

PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENTS

by

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**23rd Annual Staff Conference and Seminar
Corpus Christi, Texas
August 29, 2009**

I. DIFFERENT TYPES OF IMPROPER CLOSING ARGUMENTS

The United States Attorney 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper [arguments by the prosecutor] are apt to carry much weight against the accused when they should properly carry none.¹

Despite the foregoing recognition and admonition by the Supreme Court over seven decades ago, prosecutors are afforded broad latitude in their closing arguments made to juries. Typically, they are allowed to argue about what the evidence proved and any “reasonable inferences” from the evidence; argue about the credibility and demeanor of witnesses and about the credibility and weight of the physical evidence; argue about the manner in which the law applies to the facts of the case; argue in fair rebuttal of the arguments made by opposing counsel; and make an appropriate plea for law enforcement (to a limited extent). Below are the recurring types of *improper* closing arguments by prosecutors.

¹ Berger v. United States, 295 U.S. 78, 88 (1935).

1. Impermissible Comments on Defendant's Invocation of Right to Silence at Trial (Griffin v. California, 380 U.S. 609 (1965))

United States v. Johnson, 127 F.3d 380 (5th Cir. 1997) (“A prosecutor’s remarks constitute impermissible comment on a defendant’s right not to testify, if the prosecutor’s manifest intent was to comment on the defendant’s silence or if the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant’s silence.”); see also id. at 397-98 (finding prosecutor’s comments indirectly commented on defendant’s trial testimony; reversing conviction); United States v. Roberts, 119 F.3d 1006 (1st Cir. 1997); Hicks v. State, 525 S.W.2d 177 (Tex. Crim. App. 1975) (finding that prosecutor impermissibly commented on defendant’s silence at trial when prosecutor argued, while standing behind the defendant and looking down at him, said: “There is somebody that we haven’t heard from in this case. And I think you all know who it is.”) [note that defense counsel made a record of precisely what the prosecutor did – *i.e.*, standing behind the defendant and looking down at him – during the trial].

See also United States v. Cotnam, 88 F.3d 487, 497 (7th Cir. 1996) (“A prosecutor’s comment that the government’s evidence on an issue is ‘uncontradicted,’ ‘undenied,’ ‘unrebutted,’ ‘undisputed,’ etc., will be a violation of the defendant’s [Fifth Amendment right to silence] only if the only person who could have contradicted, denied, rebutted, or disputed the government’s evidence was the defendant himself [when he did not testify]” or “when it is highly unlikely that anyone other than the defendant could rebut the evidence.”); see also id. at 500-01 (concluding that the prosecutor’s argument in that case violated the Fifth Amendment); United States v. Soudan, 812 F.2d 920 (5th Cir. 1986) (prosecutor may argue that the defense failed to call an available witness or produce available evidence so long as the non-testifying defendant isn’t the sole source of such testimony or evidence); Eberhardt v. Bordenkircher, 605 F.2d 275 (6th Cir. 1979) (granting habeas corpus relief based on prosecutor’s closing argument, in which he rhetorically asked jurors, “what other witnesses could [the defense] have put forward who were totally available?” and then pointed in the direction of the defendant).

2. Impermissible Comments on Defendant’s Invocation of Post-*Miranda* Silence (Doyle v. Ohio, 426 U.S. 610 (1976))

United States v. Rodriguez, 260 F.3d 416 (5th Cir. 2001) (holding that prosecutor’s argument that the jury should infer guilt from the defendant’s post-Miranda silence – which, the prosecutor contended, was inconsistent with his trial testimony – was reversible error); see also United States v. Caruto, 532 F.3d 822 (9th Cir. 2008) (holding that prosecutor’s rebuttal closing argument that defendant did not say, at the port of entry, that persons recently had borrowed her truck, which was found to have drugs in it, and returned it to her was a Doyle violation requiring reversal where the defendant had given a limited statement at the port of entry but then had invoked her Miranda rights).

But cf. Anderson v. Charles, 447 U.S. 404 (1980) (defendant who waived Miranda rights and gave post-arrest statement that did not mention a relevant fact may be impeached during his testimony at trial when he mentions that important fact for the first time, at least when it is inconsistent with his post-arrest statement); Jenkins v. Anderson, 447 U.S. 231 (1980) (prosecutor’s use of pre-Miranda, pre-arrest silence of defendant to impeach defendant’s theory of self-defense raised for the first time at trial).

3. “Golden Rule” Arguments and Improper Appeals for Law Enforcement

Hodge v. Hurley, 426 F.3d 368 (6th Cir. 2005) (granting habeas corpus relief based in part based on prosecutor’s “Golden Rule” argument made during closing argument); see also United States v. Teslim, 869 F.2d 316 (7th Cir. 1989) (noting universal condemnation of courts of a prosecutor’s “Golden Rule” argument, which ask jurors to put themselves in the shoes of the victim).

Viereck v. United States, 318 U.S. 236 (1943) (reversing defendant’s conviction in a World War II era trial where prosecutor sought to appeal to jurors’ patriotism: “This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula and everywhere else.”).

United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991) (reversing defendant’s conviction based on prosecutor’s closing argument in a drug case that if jury did not convict the defendant then the local community’s problem with drugs would continue unabated; not a proper appeal to the “conscience of the community” reflected in the jury’s judgment); cf. United States v. Sanchez-Sotelo, 8 F.3d 202 (5th Cir. 1993) (holding that prosecutor’s argument that jurors should “send a message to other drug dealers” by convicting the defendants of drug crimes was not reversible error where “ample” evidence of defendants’ guilt existed; suggesting that such an argument was not an improper appeal for law enforcement).

4. Improper Racial or Religious Arguments

United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990) (in case of a Jamaican drug dealer, reversal where prosecutor referred generally to “Jamaicans” taking over the local drug trade when there was no such evidence); United States v. Sanchez, 482 F.2d 5 (5th Cir. 1973) (reversing conviction where prosecutor argued that the Hispanic defendant “should have enough machismo and chicannismo to take that stand and tell you the truth and not lie about the fact [that he has a clean record]”).

Romine v. Head, 253 F.3d 1349 (11th Cir. 2001) (granting habeas corpus relief in part based on the prosecutor’s Biblical arguments made during closing arguments; such arguments were not in response to religious arguments made by defense counsel).

5. “Vouching” for Credibility of Prosecution Witness

United States v. Gracia, 522 F.3d 597 (5th Cir. 2008) (reversal, on plain error review, based on prosecutor’s repeated statements in rebuttal argument that he personally believed the agents’ testimony); United States v. Carroll, 26 F.3d 1380 (6th Cir. 1994) (reversal based on prosecutor’s argument that government witness’ plea agreement ensured that his testimony was credible); United States v. Manning, 23 F.3d 570 (1st Cir. 1994) (reversal where prosecutor vouched for key witness’ credibility); United States v. Kerr, 981 F.2d 1050 (9th Cir. 1992) (same); United States v. Garza, 608 F.2d 659 (5th Cir. 1979)(reversing conviction where prosecutor vouched for the credibility of the police officers involved in that case).

6. Vouching for Credibility of Prosecution Itself (or Prosecutor Himself/Herself)

United States v. Hitt, 473 F.3d 146 (5th Cir. 2006) (holding that it was improper for the prosecutor to bolster argument that defendant was not credible by arguing that the judge and defense counsel would have jumped on prosecutor for stating during cross-examination of a witness that the defendant had lied right here had the prosecutor not been right about that), cert. denied, 550 U.S. 969 (2007); United States v. Smith, 962 F.2d 923 (9th Cir. 1992) (reversing conviction based on prosecutor’s argument that he was inherently credible as a government representative and that “if I did anything wrong in this trial, I wouldn’t be here. The court wouldn’t allow that to happen.”); United States v. Kerr, 981 F.2d 1050 (9th Cir. 1992) (reversal based on prosecutor’s rhetorical question of whether jurors believed that the prosecution witnesses were “hoodwinking me”); United States v. Bess, 593 F.2d 749 (6th Cir. 1979) (reversing conviction based on prosecutor’s closing argument that the government would not have indicted the defendant unless the prosecutor personally believed that the defendant was guilty); Hall v. United States, 419 F.2d 582 (5th Cir. 1969) (reversing conviction in part based on prosecutor’s closing argument that “we try to prosecute only the guilty”).

7. Effectively Offering Unsworn Testimony By the Prosecutor Himself/Herself

Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995) (granting habeas corpus relief in death penalty case where, among other things, the prosecutor argued that, in his 20-year experience, he had seen “a lot of criminals” and that the defendant was the worst; and further describing the defendant as a “mad dog”); cf. United States v. Mendoza, 522 F.3d 482 (5th Cir. 2008) (finding that prosecutor’s argument that the jury should consider a non-testifying criminal defendant’s courtroom demeanor as evidence of guilt was an improper subject for comment, but declining to reverse), cert. denied, 129 S. Ct. 269 (2008).

8. Injecting Prejudicial Facts Outside of the Record

United States v. Molina-Guevara, 96 F.3d 698 (3d Cir. 1996) (reversal on appeal where prosecutor told jurors that a government agent who did not testify would have given inculpatory testimony; violation of Confrontation Clause); United States v. Payne, 2 F.3d 706 (6th Cir. 1993) (in a case tried in Detroit area, reversing conviction based on prosecutor’s references to recent layoffs at General Motors and children’s suffering at Christmastime – in the effort to make jury feel sorry for victims of

defendant's string of postal thefts); United States v. Blakely, 14 F.3d 1557 (11th Cir. 1994) (reversal based on prosecutor's arguing facts not in evidence, namely, that the defendant was a career criminal); Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995) (granting habeas corpus relief in death penalty case where, among other things, the prosecutor argued that the defendant had a history of escape, where no such evidence was introduced during the trial); United States v. Murrah, 888 F.2d 24 (5th Cir. 1989) (reversing conviction in case in which, among other things, the prosecutor told jurors that he could have called another prosecution witness to supply important facts about the crime but did not do so because it would have been "cumulative"); United States v. Goodwin, 492 F.2d 1141 (5th Cir. 1974) (reversing conviction in part based on prosecutor's closing argument to jury, in which he referred to the defendant as having been a "fugitive" during a portion of the time leading up to the indictment, when there was no evidence offered to support this claim); Hall v. United States, 419 F.2d 582 (5th Cir. 1969) (reversing conviction in part based on prosecutor's closing argument that defendant had tampered with witnesses where no evidence supported that claim, directly or inferentially); Ginsberg v. United States, 257 F.2d 950 (5th Cir. 1958) (reversing conviction where prosecutor argued that "I could probably have fifty people in here who would show that [the defendant] isn't a good character" – in response to defense counsel's argument that the prosecutor had not called any witnesses to contract the defendant's character witnesses).

9. Materially Misstating the Evidence

Berger v. United States, 295 U.S. 78, 88 (1935) (in reversing the defendant's conviction, the Supreme Court held that: "[T]he United States prosecuting attorney overstepped the bounds of that propriety and fairness . . . by misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner."); United States v. Wilson, 135 F.3d 291 (4th Cir. 1998) (reversal based on prosecutor's repeated argument that the defendant had committed a murder when no evidence supported that argument); United States v. Donato, 99 F.3d 426 (D.C. Cir. 1996) (reversal based on prosecutor's inaccurate statement concerning evidence of defendant's motive).

10. Giving Personal Opinion that the Defendant or Defense Witnesses Are “Liars” or “Lying”

Dupree v. State, 514 P.2d 425 (Okla. Crim. App. 1973) (“It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.”) (quoting from the ABA’s *Standards for Criminal Justice, Prosecution Function*, § 5.8); see also id. at 426-27 (reversing conviction in case where prosecutor argued to jurors that the defendant and his wife were “liars” in their trial testimony).

11. Improperly Using Evidence Admitted for a Limited Purpose as Substantive Evidence

United States v. Mitchell, 1 F.3d 235 (4th Cir. 1993) (reversal based on prosecutor’s heavy reliance – as substantive evidence – on witness’ prior conviction that had been offered for impeachment purposes only).

12. Making Factual Arguments Known to Be False

Miller v. Pate, 386 U.S. 1 (1967) (prosecutor violated due process by arguing to jury that defendant’s undershorts had the victim’s blood on them when in fact the prosecutor then well knew that the red substance was paint, not blood); Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994) (due process violation).

13. Misstating or Belittling Prosecution’s Burden of Proof, Defendant’s Presumption of Innocence, or “Reasonable Doubt” Standard

United States v. Roberts, 119 F.3d 1006 (1st Cir. 1997) (reversal in part based on prosecutor’s misstatement of its burden of proof and defendant’s presumption of innocence); Mahorney v. Wallman, 917 F.2d 469 (10th Cir. 1992) (habeas corpus relief granted based on prosecutor’s argument that the presumption of innocence is for the truly innocent only and the presumption disappears once some evidence of defendant’s guilt is offered); Floyd v. Meachum, 907 F.2d 347 (2d Cir. 1990) (habeas corpus relief granted in part based on prosecutor’s jury argument that the “burden of

proof beyond a reasonable doubt is a shield for the innocent . . . not a barrier to conviction for the guilty”).

14. *Ad Hominem* or Personal Inflammatory Attacks on Defendants

United States v. Ayala-Garcia, ___ F.3d ___, 2009 WL 2196081 (1st Cir. 2009) (holding that it was reversible error for the prosecutor to argue in closing argument, among other things, that the thirty-one AK-47 bullets that were confiscated saved thirty-one lives because that argument could have served no other purpose than to inflame the jury’s passions by depicting the defendants as dangerous men who needed to be put away for a long time); United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996) (reversal where, *inter alia*, prosecutor referred to defendants as “bad people” and outsiders); Martin v. Parker, 11 F.3d 613 (6th Cir. 1993) (habeas corpus relief granted in part based on prosecutor’s inaccurately comparing defendant to Adolph Hitler); Sizemore v. Fletcher, 921 F.2d 667 (6th Cir. 1990) (habeas corpus relief granted for, among other reasons, prosecutor’s class-based argument that jurors – presumably who were not wealthy – should hold defendant’s wealth against him); Hall v. United States, 419 F.2d 582 (5th Cir. 1969) (reversing conviction in part based on prosecutor’s closing argument that the defendant was a “hoodlum”); but see Darden v. Wainwright, 477 U.S. 168 (1986) (in a federal habeas corpus case, although criticizing the prosecutor’s repeated, improper, and overly emotional closing argument – including referring to the defendant as “an animal” – the Supreme Court refused to find that such improper arguments rose to the level of a due process violation).

15. Arguments “Striking the Defendant Over Counsel’s Shoulders”

Sizemore v. Fletcher, 921 F.2d 667 (6th Cir. 1990) (habeas corpus relief granted where prosecutor argued that defense attorneys helped the defendant manufacture an alibi and to “get [his] story straight”); United States v. Friedman, 909 F.2d 705 (2d Cir. 1990) (reversal where prosecutor argued that prosecutors try to punish drug dealers while defense lawyers “try to get them off” if they are paid a “high” enough fee); United States v. Murrah, 888 F.2d 24 (5th Cir. 1989) (reversing conviction in case in which, among other things, the prosecutor improperly accused the defense attorney of obstructing justice by hiding a witness when the evidence did not permit

an inference of this alleged fact).

II. “INVITED ERROR”/FAIR REBUTTAL BY PROSECUTOR

United States v. Martinez-Larraga, 517 F.3d 258 (5th Cir. 2008) (finding that prosecutor’s otherwise impermissible comments on the defendant’s post-arrest, post-*Miranda* silence were a “fair response” to comments made by defense counsel in his closing argument); United States v. Goodwin, 492 F.2d 1141, 1147 (5th Cir. 1974) (“As an advocate (a United States Attorney) is permitted to make a fair response to defense arguments. The doctrine does not, however, give him . . . a hunting license exempt from ethical constraints on advocacy.”) (citation and internal quotations omitted); see also United States v. Young, 470 U.S. 1 (1985) (discussing the “invited response” doctrine and holding that, just because defense counsel makes an improper argument, court should not automatically permit rebuttal by prosecutor that, standing alone, clearly would be improper; however, concluding that, in evaluating whether reversible error occurred, a court must “not only weigh the impact of the prosecutor’s remarks, but also must take into account defense counsel’s opening salvo”).

III. PRESERVING ERROR FOR APPEAL

Immediately upon hearing an objectionable argument by the prosecutor, defense counsel should *object in specific terms* – including invoking the specific constitutional provision that is applicable (e.g., “Objection, your honor. The prosecutor has just adversely commented on my client’s post-*Miranda* silence in violation of the Fifth Amendment right against self-incrimination.”). Some objections (such as the foregoing one) should be made at the bench or otherwise outside of the jury’s hearing (to avoid exacerbating prejudice caused by the prosecutor’s remark). Other objections, depending on the circumstances, *should* be made in the presence of the jury (e.g., “Your, I object; the prosecutor is making an argument based on non-existent evidence. The prosecution did not introduce any evidence of what she’s now claiming to be true. That’s clearly improper.”).

If the district court overrules the objection, nothing further need be done at that point. (A motion for a new trial explaining the prejudice that resulted might be worth filing in the event of a subsequent conviction.) However, if the district court *grants*

the objection, then counsel usually should move for a mistrial rather than requesting a curative instruction because an appellate court usually will hold that a curative instruction requested by the defense cured the error. See, e.g., United States v. Baker, 432 F.3d 1189, 1230 n.25 (11th Cir. 2005). If a district judge *sua sponte* submits a curative instruction, then object on the ground that you do not think a curative instruction will cure the harm (or in some cases will only exacerbate the harm, as discussed above). Move again for a mistrial; when the district court denies that motion, you will have preserved the issue for appeal.

Occasionally, you may have a strategic reason not to move for a mistrial and, instead, accept a curative instruction (such as when you think you have a good shot at winning the case and the judge's curative instruction actually will cure the harm and potentially even embarrass the prosecutor in front of jurors). Obviously, in such cases, use your best judgment in balancing the need to maximize your client's chances at trial versus his chances on appeal in the event of a conviction.

IV. CURATIVE INSTRUCTIONS

If a curative instruction is given (even if you have asked for a mistrial and the judge instead decides to give a curative instruction), be sure that the instruction given truly does seek to cure the harm. For instance, faced with an objection that the prosecutor has misstated evidence, trial judges often will say "the jury will remember what the evidence was and remember that counsel's argument are not evidence" (or words to that effect). Such a response by the judge clearly would not cure the harm. Defense counsel should ask the judge to respond in an appropriate manner instead (*e.g.*, "The prosecutor made an argument that [a certain fact was true]. There was no such evidence offered during the trial to establish that alleged fact. Therefore, you are instructed to disregard the prosecutor's statement and consider only the evidence properly admitted during the trial.").

V. APPELLATE REVIEW

"Counsel is afforded much latitude during closing argument, and this Court gives deference to a district court's finding as to whether an argument is prejudicial or inflammatory. . . . In attempting to establish that a prosecutor's improper comments constitute reversible error, the

criminal defendant bears a substantial burden. . . . We do not lightly make the decision to overturn a criminal conviction on the basis of a prosecutor's remarks alone. . . . The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict. In determining whether to reverse a defendant's conviction on the basis of improper prosecutorial argument, we consider three factors: 1) the magnitude of the prejudicial effect of the prosecutor's remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction. . . . We test the magnitude of the prejudicial effect of the prosecutor's remarks by considering them in the context of the trial and attempting to ascertain their intended effect.”

United States v. Virgen-Moreno, 265 F.3d 276, 290 (5th Cir. 2001) (citations and internal quotation marks omitted).

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