more general right an accused enjoys to a fair trial under the Due Process Clause of the Fifth Amendment. Since these arguments infringe specific constitutional rights, however, they are especially intolerable and must be met with extremely strong measures by this Court.

1. ARGUMENTS ABOUT THE DEFENDANT

a. Commenting on Defendant's Post-Arrest Silence

A prosecutor may not comment on the accused's post-*Miranda* silence.

- United States Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself.")

- *United States v. Robinson*, 485 U.S. 25, 32 (1988) ("Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence ... the privilege against compulsory self-incrimination is violated.")

- *Darden*, 477 U.S. at 182 ("The prosecutor's argument [may] not ... implicate other specific rights of the accused such as ... the right to remain silent.")

- *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) (explaining that the *Doyle* decision "rests on the 'fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'") (quoting *South Dakota v. Neville*, 459 U.S. 553, 565 (1983))

- *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (holding that a comment by the prosecutor's about the accused's post-*Miranda* silence, even during the course of impeachment, violates the due process clause)

- *Alexander v. United States*, 718 A.2d 137, 141 (D.C. 1998)(holding that prosecutor's cross-examination and comments during argument on defendant's failure to mention, post-*Miranda*, his alibi to police was reversible error under *Doyle*)

- *Brewer v. United States*, 559 A.2d 317, 322 (D.C. 1989)(applying *Doyle* rule)[5]

The United States Court of Appeals for the District of Columbia Circuit has extended the

---

[5] Federal courts have frequently granted relief from convictions because prosecutors commented at trial on the accused's right to remain silent. *See, e.g., People of the Territory of Guam v. Veloria*, 136 F.3d 648, 652-53 (9th Cir. 1998) (reversing conviction and remanding for a new trial, after concluding that the prosecutor's comment on the defendant's post-*Miranda* silence amounted to *plain error* since "the *Doyle* rule prohibiting testimony regarding post-arrest silence has been well-established in the law") (emphasis added); *United States v. Harp*, 536 F.2d 601, 602 n. 2 (5th Cir. 1976) (holding that prosecutor violated Constitution when asked, "[n]ow doesn't it make sense that if the facts had been like the defendants said they had been, that they would have told somebody?"). *Franklin v. Duncan*, 70 F.3d 75, 76 (9th Cir. 1995) (per curiam); *United States v. Foster*, 985 F.2d 466, 468 (9th Cir. 1994), *as amended*, 17 F.3d 1256 (9th Cir. 1994); *Hill v. Turpin*, 135 F.3d 1411, 1417-19 (11th Cir. 1998); *Gravley v. Mills*, 87 F.3d 779, 790 (6th Cir. 1996); *Fields v. Leapley*, 30 F.3d 986, 990 (8th Cir. 1996); *United States v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995); *United States v. Newman*, 943 F.2d 1155, 1158 (9th Cir. 1991); *Matire v. Wainwright*, 811 F.2d 1430, 1435-36 (11th Cir. 1987); *Alo v. Olim*, 639 F.2d 466, 467 (9th Cir. 1980); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975).

protection of the Fifth Amendment to include an accused's silence after arrest but before receiving *Miranda* warnings.

- *United States v. Moore*, 104 F.3d 377, 384 (D.C. Cir. 1997)(holding in context of silent arrested defendant that had not yet been given *Miranda* warnings: "The silence of an arrested defendant, under *Griffin [v. California*, 380 U.S. 609, 612 (1965)], is an exercise of his Fifth Amendment rights which the Government cannot use to his prejudice")

- *The American Bar Association*, *Standards for Criminal Justice*, Standards Relating to Prosecution Function, Standard 3-5.6 (b) (3d ed. 1993) ("A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury ... make ... impermissible comments or arguments in the presence of the judge or jury."); *see also* Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."); Standard 3-5.9 ("The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.").

b. Directly Commenting on the Defendant's Failure to Testify

A prosecutor may not comment directly on a defendant's failure to testify.

- U.S. Const. amend. V.

- *Carter v. Kentucky*, 450 U.S. 288, 301 (1981) (a person accused of committing a crime "must pay no court-imposed price for the exercise of the constitutional privilege not to testify").

- *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) ("*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.").

- *Griffin v. California*, 380 U.S. 609, 612 (1965) (holding that the Fifth Amendment prohibits a prosecutor from commenting on the defendant's failure to testify).

- *Brewer v. United States*, 559 A.2d 317, 322 (D.C. 1989)(Fifth Amendment prohibits a prosecutor from commenting on failure to testify)[6]

- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b); 3-5.9.

---

[6] Federal courts have also recognized that it is impermissible for prosecutors to comment on the defendant's failure to testify. *Lesko v. Lehman*, 925 F.2d 1527, 1541-42 (3d Cir. 1990) (reversing death sentence and holding that comment on failure to express remorse violated Fifth Amendment's right against self-incrimination), *cert. denied*, 502 U.S. 898 (1991). *Burke v. Greer*, 756 F.2d 1295, 1300 (7th Cir. 1985); *Raper v. Mintzes*, 706 F.2d 161, 164 (6th Cir. 1983).

- Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1560 (1998) (reporting that jurors take into account an absence of expression of remorse when they determine whether to impose death sentence)

c. Indirectly Commenting on the Defendant's Failure to Testify

The Fifth Amendment prohibits a prosecuting attorney from commenting indirectly on the defendant's failure to testify. Courts have repeatedly held that where no one but the defendant can refute a witness's testimony, it is improper for a prosecutor to say that the evidence the state presents is "uncontroverted," "undisputed," "unchallenged," "uncontradicted," "undenied," "intact," or "unrefuted," or to otherwise draw attention to the accused's failure to testify.

- *White v. United States*, 248 A.2d 825, 825 & 826 n. 2 (D.C. 1969) (prosecutorial misconduct to comment on uncontradicted nature of police officers' testimony when officers and appellant were only ones at the scene)
- *Void v. United States*, 631 A.2d 374, 385-86 & n. 26 (D.C. 1993)(setting forth general rule that prosecutor commits misconduct in commenting on "uncontradicted" nature of evidence that only the defendant could contradict)[7]

---

[7] Federal Courts have issued similar holdings. *United States v. Cotnam*, 88 F.3d 487, 496-500 (7th Cir. 1996) (holding that the prosecutor committed reversible error in violation of the Fifth Amendment when he commented that the evidence the state had put on was "uncontroverted" since it was unlikely that anyone but the accused could contradict the evidence); *United States v. Hardy*, 37 F.3d 753, 759 (1st Cir. 1994) (reversing a conviction after holding that the prosecutor indirectly commented on the defendant's failure to testify by commenting that the defendant is "still running and hiding today"); *Freeman v. Lane*, 962 F.2d 1252, 1259 (7th Cir. 1992) ("Our cases have recognized that a prosecutor may not comment concerning the uncontradicted nature of the evidence when 'it is highly unlikely that anyone other than the defendant could rebut the evidence.'") (quoting *United States v. Di Caro*, 852 F.2d 259, 263 (7th Cir. 1988); *Floyd v. Meachum*, 907 F.2d 347, 353 (2d Cir. 1990) (holding that the prosecutor's question "if there was confusion in this case, from whence did that come?" and "[i]f there were facts left out in this case, from whence did that come?" violated the accused's right under the Fifth Amendment against self-incrimination); *United States v. Sblendorio*, 830 F.2d 1382, 1391 (7th Cir. 1987) ("We have taken Griffin to forbid comment on the defendant's failure to call witnesses, when the only potential witness was the defendant himself."); *Williams v. Lane*, 826 F.2d 654, 664 (7th Cir. 1987) (affirming district court's grant of habeas corpus and conclusion that prosecutor's comment that witness "told it to you and nobody else told you anything different" was unconstitutional, explaining that "[t]his Court has on numerous occasions held that prosecutorial references to 'undisputed,' 'unchallenged,' or 'uncontradicted' testimony were indirect references to defendant's failure to testify in violation of the Fifth Amendment."); *Raper v. Mintzes*, 706 F.2d 161, 166 (6th Cir. 1983) (affirming district court's grant of relief and holding that prosecutor violated Constitution by arguing that state witness' testimony was "uncontradicted or unrefuted" which constituted indirect reference to failure to testify); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (concluding that prosecutor committed error requiring habeas relief where argued that the victim's testimony "stood unchallenged").

- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

d. Referring to Defendant's Courtroom Demeanor

A prosecutor may not comment on a non-testifying defendant's courtroom demeanor. The defendant's demeanor is not part of the evidence before the jury.

- *Villacres v. United States*, 357 A.2d 423, 426 n.4 (D.C. 1976) (a prosecutor cannot "call the jury's attention to the appellant's demeanor in the courtroom while *off* the witness stand," because such a practice has been both "condemned by this Court as the presentation of unsworn testimony," and "by the federal court as adducing evidence that is legally irrelevant.") (emphasis in original)

- *Jenkins v. United States*, 374 A.2d 581, 584 (D.C. 1977) ("this court has . . . expressed disapproval of comments by the prosecutor on a defendant's demeanor in the courtroom while off the witness stand.")

- *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (holding that it violates due process clause for prosecutor to comment on non-testifying defendant's demeanor at trial because it is irrelevant to question of guilt)8

- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

e. Suggesting that Defendant's Presence At Trial Helped Him Fabricate A Defense

A prosecuting attorney may not suggest that the accused's presence at trial helped him fabricate a defense. Such comments infringe the defendant's constitutional right to be present at trial and to confront and cross-examine the witnesses against him.

United States. v. Fearns, 501 F.2d 486, 490 (7th Cir. 1974) ("[W]hen a defendant has not testified a prosecutor risks reversal by arguing that evidence is undisputed when that evidence was of a kind that could have been disputed by the defendant if he had chosen to testify").

8 Federal cases regarding the impropriety of a prosecutor's reference to a defendant's in court demeanor include *United States v. Schuler*, 813 F.2d 978, 982-83 (9th Cir. 1987) (holding that the prosecutor violates the Fifth Amendment by commenting on a non-testifying defendant's demeanor at trial or suggesting that the jury can consider his behavior as evidence of guilt); *United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984) (same) and *United States v. Carroll*, 678 F.2d 1208, 1209 (5th Cir. 1982) (reversing and remanding for new trial, holding that prosecutor's reference to the defendant's courtroom behavior violated his Fifth Amendment right not to testify, and not to be convicted except on the basis of evidence the state puts on against him, and the Sixth Amendment's right to a trial by jury which prohibited his presence from being taken into account as evidence of guilt).

- U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...")

- *Jenkins v. United States*, 374 A.2d 581, 584 (D.C. 1977) (condemning as misconduct prosecutor's argument that "Defendant was the one and only witness who sat for all the testimony during trial. . . . He had an advantage over everybody. He already knew what the evidence was, and he knew exactly what he had to explain away and did everything he could to explain it" because "in effect, the prosecutor sought to have the jury draw adverse inferences from appellant's exercise of his right to confront the witnesses against him.")

- *Mitchell v. United States*, 569 A.2d 177, 183 (D.C. 1990)(comments that suggest that defendant's presence in courtroom assisted in formulating defense tailored to testimony improper infringe on right to confrontation)

- *Coreas v. United States*, 564 A.2d 594, 604 (D.C. 1989) (misconduct to suggest jury may draw negative inferences from exercise of confrontation right)

- *Sherrod v. United States*, 478 A.2d 644, 656 (D.C. 1984) (misconduct to suggest jury may draw negative inferences from exercise of confrontation right)

- *Fornah v. United States*, 460 A.2d 556, 560-61 (D.C. 1983) (misconduct to suggest jury may draw negative inferences from exercise of confrontation right)

- *Dyson v. United States*, 418 A.2d 127, 131 (D.C. 1980) ("Even more troubling was the prosecutor's suggestion, over objection, that appellant's presence during the trial facilitated his ability to fabricate his testimony.")

f. Referring to the Defendant's Refusal to Consent to a Search

A prosecutor may not comment on the defendant's refusal to consent to a search or seizure.

- U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); *see also Mapp v. Ohio,* 367 U.S. 643, 654 (1961) (holding that right under Fourth Amendment would be enforced by "the same sanction of exclusion as is used against the federal government"); *Ker v. California*, 374 U.S. 23, 30 (1963) (holding that searches by state authorities would be judged under same standards as those the Fourth Amendment imposes on federal searches)

- *United States v. Prescott*, 581 F.2d 1343, 1350-51 (9th Cir. 1978) (reversing the conviction where the prosecutor commented on the defendant's assertion of her Fourth Amendment right to refuse to unlock her door when the police sought entry to search her apartment without a warrant because the "[t]he Amendment gives [a person] a constitutional right to refuse to consent to entry and search")

- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

g. Arguing that the Defendant is 'Abusing the System'

A prosecutor may not complain that the defendant has too many constitutional rights or that he is abusing the system.

- *Cunningham v. Zant*, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (affirming grant of habeas corpus writ where prosecutor remarked that he was offended by defendant's exercise of his right to a trial by jury which court calls "outrageous")
- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

2. ARGUMENTS ABOUT DEFENSE COUNSEL

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of counsel for his defence." U.S. Const. amend. VI. The right to counsel applies to the states through the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The right "to counsel is so basic to all other rights that it must be accorded very careful treatment. Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error." *United States. v. McDonald*, 620 F.2d 559, 564 (5th Cir. 1980). For this reason, certain comments about counsel are a violation of the Sixth and Fourteenth amendments. Examples of these are set forth below.

a. Commenting on the Defendant's Retention of, or Request for, Counsel

Under the Sixth Amendment's right to counsel and the Fourteenth Amendment's due process clause, a prosecutor may not comment on the accused's retention of, or request for, counsel.

- *Diaz v. United States,* 716 A.2d 173, 179-80 (D.C. 1998) (condemning prosecutor's arguments suggesting that the defendant and his lawyer had "put together" "a nice little story" because "it is improper for the prosecutor to urge the jury to draw adverse inferences from the defendant's exercise of his right to counsel.")

- *Henderson v. United States*, 632 A.2d 419, 433 (D.C. 1993) (reversing murder conviction and holding that prosecutor committed misconduct by drawing jury's "attention to the fact that appellant had sought legal advice the day after his wife's murder" because "the Fifth

Amendment precludes a prosecutor from eliciting the defendant's action in consulting an attorney because of "the tendency of such testimony to serve as the base for an inference of guilt based on such an act.")9

- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

b. Disparaging Counsel

A prosecutor may not disparage or ridicule the defendant's counsel or criminal defense attorneys in general because defendants enjoy "the right to counsel unstained by unfair disparagement." *United States v. Rodrigues*, 159 F.3d 439, 451 (9th Cir. 1998); *see also United States v. Santiago*, 46 F.3d 885, 892 (9th Cir. 1995) ("[U]nder the Sixth Amendment, prosecutors may not imply that ... all defense counsel are programmed to conceal and distort the truth."). Comments suggesting that defense counsel in general, or the defendant's attorney in particular, are unethical, amoral, sneaky, cunning, or deceptive violate the Constitution's Sixth Amendment right to counsel and the Fourteenth Amendment's due process clause.

---

9 Federal cases addressing prosecutors' improper infringement on the right to counsel include *Hill v. Turpin*, 135 F.3d 1411, 1417-19 (11th Cir. 1998) (granting relief in habeas corpus under Fourteenth Amendment's due process clause where prosecutor referred to petitioner's request for counsel); *United States v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995) (holding that prosecutor violated the due process clause under the rule in *Doyle* and committed reversible error when prosecutor asked the accused during cross-examination whether he had hired an attorney, whether that attorney was a criminal defense lawyer, and the length of time during which he had retained his services); *United States v. Santiago*, 46 F.3d 885, 892 (9th Cir. 1995) ("[U]nder the Sixth Amendment right to counsel, prosecutors may not imply that the fact that a defendant hired a lawyer is a sign of guilt."), *cert. denied*, 515 U.S. 1162 (1995); *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990) ("A prosecutor may not imply that an accused's decision to meet with counsel, even shortly after the incident giving rise to a criminal indictment, implies guilt.... Such statements strike at the core of the right to counsel and must not be permitted."); *United States v. Daoud*, 741 F.2d 478, 480 (1st Cir. 1984) (holding that prosecutor's reference to the defendant's request for the best attorney in Puerto Rico violated the Constitution); *Bruno v. Rushen*, 721 F.2d 1193, 1194 (9th Cir. 1983) (per curiam) (affirming grant of writ of habeas corpus and holding that it violates due process to suggest that jury take into account the hiring of counsel in determining guilt); *United States v. McDonald*, 620 F.2d 559, 564 (5th Cir. 1980) (holding that prosecutor's conduct "penalized McDonald for exercising his Sixth Amendment right to counsel" by eliciting testimony, and commenting in closing, that attorney was present when Secret Service agents searched defendant's home) and *Zemina v. Solem*, 573 F.2d 1027, 1028 (8th Cir. 1978) (affirming habeas corpus relief and district court's conclusion that prosecutor violated the petitioner's right under the Sixth Amendment where suggested in closing that the defendant's phone call to his attorney after his arrest indicated guilt).

- *Johnson v. United States*, 671 A.2d 428, 437 (D.C. 1995)(prosecutor's comment "shame on you" directed at defense counsel who had argued that government witnesses had lied was "completely inappropriate" and improper)

- *Poole v. United States*, 630 A.2d 1109, 1129 (D.C. 1993)(statement that defense lawyers "were trying to intimidate these witnesses" was improper and went "too far" but not reversible because of overwhelming evidence of guilt)

- *Irick v. United States*, 565 A.2d 26, 34 (D.C. 1989) (prosecutor's attacks on defense counsel were "uncalled for and unprofessional")

- *Mathis v. United States*, 513 A.2d 1344, 1347 (D.C. 1986)(reversing based in part on prosecutorial misconduct during closing argument where prosecutor characterized defense attorney characterized as "leading the pack" in this trial just as appellant had "led the pack" on the night of the murder)

- *Hammill v. United States*, 498 A.2d 551, 558 n. 8 (D.C. 1985)(holding that "it is improper for the prosecutor to impute thoughts and poor judgment to defense counsel" and finding misconduct when prosecutor questioned defense counsel's tactics (in calling appellant's child as a witness) and described defense counsel's judgment "a terrible thing – I wouldn't even cross-examine him)

- *United States v. Richardson*, 161 F.3d 728, 735 (D.C. Cir. 1998) (reversing conviction and ordering new trial where prosecutor suggested to jury that defense counsel was "out of touch with the realities and concerns" of the defendant's and the jury's world)[10]

---

[10] Federal cases prohibiting disparagement of defense counsel include *United States v. Rodrigues*, 159 F.3d at 451 (ordering new trial in spite of defense counsel's failure to object contemporaneously where the prosecutor told jurors at trial that after listening to defense counsel, "you all must be feeling somewhat confused ... [defense counsel] has tried to deceive you" because the prosecutor "does not speak as a mere partisan. He speaks on behalf of a government interested in doing justice. When he says the defendant's counsel is responsible for lying and deceiving, his accusations cannot fail to leave an imprint on the jurors' minds. And when no rebuke of such false accusations is made by the court, when no response is allowed the vilified lawyer, when no curative instruction is given, the jurors must necessarily think that the false accusations had a basis in fact. The trial process is distorted."); *United States v. Friedman*, 909 F.2d 705, 709-10 (2d Cir. 1990) (holding that it was reversible error for prosecuting attorney to state that defense counsel would "make any argument he can to get that guy off" and that "while some people ... prosecute [drug] dealers ... there are others who try to get them off, perhaps even for high fees") and *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam)(holding that prosecutor violated defendant's right to due process by commenting that witness changed story after meeting with defense attorney and explaining that, maligning defense counsel "severely damage[s] an accused's opportunity to present his case before the jury. It therefore is an impermissible strike at the very fundamental due process

· *ABA Standards for Criminal Justice*, Standards 3-5.6, 3.5-8 (d), 3-5.9 (b)

· National District Attorneys Association, *National Prosecution Standards*, Rule 6.5 (b) (2d ed. 1991) ("Counsel should avoid the expression of personal animosity toward opposing counsel, regardless of personal opinion.")

c. Complimenting Defense Counsel

A prosecutor may not compliment the defense attorney.

- *United States v. Frederick*, 78 F.3d 1370, 1380 (9th Cir. 1996) (explaining that it was improper for prosecutor to comment that "it is a defense attorney's job to do his best to cross-examine thoroughly the witnesses presented by the Government for the benefit of his client. And you can have admiration for [the defense attorney] because he is a skilled practitioner of that art," and in response to an objection, "I'm trying to compliment him that he did a very good job of confusing [the witness] on the stand" because they suggested to jurors that the defense counsel's "methods were somewhat underhanded and designed to prevent the truth from coming out.")
- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9

d. Commenting On the Cost Of Defense

A prosecutor may not comment on the cost of the defense, including the fees the state must pay for lawyers and witnesses.

- U.S. Const. amend. VI.
- *Ake v. Oklahoma*, 470 U.S. 68, 70 (1985) (holding that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition")
- *Gideon v. Wainwright*, 372 U.S. 335, 359 (1963) (recognizing that an indigent defendant has a right to have counsel appointed for him by the state)
- *Taylor v. United States,* 329 F.2d 384, 386 (5th Cir. 1964) (holding that right as indigent to subpoena witnesses exists under the Sixth Amendment's right to compulsory process)
- *Young Bark Yau v. United States*, 33 F.2d 236, 237 (9th Cir. 1929) (holding that the district

---

protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice").

court erred in denying application to take the testimony of witnesses in China)

- *D.C. Rule. Prof. Cond.* 3.8(f); *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9

Prosecutors may not comment on the cost of the defense since this would penalize the accused for the exercise of federal constitutional rights. Were prosecutors permitted to make these comments, they would force the defendant to choose between, first, exercising his rights to the assistance of counsel and the right to present a defense under the Constitution and being penalized for it, or second, foregoing these rights in an effort to foreclose the opportunity for the prosecutor to argue improperly. Like other comments which penalize the accused for asserting a constitutional right, comment on the cost of the defense would, as the Supreme Court explained in *United States v. Robinson*, 485 U.S. 25, 30 (1988), "cut[] down on the privilege by making its assertion costly." Under the federal constitution, therefore, a prosecutor may not comment on the cost of the defense.

3. ASSERTING PERSONAL OPINION OR EXPERTISE

The prosecutor may not offer a personal opinion or assert an expertise on any matter because it violates the accused's right to confrontation. The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him..." This right applies to the states through the due process clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The Supreme Court explained in *California v. Green*, 399 U.S. 149, 158-59 (1970), that the Confrontation Clause requires that a witness be "subject to full and effective cross-examination" and it emphasized that:

> Confrontation: (1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

By offering an opinion or asserting an expertise on a matter, the prosecutor performs the role of a witness. As one court explained it,

> [b]y giving his opinion, an attorney may increase the apparent probative force of his evidence by virtue of his personal influence, his presumably superior knowledge of the facts and background of the case, and the influence of his official position.... The prosecutor is not just a retained attorney; he is a public official occupying an exalted station. Should he be allowed to 'testify' in closing argument, jurors hear the 'expert testimony' of a trusted officer of the court on, perhaps, a crucial issue. On the other side may be appointed counsel, laboring valiantly to present all defenses available to the accused, who nevertheless may be unable to respond to the implied challenge by asserting his personal belief in his assigned client's innocence.

United States v. Morris, 568 F.2d 396, 401-02 (5th Cir. 1978). When a prosecutor offers "expert testimony," he or she does not take the stand, testify under oath, or subject himself to the defense's right of confrontation. Indeed, as the *ABA Standards for Criminal Justice*, Standard 3-5.8, have noted in their commentary, "[e]xpressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office..."[11] They therefore violate the right of confrontation.

The prosecutor also violates the right to a trial by an impartial jury when he or she offers a personal opinion or asserts an expertise on a matter. The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." U.S. Const. amend. VI. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Supreme Court recognized that the accused enjoys the right to have a jury ascertain the facts and determine the ultimate question of guilt or innocence. *Id*. at 149. When a prosecutor offers a personal opinion, jurors will naturally be swayed. As the Supreme Court explained in *United States v. Young*, 470 U.S. at 18-19, a prosecutor may not offer his personal

---

[11] The Supreme Court, in *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 n. 15 (1974), briefly and without explanation remarked in a footnote that, although improper, the assertion of a personal opinion itself might not violate the Confrontation Clause. This does not, however, foreclose the argument that the assertion of a personal opinion about a factual matter is tantamount to testifying without taking the stand and would violate this provision of the Sixth Amendment.

opinion because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." In *United States v. Garza*, 608 F.2d 659, 663 (5th Cir. 1979), the court of appeals wrote that:

> The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.

Indeed, the court of appeals emphasized in *Morris*, 568 F.2d at 401 that "an attorney's statement of his beliefs impinges on the jury's function of determining the guilt or liability of the defendant." *See also Mathis v. United States*, 513 A.2d 1344, 1347 (D.C. 1986)("This court has repeatedly reproved lawyers for expressing personal opinions . . . We continue to condemn this type of prosecutorial misconduct."); *Dyson v. United States*, 418 A.2d 127, 130 (D.C. 1980) ("We have admonished lawyers to eschew personal opinions in the course of arguments to juries because this can divert jurors from their role.") [12]

Ethical rules in this jurisdiction also prohibit the assertion by a prosecutor of a personal opinion. Rule 3.4(e) of the District of Columbia Bar Rule s forbids "assert[ing] personal knowledge of facts in issue except when testifying as a witness, or stat[ing] a personal opinion as to the justness of a cause, the credibility of a witness ... the guilt or innocence of an accused..." The *ABA Standards for Criminal Justice* provide, moreover, that "[t]he prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant." Standard 3-5.8 (b). In the explanatory notes, the ABA warns prosecutors to avoid using the first person in describing or remarking on evidence and to instead "restrict themselves to statements such

---

[12] The District of Columbia Court of Appeals has consistently followed the federal constitutional rule prohibiting prosecutors from asserting a personal opinion or expertise on any matter. *Daye v. United States*, 733 A.2d 321, 327 (D.C. 1999); *Diaz v. United States*, 716 A.2d 173, 180 (D.C. 1998); *Scott v. United States*, 619 A.2d 917, 927 (D.C. 1993); *Mitchell v. United States*, 569 A.2d 177, 184 (D.C. 1990); *Beynum v. United States*, 480 A.2d 698, 710 (D.C. 1984); *Sherrod v. United States*, 478 A.2d 644, 656-57 (D.C. 1984).

as 'The evidence shows...' or something similar." Id. Commentary.

The unconstitutional and improper assertion of a personal opinion can take different forms. As described below, courts have condemned prosecutors for expressly stating an opinion or a belief. They have also held that pointing at the defendant or facing him melodramatically while stating that he is guilty or deserves the death penalty constitutes an improper assertion of a personal opinion. The following arguments are examples of improper assertions by prosecutors of personal opinions or expertise.

a. Expressing A Personal Opinion About the Defendant's Guilt

Under federal constitutional law, a prosecuting attorney may not express a personal opinion about the guilt of the person on trial or assert an expertise in assessing guilt. Asserting a personal opinion also violates the rule against referring to facts outside the record.

- *United States v. Young*, 470 U.S. 1, 17 (1985) (holding that it is "improper" for prosecutors to express an opinion about the guilt of the accused);
- *Irick v. United States*, 565 A.2d 26, 36 n. 26 (D.C. 1989)(emphasizing importance of Supreme Court's admonition in *Young* that prosecutors not express personal opinions about guilt because doing suggests to jury that prosecutor has access to more evidence than jury does, and places imprimatur of government on proof, urging jury to trust government's view of evidence rather than its own)
- *Dyson v. United States*, 418 A.2d 127, 130 n. 5 (D.C. 1980) (reminding government of ethical obligation not to express personal opinion on "guilt")
- *Sherrod v. United States*, 478 A.2d 644, 657 n. 15 (D.C. 1984)(error for prosecutor to express "personal belief in appellant's guilt," but comments made at trial did not do so)
- *Logan v. United States*, 489 A.2d 485, 490 (D.C. 1985) ("We have often stated that attorneys may not express personal opinions during arguments to the jury.")
- *Powell v. United* States, 455 A.2d 405, 409 n. 2 (D.C.1982)(" It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.")[13]

---

13 Federal cases regarding improper expression of personal opinion by prosecutors include *United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999) (calling prosecutor's comments about his experience of 26 years as a lawyer and his story of his grandfather's struggles "irrelevant and unnecessary" as well as "objectionable" and an attempt "to vouch for his own credibility and

- D.C. Bar R. 3.4(e) (provides that lawyers must not "[i]n trial ... state a personal opinion as to . . . the credibility of a witness")
- *ABA Standards for Criminal Justice*, Standard 3-5.8(b) ("The prosecutor should not express his or her personal belief or opinion as to ... the guilt of the defendant.")

b. Vouching for the Credibility of Witnesses or Offering A Personal Opinion About the Evidence

A prosecutor may not vouch for the credibility of any witness. There are two types of vouching and they are both improper. The Ninth Circuit, in *United States v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996), held that a prosecutor can neither personally vouch for the witness by asserting his belief in him nor bolster his testimony by alluding to facts outside the record tending to support the credibility of a particular witness.

- *Young*, 470 U.S. 1, 18-19 (1985) ("The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.")

---

thereby the credibility of the prosecution's case"); *Young v. Bowersox*, 161 F.3d 1159, 1162 (8th Cir. 1998) (comment that crime was "disgusting and it's as cold as anything I've ever seen," in support of aggravating factor, was "clearly improper" because "[i]t invited the jury to rely on the prosecutor's personal opinion about the relative coldness of this crime and compared the circumstances of this crime to other crimes that were not in the record"); *United States v. Molina*, 934 F.2d 1440, 1444-45 (9th Cir. 1991) ("[A] prosecutor may not express his opinion of the defendant's guilt..."); *Floyd v. Meachum*, 907 F.2d 347, 354-55 (2d Cir. 1990) (explaining that prosecutor's misconduct in requesting that jury consider prosecutor's own integrity before considering and evaluating the evidence against the defendant was reversible error); *United States v. Garza*, 608 F.2d 659, 662 (5th Cir. 1979) (reversing conviction and remanding for new trial because prosecutor's comments that "I don't want innocent people going to jail" and "if I thought that I had ever framed an innocent man and sent him to the penitentiary, I would quit" were "so clearly improper and so obviously require reversal"); *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978) (explaining that it is impermissible for prosecutor to state "I believe that the defendant is guilty") and *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (ordering the district court to grant habeas corpus relief where state's attorney made "highly improper expression of personal opinion" in telling jurors that "[i]f you can't find the defendant guilty on the facts that I have presented to you, I feel like I just might as well, you know, close up shop and go home...").

- *Coreas v. United States*, 565 A.2d 594, 604 (D.C. 1989) ("The assertion that the statement was "untrue" was improper; prosecutors may not assert that a witness has lied)

- *Jones v. United States,* 512 A.2d 253, 257 (D.C. 1986)("This court has repeatedly condemned assertions by counsel that a witness has lied on the witness stand. . . . It is for the jury to decide whether a witness is truthful and an attorney may not inject personal evaluations and opinions as to a witness' veracity. . . . Accordingly, we hold that the prosecutor's comment that "Tinsley thought he would get away with lying" was improper")

- *Miller v. United States*, 444 A.2d 13, 16 (D.C. 1982) (reversing conviction because of prosecutor's misconduct in labeling defense witness testimony as "false" and "just outright perjury")

- *Powell v. United* States, 455 A.2d 405, 409 (D.C.1982) ("It is for the jury, not for counsel, to decide whether a witness is telling the truth. An attorney may not divert the jurors from this task by injecting his personal evaluation as to a witness' veracity. This is of cardinal importance when, as here, the credibility of [the witness] was crucial to the verdict. . . . . The prosecutor may not publicly cast his vote.")

- *Dyson v. United States*, 418 A.2d 127, 130 (D.C. 1980)(en banc) (reversing conviction because of prosecutorial misconduct, including prosecutor's characterizations of defense testimony as "falsehood," "not a grain of truth in this defense" and that the defense witnesses had "lied")

- *Washington v. United States*, 397 A.2d 946, 951 (D.C. 1979)(finding prosecutorial misconduct where government argued "I believe Detective Chaillet's testimony")

- *Hyman v. United States*, 342 A.2d 43, 45 (D.C. 1975) ("a prosecutor may not express his opinion of the veracity of a witness . . . since such remarks amount to unsworn testimony and as such are impermissible.")[14]

---

[14] Federal cases regarding improper vouching by prosecutors include *United States v. Sanchez*, 176 F.3d 1214, 1224-25 (9th Cir. 1999) (holding that prosecutor improperly vouched for government witnesses when commented that "Department of Justice would be put on the line to solicit false testimony just to prove up a case against these two defendants" and "you will have to believe what the two people who have the most to lose here have said happened"); *United States v. Dispoz-O-Plastics, Inc.*, 172 F.3d 275, 283-84 (3d Cir. 1999) (reversing conviction because prosecutor improperly vouched for credibility of witnesses by telling jurors that "[t]hey told the Government they fixed prices twice and I can guarantee you the Justice Department doesn't give two for one deals; they had to plead guilty to both price-fixing conspiracies and their sentence reflected that," which court concluded was an attempt "to buttress the credibility of cooperating witnesses by providing extra-record information"); *United States v. Francis*, 170 F.3d 546, 550-51 (6th Cir. 1999) (holding that prosecutor's comments about role she would play in recommending whether witnesses' sentences would be lowered were improper vouching because she "made it clear that her recommendation would depend on whether she personally believed [the witnesses] told the truth. Because this could lead a reasonable juror to infer that the prosecutor had a special ability or extraneous knowledge to assess credibility, the statements were improper"); *United States v. Garcia-Guizar*, 160 F.3d 511, 520-21 (9th Cir. 1998) (calling defendant a "liar" based on state witness' "compelling" testimony constituted improper vouching); *Frederick*, 78 F.3d 1370, 1377 (9th Cir. 1996) (holding that prosecutor's reference to the consistency of witness' testimony and earlier statement was improper); *Maurer v. Minn. Dept. Of Corrections*, 32 F.3d 1286, 1290 (8th Cir. 1994) (reversing denial of writ and ordering habeas relief where prosecutor improperly bolstered

- *ABA Standards for Criminal Justice*, 3-5.8 (b) ("The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence...").

4. MISSTATING THE FACTS

A prosecutor may not misstate or misrepresent the facts. The Ninth Circuit recently explained that the rationale of the rule against misstating the facts is that "[w]hen a lawyer asserts that something in the record is true, he is, in effect testifying. He is telling the jury: 'look, I know a lot more about this case than you, so believe me when I tell you X is a fact.' This is definitely improper." *United States. v. Kojayan*, 8 F.3d 1315, 1321 (9th Cir. 1993).

- *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974) ("It is totally improper for a prosecutor ... to misstate the facts.")
- *Berger v. United States*, 295 U.S. 78, 84 (holding that, by misstating the facts, "the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense...")

---

credibility of witnesses by asking witnesses if complainant appeared sincere when she reported rape); *United States v. Manning*, 23 F.3d 570, 572-75 (1st Cir. 1994) (holding that it was reversible error for prosecutor to comment that government witnesses could not lie on the stand); *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (holding that it was plain error for prosecutor to relay to jurors his opinion about a witness' testimony); *United States v. Simtob*, 901 F.2d 799, 805 (9th Cir. 1990) (reversing because prosecutor improperly bolstered witness's credibility by offering to grant immunity to witness and urging to tell the truth); *United States v. Rodriguez-Estrada*, 877 F.2d 153, 158 (1st Cir. 1989) (holding that "prosecutor crossed the line" and "was out of bounds" when assured jurors that the witness was telling the truth); *United States v. Shaw*, 829 F.2d 714, 717 (9th Cir. 1987) (holding that it was improper for the prosecutor to bolster witness's credibility by remarking to jurors that plea agreement requires truthful testimony because this remark "contains an implication, however muted, that the government has some means of determining whether the witness has carried out his side of the bargain); *United States v. West*, 680 F.2d 652, 655 (9th Cir. 1982) (reversing and remanding where prosecutor improperly vouched for witness' credibility by saying to jurors, "[i]f you are willing to believe that an officer of this Court and a member of the U.S. Attorney's Office is going to commit perjury..."); *United States v. Garza*, 608 F.2d 659, 663-64 (5th Cir. 1979) (reversing conviction and ordering new trial where prosecutor both offered his opinion about the motives of state witnesses and bolstered their credibility by arguing that they were "professional" and "dedicated" and would not have obtained a job with the Drug Enforcement Administration unless they had integrity); *United States v. Morris*, 568 F.2d 396, 402 (5th Cir. 1978) (explaining that prosecutor may not say, "[t]he prosecution's witnesses are telling the truth," or "I believe that the prosecution's witnesses are telling the truth.").

- *Diaz v. United States*, 716 A.2d 173, 180(D.C. 1998)(improper for prosecutor to misstate record by implying that defendant lied when he said he didn't understand a statement made in English)

- *McClellan v. United States,* 706 A.2d 542, 553 (D.C. 1997) (improper for prosecutor to remark in closing that complainant had seen defendant's face and was threatened by defendant was improper when no evidence to support the argument had been presented)

- *Russell v. United States*, 701 A.2d 1093, 1099 (D.C. 1997) (reversible error for prosecutor to argue that defendant aided and abetted third party in setting fires when no evidence was presented on this fact)

- *Lee v. United States,* 668 A.2d 822, 830-33 (D.C. 1995) (improper for prosecutor to argue that three witnesses had seen defendant shoot decedent, when evidence showed they had not)

- *Lewis v. United States,* 541 A.2d 145 (D.C. 1988) (reversible error for prosecutor to misstate witness' testimony by implying that witness truly saw something witness in fact denied seeing)

- *Ali v. United States,* 520 A.2d 306 (D.C. 1987)(improper for prosecutor to imply that defendant sought to suborn perjury based on innocuous statement)

- *Morris v. United States,* 564 A.2d 746 (D.C. 1989) (improper for prosecutor to invite jurors to imagine conversations between codefendants planning to gang rape complainant)

- *Jones v. United States,* 512 A.2d 253 (D.C. 1986) (reversible error for prosecutor to make arguments in closing regarding communication and collusion between co-defendants where no evidence or reasonable inferences from evidence indicated any such conversation)[15]

- *D.C. Bar R. of Prof. Cond.* 3.4(e) (a lawyer shall not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence")

- *ABA Standards for Criminal Justice*, Standard 3-5.8 (a) ("The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.")

---

15 Federal cases prohibiting misstatement of the facts by the prosecutor include *United States v. Mastrangelo*, 172 F.3d 288, 298 (3d Cir. 1999) (holding that prosecutor's misstatements about content of stipulation warranted reversal); *United States v. Donato*, 99 F.3d 426, 432 (D.C. Cir. 1997) (reversing and remanding for new trial where prosecutor made factually incorrect statement);
United States v. Forlorma, 94 F.2d 91, 96 (2d Cir. 1996) (holding that prosecutor's misstatement, which reinforced notion that defendant was aware of narcotics concealed in bag, was reversible error); *Davis v. Zant*, 36 F.3d 1538, 1544 (11th Cir. 1994) (reversing denial of writ of habeas corpus where prosecutor committed falsehood by objecting to defendant's testimony that there was another confession when in fact there was); *United States v. Blakey*, 14 F.3d 1557, 1559 (11th Cir. 1994) (holding that, by calling defendant a "professional criminal," when contrary facts existed, prosecutor committed reversible error); *Kojayan*, 8 F.3d at 1321 (holding that misstatement of fact by prosecutor constituted reversible error); *United States v. Foster*, 982 F.2d 551, 555 n. 7 (D.C. Cir. 1993) (holding that prosecutor's statement to court that state had not granted immunity to witness was reversible error where untrue) and *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (ordering new trial where prosecutor argued false evidence).

5. ALLUDING TO FACTS OUTSIDE THE RECORD

In *Donnelly*, 416 U.S. at 645, the Supreme Court explained "[i]t is totally improper for a prosecutor to argue facts not in evidence..." Such arguments also violate the right to confrontation and cross-examination, in the same way that a prosecutor's expression of personal opinion puts unsworn "testimony" before the jury.

- *Donnelly v. DeChristoforo*, 416 U.S. 637, 639 (1974) (improper for prosecutor to inform jury in closing argument that former co-defendant had plead guilty)
- *Daye v. United States*, 733 A.2d 321, 328 n.6 (D.C. 1999) (improper for prosecutor to argue that ''[i]f we had other evidence that [government witness] committed this murder, we would have prosecuted him for that" when no facts introduced into evidence implicated the witness)
- *Diaz v. United States*, 716 A.2d 173, 180 (D.C. 1998) (improper for prosecutor to misstate record by implying that defendant lied when he said he didn't understand a statement made in English)
- *McClellan v. United States*, 706 A.2d 542, 553 (D.C. 1997) (improper for prosecutor to remark in closing that complainant had seen defendant's face and was threatened by defendant was improper when no evidence to support the argument had been presented)
- *Russell v. United States*, 701 A.2d 1093, 1099 (D.C. 1997) (reversible error for prosecutor to argue that defendant aided and abetted third party in setting fires when no evidence was presented on this fact)
- *Gardner v. United States*, 698 A.2d 990, 1001 (D.C. 1997) (improper for counsel to engage in speculative argument)
- *Lee v. United States*, 668 A.2d 822, 830-33 (D.C. 1995) (improper for prosecutor to argue that three witnesses had seen defendant shoot decedent, when evidence showed they had not)
- *Coreas v. United States*, 565 A.2d 594, 598 (D.C. 1989) (reversible error for prosecutor to argue in rebuttal, for the first time, that defendant lay in wait for decedent, where no evidence of such conduct had been presented)
- *Morris v. United States*, 564 A.2d 746,750 (D.C. 1989) (improper for prosecutor to invite jurors to imagine conversations between codefendants planning to gang rape complainant)
- *Lewis v. United States*, 541 A.2d 145, 146 (D.C. 1988) (reversible error for prosecutor to misstate witness' testimony by implying that witness truly saw something witness in fact denied seeing)
- *Ali v. United States*, 520 A.2d 306, 316 (D.C. 1987) (improper for prosecutor to imply that

defendant sought to suborn perjury based on innocuous statement)

- *Jones v. United States*, 512 A.2d 253, 258 (D.C. 1986) (reversible error for prosecutor to make arguments in closing regarding communication and collusion between co-defendants where no evidence or reasonable inferences from evidence indicated any such conversation)

- *Hawthorne v. United States*, 476 A.2d 164, 171 (D.C. 1984) (reversible error for prosecutor to give closing in first-person, speaking as decedent about decedent's personal life and decedent's thoughts during and after his murder)

- *Villacres v. United States*, 357 A.2d 423, 428 (D.C. 1976) (reversible error for prosecutor to, *inter alia*, comment on non-testifying defendant's demeanor and speculate regarding defendant's "instructions" to other witnesses)

- *Fuller v. District of Columbia*, 204 A.2d 812, 813 (D.C. 1964) (reversible error for prosecutor to make reference to prosecutor's personal pre-trial conversation with defendant regarding defendant's guilt)to carry much weight against the accused when they should properly carry none.")

- *National Prosecution Standards*, Rule 76.2 ("The prosecution should not allude to evidence unless there is a reasonable objective basis for believing that such evidence will be tendered and admitted into evidence at the trial.")

- *ABA Standards for Criminal Justice*, Standard 3-5.9 ("The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice"); see also Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.")

B. OTHER ARGUMENTS INFRINGING THE DEFENDANT'S RIGHT TO FAIR TRIAL

In addition to enjoying specific constitutional rights, the accused enjoys the right to due process of law. The Supreme Court has held that prosecutorial misconduct may violate the federal constitution when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The following are some examples of arguments which violate the right to a fair trial under the due process clause of the Fifth Amendment to the Constitution and District of Columbia law. In many of these cases, federal courts and the District of Columbia Court of Appeals have granted defendants relief from their convictions and ordered new trials.

1. MISSTATING THE LAW

a. Misstating the Law on the Presumption of Innocence

A prosecutor may not misstate the law on the presumption of innocence. To do so not only violates the due process clause, but also, the prohibition against alluding to facts outside the record. Such comment may also violate the rule against asserting a personal opinion about the guilt of the accused.

- *Porter v. U.S.,* 826 A.2d 398, 407 (D.C. 2003) (improper undermining of presumption of innocence for prosecutor to argue that "every defendant is entitled to the strongest possible defense)
- *Johnson v. United States*., 671 A.2d 428, 438 (D.C. 1995) (improper undermining of presumption of innocence for prosecutor to suggest defendant would not have been charged or prosecuted unless guilty)
- *Golsun v. United States*, 592 A.2d 1054, 1058 (D.C. 1991) (improper for prosecutor to argue that, at certain point "presumption of innocence should have slipped away")
- *ABA Standards for Criminal Justice*, Standard 3-5.8 (a) ("The prosecutor should not ... mislead the jury as to the inferences it may draw.")

b. Misstating the Law About What The Government Must Show to Establish Guilt

A prosecutor may not misstate the law on the meaning of guilt beyond a reasonable doubt.

- *Sullivan v. Louisiana,* 508 U.S. 275, 278 (1993) (holding that misstating law on reasonable doubt is so egregious that it is never harmless).
- *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (holding that any equation of reasonable doubt with "substantial doubt" or "moral certainty" as well as any other definition that would confuse jurors or lead them to believe that the state's burden is less significant than it is, is unconstitutional), *overruled on other grounds by Estelle v. McGuire, 502, U.S. 62, 73 (1991).*
- *Butler v. United States*, 646 A.2d 331, 333 (D.C. 1994) (improper to modify standard Redbook Instruction regarding reasonable doubt by (1) substituting the phrase "is firmly convinced" for the phrase "has an abiding conviction," and (2) omiting the following sentence supplying one characterization of "reasonable doubt:" "It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions in life.")

- *United States v. Merlos*, 8 F.3d 48, 50 (D.C. Cir. 1993) (improper to argue or instruct jury to find guilt beyond reasonable doubt if evidence caused them to have "strong belief" in defendant's guilt)

c. Misstating the Law on Who Carries The Burden of Proof

A prosecutor may not suggest that the defendant bears a burden of proof.

- *Mullaney v. Wilbur*, 421 U.S. 684, 702 (1975) (reversible error for prosecutor to imply that the defendant shares any of the burden of proof or should not be presumed innocent)
- *Golsun v. United States*, 592 A.2d 1054, 1059 (D.C. 1991) (improper for prosecutor to state that presumption of innocence ‘‘had slipped away’’ during course of trial)
- *Gray v. United States*, 589 A.2d 912, 917 (D.C. 1991) (improper for prosecutor's comments to highlight defendant's failure to testify)
- *Logan v. United States*, 489 A.2d 485, 488 (D.C. 1985) (improper for prosecutor to argue that defendant is trying to ‘‘hide behind’’ government’s burden of proving guilt beyond a reasonable doubt)
- *Parks v. United States*, 451 A.2d 591, 613 (D.C. 1982) (improper for prosecutor to suggest ‘missing witness’ type of inference by asking in closing “where is [witness]?”)
- *ABA Standards for Criminal Justice*, Standard 3-5.8 (a)

d. Misstating the Law on Intent

A prosecutor may not misstate the law on intent.

- *Francis v. Franklin*, 471 U.S. 307, 317 (1985) (holding that jury instruction which shifted burden of persuasion on intent element to the defendant violates Constitution’s Fourteenth Amendment).
- *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979) (ruling that instruction presuming a person intends ordinary consequences of voluntary acts violated due process clause under which state must prove each element of offense beyond a reasonable doubt).
- *Brown v. United States*, 766 A.2d 530, 540 (D.C. 2001) (reversible error for prosecutor to misstates the law of intent)
- *ABA Standards for Criminal Justice*, Standard 3-5.8 (a)

2. MISCHARACTERIZING THE EVIDENCE

A prosecutor may not mischaracterize the evidence. Mischaracterizing the evidence introduces the same kind of unsworn “testimony” before the jury, without cross-examination or

confrontation as misstatements of the facts and expressions of personal opinion. See sections II (A) (3, 4), above. *United States v. Donato*, 99 F.3d 426, 432 (D.C. Cir. 1997) ("[I]t is clear that it is error for a prosecutor to mischaracterize evidence...").

- *Diaz v. United States*, 716 A.2d 173, 180 (D.C. 1998) (improper for prosecutor to misstate record by implying that defendant lied when he said he didn't understand a statement made in English)

- *Carpenter v. United States*, 635 A.2d 1289,1295 (D.C. 1993) (reversible error for prosecutor to, *inter alia*, suggest that defendant and defendant's family had had hand in pre-trial assault on government witness)

- *Lee v. United States*, 668 A.2d 822, 830-33 (D.C. 1995) (improper for prosecutor to argue that three witnesses had seen defendant shoot decedent, when evidence showed they had not)

- *Lewis v. United States*, 541 A.2d 145, 146 (D.C. 1988) (reversible error for prosecutor to misstate witness' testimony by implying that witness truly saw something witness in fact denied seeing)

- *Ali v. United States*, 520 A.2d 306, 316 (D.C. 1987) (improper for prosecutor to imply that defendant sought to suborn perjury based on innocuous statement)

- *ABA Standards for Criminal Justice*, Standard 3-5.8 (a) ("The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw."); *see also* Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.")

3. COMMENTS ABOUT THE DEFENDANT

a. Ridiculing Or Disparaging the Defendant

It is improper for prosecutors to ridicule or disparage the defendant. Indeed, "the prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric is every bit as solemn as his obligation to attempt to bring the guilty to account." *United States v. Rodriguez-Estrada*, 877 F.2d 153, 159 (1st Cir. 1989). Such comments not only violate the right to due process of law, but may also violate the rule forbidding prosecutors from asserting a personal opinion and from alluding to facts which are not in the record.

- *Settles v. United States*, 615 A.2d 1105, 1113 (D.C. 1992) (improper for prosecutor to attack testifying defendant as a ''self-centered coward')

- *Doe v. United States*, 583 A.2d 670, 676 (D.C. 1990) (improper for prosecutor to refer to defendant as a "bad person”)

- *Maxwell v. United States*, 297 A.2d 771, 773 (D.C. 1972) (improper for prosecutor to call defendant a ‘‘burglar, thief, robber’’)

- *Pendergrast v. United States*, 416 F.2d 776, 786 (D.C. Cir. 1969) (improper for prosecutor to address defendant as “Mr. Defendant” because when a defendant takes the stand he is a witness; he is entitled to the same form of address, the same courtesies and consideration as all others involved in the proceeding”)

- *ABA Standards for Criminal Justice*, Standard 3-5.6 (b) (“A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury ... make ... impermissible comments or arguments in the presence of the judge or jury.”); *see also* Standard 3-5.8 (c) (“The prosecutor should not make argument calculated to appeal to the prejudices of the jury.”); Standard 3-5.8 (d) (“The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.”)

b. Comparing the Defendant to an Animal

It is improper to call the defendant a monster, beast, creature, devil, an “animal” or to describe him as a particular type of animal. Such improper descriptions may also constitute a comment appealing to group prejudice. *See* section II (B) (4), below.

- *Darden v. Wainwright*, 477 U.S. 168, 180 (1986) (condemning as “improper” the prosecutor’s description of defendant as an “animal”)

- *Settles v. United States*, 615 A.2d 1105, 1113 (D.C. 1992) (improper for prosecutor to attack testifying defendant as a ‘‘self-centered coward’’ and “an octopus because . . . when an octopus is scared in water,[it] lets out a black ink’’)

c. Calling the Defendant Names

It is improper for a prosecutor to engage in name calling or to personally attack the defendant. Such comments may represent an impermissible assertion of a personal opinion. *See* section II (A) (3). Where a defendant is from a minority group, such comments are also racially and ethnically inflammatory. *See* section II (B) (4), below.

- *Settles v. United States*, 615 A.2d 1105, 1113 (D.C. 1992) (improper for prosecutor to attack testifying defendant as a ‘‘self-centered coward’’ and “an octopus because . . . when an octopus is scared in water,[it] lets out a black ink’’)

- *Doe v. United States*, 583 A.2d 670, 676 (D.C. 1990) (improper for prosecutor to refer to defendant as a "bad person")
- *Irick v. United States*, 565 A.2d 26, 36-37 (D.C.1989), (improper for prosecutor to refer to defendant as "Dirty Harry" and "the enforcer")
- *Harris v. United States*, 430 A.2d 536, 540-41 (D.C. 1981) (improper for prosecutor to compare defendant to Mafia godfather and referred to defendant as a "thief")
- *Maxwell v. United States*, 297 A.2d 771, 773 (D.C. 1972) (improper for prosecutor to call defendant a ''burglar, thief, robber'')

d. Comparing the Defendant to Notorious Figures

It is improper for a prosecutor to compare the defendant to a notorious figure; it is thus impermissible to compare him to terrorists, murderers, movie characters, and so forth. Such comments can also constitute impermissible appeals to racial, ethnic, and other group prejudices. See section II (B) (4), below. They also constitute improper assertions of personal opinion, see section (11)(A)(4), above, and references to facts outside the record, *see* section II (A)(5).

- *Irick v. United States*, 565 A.2d 26, 36-37 (D.C.1989), (improper for prosecutor to refer to defendant as "Dirty Harry" and "the enforcer")
- *Mathis v. United States*, 513 A.2d 1344, 1348 (D.C. 1986) (reversible error for prosecutor to, *inter alia*, describe defendant as ''the Godfather'')
- *Harris v. United States*, 430 A.2d 536, 540-41 (D.C. 1981) (improper for prosecutor to compare defendant to Mafia godfather)
- *Miles v. United States*, 374 A.2d 278, 283-84 (D.C. 1977) (improper for prosecutor to makes references during closing argument to Benedict Arnold and Judas Iscariot)
- *Villacres v. United States*, 357 A.2d 423, 428 (D.C. 1976) (reversible error for prosecutor to, *inter alia*, argue analogy between ''execution'' of victim and crucifixion of Jesus Christ)

e. Calling the Defendant a 'Professional Criminal'

It is improper for a prosecutor to refer to the accused as a "professional criminal."

- *Lee v. United States*, 562 A.2d 1202, 1205 (D.C. 1989) (improper for prosecutor to comment that defendant is "a more likely person to not tell the truth if he's the kind of person that would steal from somebody else" as such language suggests use of past

convictions as evidence of propensity)

- *Jones v. United States*, 512 A.2d 253, 261 (D.C. 1986). (improper for prosecutor to link argument about past convictions with argument that defendant committed key, contested element of the charged offense)

- *Dyson v. United States,* 450 A.2d 432, 440 (D.C. 1982) (reversible error for prosecutor to argue during closing that defendant's past convictions indicated propensity)

- *Harris v. United States*, 430 A.2d 536, 541 (D.C. 1981) (improper for prosecutor to describe defendant "thief" unworthy of belief as such language suggests use of past convictions as evidence of propensity)

- *Fields v. United States*, 396 A.2d 522, 526 (D.C. 1978) (reversible error for prosecutor to employ sequence of cross-examination to suggest that prior conviction, ostensibly introduced as impeachment evidence, showed a propensity to commit the offense in question)

- *Ward v. United States,* 386 A.2d 1180, 1183 (D.C. 1978) (reversible error for prosecutor to argue during closing that defendant's past convictions indicated propensity)

- *Evans v. United States*, 392 A.2d 1015, 1026 (D.C. 1978) (improper for prosecutor to refer to defendants as "gang of felons" as such language suggests use of past convictions as evidence of propensity)

- *ABA Standards for Criminal Justice*, Standards 3-5.8 (c), 3-5.8 (d).

f. Suggesting that the Defendant Poses a Threat to Society

A prosecutor may not tell jurors that the person on trial is a threat to society in general or to jurors in particular. Such comments can also be racially inflammatory. An academic study reports that 57.9% of the jurors he questioned were more likely to vote for death if they thought that the defendant might present a danger to society. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559 (1998). Since jurors will likely be influenced by a prosecutor's improper suggestion that the defendant will pose a future threat unless he is found guilty and executed, this Court must prevent the prosecutor from making such comments. See section II (B) (4), below.

- *Darden*, 477 U.S. at 180 (condemning as "improper" comment that "implied that the death penalty would be the only guarantee against a future similar act")

- *Hart v. United States*, 538 A.2d 1146, 1150 (D.C. 1988) (improper for prosecutor to ask jury to convict defendant "for everything that man did" as such argument encourages jury to

render verdict based on their own fears of being victimized)

- *Miller v. United States*, 444 A.2d 13, 14 (D.C. 1980) (reversible error for prosecutor to, *inter alia*, argue that robbery in case was of the "type ... we have seen too many times in this city and other cities")

- *Powell v. United States*, 455 A.2d 405, 410 (D.C.1982)(improper for prosecutor to appeal to jurors' fears of violence)

- *Fernandez v. United States*, 375 A.2d 484, 486 (D.C. 1977) (improper for prosecutor to argue that it "would be a really sad day" for city and young children if not guilty verdict returned)

- *United States v. Johnson*, 231 F.3d 43, 343 (D.C. Cir 2000) (improper for prosecutor to urge jury to convict defendant of drug distribution to protect others from drugs)

- *ABA Standards for Criminal Justice*, Standards 3-5.8 (c), 3-5.8 (d)

g. Referring to the Defendant's Alleged Gang Involvement

A prosecutor may not refer to a person's alleged gang involvement when gang involvement is not relevant to the proof of the charged offense. Such comments both violate the rule against referring to facts outside the record and can be racially or ethnically inflammatory. See section II (B) (4), below.

- *Plummer v. United States*, 813 A.2d 182, 190 (D.C. 2002) (improper for prosecutor to imply in closing that gang violence was motivation for murder)
- *ABA Standards for Criminal Justice*, Standards 3-5.8 (c), 3-5.8 (d)

h. Referring to Prior Convictions

A prosecutor may not refer to the defendant's prior convictions that are not in evidence or suggest in any way to the jury that the defendant has a criminal record.

- *Lee v. United States*, 562 A.2d 1202, 1205 (D.C. 1989) (improper for prosecutor to comment that defendant is "a more likely person to not tell the truth if he's the kind of person that would steal from somebody else" as such language suggests use of past convictions as evidence of propensity)

- *Jones v. United States*, 512 A.2d 253, 261 (D.C. 1986) (improper for prosecutor to link argument about past convictions with argument that defendant committed key, contested element of the charged offense)

- *Dyson v. United States,* 450 A.2d 432, 440 (D.C. 1982) (reversible error for prosecutor to argue during closing that defendant's past convictions indicated propensity)

- *Harris v. United States*, 430 A.2d 536, 541 (D.C. 1981) (improper for prosecutor to describe defendant "thief" unworthy of belief as such language suggests use of past convictions as evidence of propensity)

- *Fields v. United States*, 396 A.2d 522, 526 (D.C. 1978) (reversible error for prosecutor to employ sequence of cross-examination to suggest that prior conviction, ostensibly introduced as impeachment evidence, showed a propensity to commit the offense in question)

- *Ward v. United States,* 386 A.2d 1180, 1183 (D.C. 1978) (reversible error for prosecutor to argue during closing that defendant's past convictions indicated propensity)

- *Evans v. United States*, 392 A.2d 1015, 1026 (D.C. 1978) (improper for prosecutor to refer to defendants as "gang of felons" as such language suggests use of past convictions as evidence of propensity)

- *ABA Standards for Criminal Justice*, Standards 3-5.8 (c); 3-5.8 (d)

4. ARGUMENTS BASED ON GROUP PREJUDICE

"A prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law." *Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991). Such comments not only violate the right to due process of law, but also, as the federal court explained in *Lee v. Bennett,* 927 F. Supp. 97, 101 (S.D.N.Y. 1996), *aff'd*, 104 F.3d 349 (1996), "[d]eliberate injection of extrinsic or prejudicial matter which has no relevance to the case and no basis in the evidence is not an appropriate element of a prosecutor's summation because it impinges on the jury's function for determining guilt or innocence." The American Bar Association has similarly condemned such arguments, providing in one of its standards that "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury," and elaborating:

> Remarks calculated to evoke bias or prejudice should never be made in a court by anyone, especially the prosecutor. Where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused's witnesses, such argument clearly trespasses the bounds of reasonable inference or

fair comment on the evidence.

American Bar Association Standards for Criminal Justice, Standard 3-5.8. The National District Attorneys Association also states that it is impermissible for prosecutors to make "prejudicial or inflammatory argument..." *National Prosecution Standards*, Rule 6.5 (g) (5). Such comments may also violate the rule against singling out jurors. *See* section II (B) (10) (d), below.

Arguments explicitly or implicitly urging the jury to make a finding of guilt, or to impose punishment, based on group bias violate the defendant's right to equal protection of the laws under the Constitution.

a. Comments About Race

A prosecutor may not make a comment that appeals to the racial prejudices jurors may hold. A recent study about the reactions of jurors to certain factors highlights the need for prosecutors to refrain from, and for courts to prevent, improper comments about race. Jurors take into account the race of an accused in deciding at sentencing whether aggravating factors, like future dangerousness, exist. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1560 (1998). When prosecutors make comments appealing to racial prejudice, they evoke or reinforce any racial prejudice jurors may hold and confirm in their minds that race is a proper consideration at a capital trial. Comments referring to race, whether explicit or veiled, thus compromise the accused's right to a fair trial and to equal protection of the laws.

- *Bates v. United States*, 766 A.2d 500, 508 (D.C. 2000) (improper for prosecutor to call defense counsel racist, or to highlight race of defense counsel)
- *United States v. Doe*, 903 F.2d 16, 30 (D.C. Cir. 1990) (reversible error for prosecutor to repeated refer to defendants as "the Jamaicans" especially when combined by 'expert' testimony indicating that Jamaican immigrants had seized control of local drug market)
- *United States v. Richardson*, 161 F.3d 728, 735 (D.C. Cir. 1998) (reversible error for prosecutor to suggest that defense of misidentification was based on offensive racial stereotype by arguing to jury "we don't all look alike")
- *ABA Standards for Criminal Justice*, Standard 3-5.8 (d) ("The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."); see also Standard 3-5.8 (c) ("The prosecutor should not make arguments calculated to appeal to

the prejudices of the jury.")

b. Comments Appealing to Gender Bias or Homophobia

A prosecutor may not appeal to gender bias in argument.

- *Jones v. United States*, 625 A.2d 281, 284 (D.C. 1993) (reversible error for prosecutor to repeatedly and inflammatorily refer to marginally relevant fact of alleged homosexual relationship between defendants)
- *Lee v. Bennett*, 927 F. Supp. 97, 104-05 (S.D.N.Y. 1996) (prosecutor improperly appealed to gender bias by commenting that defense witness's testimony helped explain "why so many rapes go unreported in this country" and was "completely insensitive" because the term "insensitive" is "a current buzz word used on TV talk shows and soap operas to describe masculine reactions to complaints by women. This statement itself was an appeal to gender bias among the jurors."), *aff'd*, 104 F.3d 349 (1996)
- *ABA Standards for Criminal Justice,* Standards 3-5.8 (d), 3-5.8 (c)

c. Comments Appealing to Class Bias

A prosecutor may not appeal to class bias.

- *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 239 (1940) ("[A]ppeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them.")
- *Brown v. United States*, 766 A.2d 530, 548 (D.C. 2001) (reversible error for prosecutor to, *inter alia*, refer to defendants as rich, powerful and arrogant physicians)
- *ABA Standards for Criminal Justice*, Standards 3-5.8 (d); 3-5.8 (c)

d. Comments About Region

A prosecutor may not appeal to regional prejudice.

- *Powell v. United States*, 455 A.2d 405, 410 (D.C. 1983) (improper for prosecutor to argue that "in this country the jury decides" as comment was clearly calculated to arouse the national bias and sympathy of the jury)
- *ABA Standards for Criminal Justice*, Standards 3-5.8 (d); 3-5.8 (c)

e. Comments About Religion

A prosecutor may not appeal to religious authority in support of an argument. Such comment

also constitutes an impermissible reference to facts outside the record.

- *Miles v. United States*, 374 A.2d 278, 283-84 (D.C. 1977) (improper for prosecutor to makes references during closing argument to Benedict Arnold and Judas Iscariot)

- *Villacres v. United States*, 357 A.2d 423, 428 (D.C. 1976) (reversible error for prosecutor to, *inter alia*, argue analogy between ''execution'' of victim and crucifixion of Jesus Christ)

f. Comments About Beliefs Protected by the First Amendment

Arguments stigmatizing the defendant on the basis of beliefs protected by the First Amendment, or membership in unpopular organizations, when those facts are not relevant to issues presented at trial, are improper.

- *Dawson v. Delaware,* 503 U.S. 159, 166-167 (1992) (impermissible to admit evidence of defendant's membership in Aryan Brotherhood prison gang at sentencing, where not relevant to issues presented and defendant's abstract beliefs protected by First Amendment and not admissible to show "character").

- *Keyeshian v. Board of Regents*, 385 U.S. 580, 606 (1967) ("[M]ere knowing membership without a specific intent to further the unlawful aims of [Communist Party]" not adequate basis for exclusion from university employment).

- *Schware v. Board of Bar Examiners*, 353 U.S. 232, (1957) (previous membership in Communist Party not basis for denying admission to bar where no connection to requirement of "good moral character").

5. RIDICULING OR DENIGRATING THE DEFENSE THEORY

A prosecutor may not ridicule the defense theory.

- *Bates v. United States*, 766 A.2d 500, 508 (D.C. 2000) (improper for prosecutor to call defense counsel racist, or to highlight race of defense counsel)

- *Johnson v. United States*, 671 A.2d 428, 436 (D.C. 1995) (improper for prosecutor to say ''shame on you both of you'' to defense counsel)

- *Poole v. United States, 630 A.2d 1109*, 1129 (D.C. 1993) (improper for prosecutor to state that defense counsel "were trying to intimidate these witnesses")

- *Curry v. United States*, 520 A.2d 255, 267 (D.C. 1987) (improper for prosecutor to asser that ''[w]hen a lawyer argues plant, there is nothing left")

- *Hammill v. United States*, 498 A.2d 551, 558 n.8 (D.C. 1985) (improper for prosecutor to describe defense counsel's judgment in calling defendant's child to testify as "a terrible thing" and to impute defense counsel the opinion that an aspect of defense case was not worth arguing)

- *Jaggers v. United States*, 482 A.2d 786, 796 (D.C. 1984), *overruled on other grounds* by *Carter v. United States*, 684 A.2d 331 (D.C. 1996) (improper for prosecutor to argue that legitimate cross-examination by defense counsel was unfair)

- *Powell v. United States*, 455 A.2d 405, 409 (D.C. 1983) (reversible error for prosecutor to, *inter alia*, suggest defense counsel did not believe own client)

- *Bates v. United States*, 403 A.2d 1159, 1163 (D.C. 1979) (improper for prosecutor to insinuate that defense counsel did not believe own client's testimony or had no confidence in defense case)

6. ARGUMENTS ABOUT WITNESSES

a. Calling a Lay Witness a “Liar”

A prosecutor may not call a lay witness a “liar.” Such comment is also an assertion of a personal opinion, *see* section II (A) (3), and of a fact outside the record, *see* section II (A) (5).

- *Coreas v. United States*, 565 A.2d 594, 604 (D.C. 1989) (improper for counsel to refer to certain testimony as “untrue”)

- *Jones v. United States*, 512 A.2d 253,257 (D.C. 1986) (improper for prosecutor to argue that defendant “thought he would get away with lying")

- *Freeman v. United States*, 495 A.2d 1183, 1186 (D.C. 1985) (improper for prosecutor to ask defendant during cross-examination if defendant knew of any reason why government witnesses would lie)

- *Powell v. United States*, 455 A.2d 405, 408 (D.C. 1983) (reversible error for prosecutor to, *inter alia*, describe defense case as "a ridiculous story” and an “attempt to deny [defendant’s] responsibility to you and to this community")

- *Dyson v. United States*, 450 A.2d 432 (D.C. 1982) (reversible error for prosecutor to argue that defendant, when testifying, “did not tell you the truth”)

- *Miller v. United States*, 444 A.2d 13, 14 (D.C. 1980) (reversible error for prosecutor to label alibi testimony as "false" and "just outright perjury" and a “lie”)

- *Dyson v. United States*, 418 A.2d 127, 130 (D.C. 1980) (en banc) (improper for prosecutor to argue that witness is “lying”)

- *Washington v. United States*, 397 A.2d 946, 951 (D.C. 1979) (improper for prosecutor to argue that he “believed” testimony of government witness)

- *Jenkins v. United States*, 374 A.2d 581, 584 (D.C.1977) (improper for prosecutor to refer to testimony as "total outright fabrication")

- *Hyman v. United States*, 342 A.2d 43, 44 (D.C. 1975) (improper for prosecutor to argue regarding defense witness "I think you can fairly conclude that he almost appeared irrational")

- *National Prosecution Standards*, Rule 6.5 (f), 77.1, 77.6

- *ABA Standards for Criminal Justice*, Standard 3-5.7 (a)

b. Commenting on Inability to Call Witnesses Because of Privilege

A prosecutor may not comment on the state's inability to call people as witnesses because of an assertion of a privilege, or to call a witness so that he will invoke the privilege before the jury. Commenting on the inability to call witnesses also violates the rule against alluding to facts outside the record. *See* section II (A) (5).

- *Hammill v. United States*, 498 A.2d 551, 556 (D.C. 1985) (improper for prosecutor to argue that an adverse inference could be drawn from fact that defendant's husband did not testify at defendant's murder trial)

- *Kleinbart v. United States*, 426 A.2d 343, 351 (D.C. 1981) (improper for prosecutor to call attention to defendant's wife's failure to testify and to ask jury to draw inferences adverse to defendant from her absence where wife had invoked marital privilege)

- *ABA Standards for Criminal Justice*, Standard 3-5.7 (c) (improper to "call a witness who the prosecutor knows will claim a valid privilege for the purpose of impressing upon the jury the fact of the claim of privilege.")

- 8 *Wigmore on Evidence* § 2243 at 259-61 (McNaughton rev. ed. 1961); *McCormick on Evidence* § 66 at 255

7. ARGUMENTS ABOUT THE VICTIM

a. Putting Jurors in Victim's Shoes

A prosecutor may not make remarks putting jurors in the victim's shoes.

- *Settles v. United States*, 615 A.2d 1105,1113 (D.C. 1992) (improper for prosecutor to urge jury to think about 12-year-old decedent's promising future)

- *Mills v. United States*, 599 A.2d 775, 787 (D.C. 1991) (improper for prosecutor to urge jury imagine rape victims' pain and suffering)

- *Dixon v. United States*, 565 A.2d 72, 76 (D.C. 1989) (improper for prosecutor to ask jury to consider fact that decedent's children would grow up without their father)

- *Turner v. United States*, 443 A.2d 542, 546 (D.C. 1982) (improper for prosecutor to tell jury to think of decedent as if he "were your son, your husband, your brother")
- *Clarke v. United States*, 256 A.2d 782, 787 (D.C. 1969) (improper for prosecutor to ask jurors to imagine themselves in victim's position)
- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9.

b. Identifying The Government With the Victim

A prosecutor may not put himself or herself in the victim's shoes or otherwise ally himself with a victim. Such comments also violate the rules against expressing personal opinions and invoking the authority of the state. *See* sections II (A) (3), above; II (B) (9), below.

- *Hawthorne v. United States,* 476 A.2d 164, 172 (D.C. 1984) (reversible error for prosecutor to pretend to speak as decedent in describing events before and after death)
- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9, 3-5.8 (d)

c. Referring to Victims and Holidays

A prosecutor may not seek to elicit an emotional reaction by referring to holidays.

- *United States v. Payne*, 2 F.3d 706 (6th Cir. 1993) (per curiam) (condemning prosecutor's remarks about Christmas time as "part of a calculated effort to evoke strong sympathetic emotions" for victims).
- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9

d. Arguing that The Victim Did Not Have as Many Rights As The Defendant

A prosecutor may not compare the victim's rights with those of the accused. Such arguments infringe the defendant's exercise of his constitutional rights to trial by jury, to representation by counsel, to cross-examination and confrontation, and all other trial rights, see section II (A), above; and they also seek to deform the jury's constitutional function, by suggesting that the jury should act the same way as an alleged criminal. *See* section III (3)(c), below.

- *Cunningham v. Zant*, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (affirming grant of habeas corpus writ where prosecutor remarked that he was offended by defendant's exercise of right

to trial by jury)

- *Brooks v. Kemp*, 762 F.2d 1383, 1411 (11th Cir. 1985) (condemning the prosecutor for impermissibly commenting on the defendant's exercise of his constitutional rights and for remarking that the victim did not enjoy the same procedural protections), *cert. denied*, 478 U.S. 1022 (1986), *vacated on other grounds*, 478 U.S. 1016 (1986)

- *State v. Cockerham*, 365 S.E.2d 22, 23 (S.C. 1988) (reversing sentence where prosecutor violated Sixth Amendment rights to counsel and jury trial by remarking that victim's rights under the Constitution "didn't do much for her that night because [defendant] ... was her judge, jury, and executioner. And she didn't have the right to ... be represented by a lawyer ... to have independent people on her jury.")

- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9

8. INSINUATING OR STATING THAT JUDGE AND GOVERNMENT ARE ON SAME SIDE

A prosecutor may not suggest that the judge is on the state's side or otherwise invoke the authority of the court. The Court of Appeals for the Ninth Circuit has explained, "[a] prosecutor must not abuse his position and his duty to see justice done by invoking the authority of the court." *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992). This is because, as the same court elaborated in another case,

> vouching ... on behalf of the court would pose a clear threat to the integrity of judicial proceedings. That particular form of vouching goes beyond the mere proffer of an institutional warranty of truthfulness; rather, it casts the court as an active, albeit silent, partner in the prosecutorial enterprise. In doing so, it strikes at two principles that lie at the core of our system of criminal justice. The first of these is that '[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary....' The second, long elevated to constitutional significance because it is so closely intertwined with the first, is that 'to perform its high function in the best way 'justice must satisfy the appearance of justice.'

United States v. Smith, 962 F.2d 923, 936 (9th Cir. 1992) (citations omitted).

- *United States v. Frederick,* 78 F.3d 1370, 1380 (9th Cir. 1996) (reversing conviction partly because the prosecutor implied that the state and the court agreed in an interpretation of the law by telling jurors that "[t]he Government and the Judge will be asking you to consider all of the evidence in making your decision").

- *Kerr*, 981 F.2d at 1053 (reversing conviction in spite of the defense's failure to object because the prosecutor insinuated that the judge, by accepting a witness' plea bargain with

the state, believed that the witness was truthful).

- *Smith*, 962 F.2d at 936 (reversing conviction in spite of defense counsel's failure to object where the prosecutor vouched for the credibility of a witness by arguing to the jurors "if I did anything wrong in this trial, I wouldn't be here. The court wouldn't allow that to happen" and explaining that "unlike the other comments that courts have on some occasions reluctantly overlooked, it placed the imprimatur of the judicial system itself on [witness's] credibility. That is something we simply cannot permit").

- *ABA Standards for Criminal Justice*, Standards 3-5.6 (b), 3-5.8 (d), 3-5.9

- *National Prosecution Standards*, Rule 6.5 (c) ("Counsel should at all times display proper respect and consideration for the judiciary...")

9. INVOKING THE POWER OF THE UNITED STATES OR DISCUSSING THE GOVERNMENT'S SYSTEM FOR CHARGING A PERSON

It is impermissible for a prosecutor to invoke the authority of the state. Such comment also constitutes an impermissible reference to facts outside the record.

- *Lewis v. United States*, 541 A.2d 145 (D.C. 1988) (reversible error for prosecutor to, *inter alia*, suggest that jury should assume guilt from arrest)

- *Parks v. United States*, 451 A.2d 591, 610 (D.C. 1982) (improper for prosecutor to analogize criminal justice system to "relay race" where police, U.S. Attorney's Office and Grand Jury "pass the baton" on to the jury)

- *ABA Standards for Criminal Justice*, Standards 3-5.8 (d), 3-5.9

10. PRESSURING THE JURORS AS A GROUP OR AS INDIVIDUALS

a. Telling Jurors to "Do Your Job," to Fulfill their Duty, to Send a Message, to Act as the Conscience of the Community, or to Correct Society's Ills

A prosecutor may not pressure jurors by telling them to do their "job," to fulfill their civic duty, to act as the conscience of the community, to cure society's ills, or to send out a message by finding the defendant guilty.[16] Such comments may also constitute an impermissible assertion of a

[16] Were deterrence a proper subject for argument, the defendant would have a due process right to present evidence, for example, to rebut allegations that the death penalty deters under *Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994) (if state rests its arguments at sentencing at least in part on future dangerousness, due process requires that defendant be allowed to rebut with evidence that he will not be eligible for parole). *See also* section II (A) (6) (referring to facts outside the record); section III (3)(C)(a) below.

personal opinion and a reference to facts outside the record.

- *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994) (arguing dangerousness of defendant improper at guilt phase of trial)
- *United States v. Young*, 470 U.S. 1, 5-7 (1985) (reminding prosecutors to "refrain from improper methods calculated to produce a wrongful conviction" in holding that it was improper for a prosecutor to tell jurors that "[i]f you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law...")
- *Viereck v. United States* 318 U.S. 236, 247 (1943) (improper, and potentially reversible error, for prosecutor to tell jury that "[t]he American people are relying upon you ladies and gentlemen for their protection against this sort of a crime …We are at war. You have a duty to perform here")
- *Plummer v. United States*, 813 A.2d 182, 191(D.C. 2002) (improper for prosecutor to appeal to "community conscience" during closing argument)
- *Battle v. United States*, 754 A.2d 312, 321 (D.C. 2000) (improper for prosecutor to tell jury that because government witnesses had testified in fear, jury had to do justice for witnesses by delivering a guilty verdict)
- *McGriff v. United States*, 705 A.2d 282, 288-89 (D.C. 1997) (improper for prosecutor to ask jury to "send a message")
- *Freeman v. United States*, 689 A.2d 575, 585 (D.C. 1997) (improper for prosecutor to argue to jury that ''this is your opportunity to make a difference'' improper)
- *Buergas v. United States*, 686 A.2d 556, 559 (D.C. 1996) (improper for prosecutor to ask jury to send message "that drug dealing is a business that this community cannot and will not tolerate")
- *Thomas v. United States*, 619 A.2d 20, 24 (D.C.1992) (improper for prosecutor to argue to ask jury to "send a message" to the defendant and to the community)
- *Coreas v. United States*, 565 A.2d 594, 596 (D.C. 1989) (reversible error for prosecutor to, *inter alia*, ask jury to "send a message")
- *Powell v. United States*, 455 A.2d 405, 410 (D.C.1982) (improper for prosecutor to ask jurors to "act[] as the conscience of the community" and "send a message" that the community does not tolerate violence)
- *Reed v. United States*, 403 A.2d 725, 730 (D.C. 1979) (improper for prosecutor to argue that "this community owes" defendant "something" to avenge death of decedent)
- *Fernandez v. United States*, 375 A.2d 484, 486 (D.C. 1977) (improper for prosecutor to argue that it "would be a really sad day" for city and young children if not guilty verdict returned)

b. Seeking to Make the Defendant a Scapegoat For Asserted Failings of the American Justice System

The prosecutor may not seek to make the defendant a scapegoat for asserted failings of the American justice system. Such comment also violates the rule against alluding to facts outside the record and against asserting a personal opinion. *Darden*, 477 U.S. at 179-80 (condemning as "improper" the prosecutor's comment that "attempted to place some of the blame for the crime on the Division of Corrections").

- *Logan v. United States*, 489 A.2d 485, 488 (D.C. 1985) (improper for prosecutor to argue that defendant is trying to ''hide behind'' government's burden of proving guilt beyond a reasonable doubt)

c. Telling Jurors They Are Involved in 'War' or Appealing to Patriotism

A prosecutor may not allude to a war or appeal to the patriotic sensibilities of jurors. Such comment also violates the rule against alluding to facts outside the record and against asserting a personal opinion.

- *Viereck*, 318 U.S. 236, 247-48 (1943) (holding that it denied defendant right to a fair trial when prosecutor remarked to jurors that "this is war. This is war, harsh, cruel, murderous war" because these comments "were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection.")
- *Coreas v. United States*, 565 A.2d 594, 596 (D.C. 1989) (reversible error for prosecutor to, *inter alia*, tell jury "in this country the jury decides" as comment was clearly calculated to arouse the national bias)
- *Reed v. United States*, 403 A.2d 725, 730 (D.C.1979) (improper for prosecutor to argue that "this community owes" defendant "something" to avenge death of decedent)

d. Speaking to Only a Few Jurors or Otherwise Singling Them Out

A prosecutor may not single out jurors because "it brings to bear a collateral influence which may tend to prejudice the mind of the juror on the basis of something irrelevant to the issues of the case." *Lee v. Bennett*, 927 F. Supp. 97, 105-06 (S.D.N.Y. 1996). Such arguments may also constitute impermissible appeals to group bias.

Lee v. Bennett, 927 F. Supp. 97, 104-05 (S.D.N.Y. 1996) (explaining that "[i]t is grossly improper to address individual jurors or less than all of the members of the jury in summation" in ruling that prosecutor made impermissible appeal to female jurors in case involving rape), aff'd, 104 F.3d 349 (1996).

- *Dixie Motor Coach Corp. v. Galvan*, 86 S.W.2d 633, 633 (Tex. Crim. App. 1935) ("[A]rgument [addressing individual jurors], as well as all other remarks suggestive of an intimate friendly relationship between counsel and jurors, should be scrupulously avoided.").
- SCR 176 (1) ("A member of the state bar should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, such as fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like.").
- E. LeFevre, Annotation, Prejudicial Effect of Counsel's Addressing Individually or by Name Particular Juror During Argument, 55 A.L.R.2d 1198 (1957).

11. ABUSING REBUTTAL ARGUMENT

"As a general rule, Government counsel should not be allowed to develop new arguments on rebuttal but should be restricted to answering the arguments put forth by defense counsel." *Moore v. United States*, 344 F.2d 558, 560 (1965). In addition, "[i]mproper prosecutorial comments are looked upon with special disfavor when they appear in the rebuttal because at that point defense counsel has no opportunity to contest or clarify what the prosecutor has said." *Lee v. United States*, 668 A.2d 822, 830-33 (D.C. 1995); *Coreas v. United States*, 565 A.2d 594, 605 (D.C. 1989)l; *Hall v. United States*, 540 A.2d 442, 448 (D.C.1988); *Lewis v. United States*, 541 A.2d 145, 146-48 (D.C. 1988); *Powell v. United States*, 455 A.2d 405, 411 (1983)

- *Porter v. United States*, 826 A.2d 398, 409 (D.C. 2003) (Generally improper for prosecutor to argue new legal theory, such as aiding and abetting, for first time in rebuttal)
- *Coreas v. United States*, 565 A.2d 594, 600 (D.C. 1989) (Reversible error for prosecutor to, *inter alia*, introduce new theory relying on new factual scenario for first time in rebuttal)
- *Hall v. United States*, 540 A.2d 442, 448 (D.C.1988) (Generally improper for prosecutor to argue new theory for first time in rebuttal)

III.

CONCLUSION

For all the reasons stated above, the defendant respectfully requests that the Court enter an order *in limine* prohibiting the prosecutor from committing any of the misconduct specified in section II of this motion, or any similar misconduct, and to enforce that order as requested in section I of this motion.

Respectfully submitted,

____