Journal of Criminal Law and Criminology

Volume 64 | Issue 1 Article 3

1973

Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument

Henry Blaine Vess

THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY
Vol. 64, No. 1

Printed in U.S.A.

WALKING A TIGHTROPE: A SURVEY OF LIMITATIONS ON THE PROSECUTOR'S CLOSING ARGUMENT

HENRY BLAINE VESS*

INTRODUCTION

The public prosecutor is responsible for the enforcement of the laws against those who disobey them. Unlike his opposing counsel, whose primary duty is to his client, the prosecutor represents all of the people within his jurisdiction. This creates in the prosecutor's office a position unique to that basic part of our judicial system, the adversary process; for it means that the accused can expect, and indeed must demand, the prosecutor to represent his interests insofar as he, too, is a member of the prosecutor's broad constituency.[1]

As a result, the prosecutor is forced to operate with one hand on the throttle and the other hand poised firmly on the brake. His primary duty is to earnestly and vigorously present the government's case, using every legitimate means to bring about a conviction.[2] It is not sufficient to convict, however; for if justice has not been done, his "clients" have been poorly represented. Therefore, the prosecutor's duty is to convict only the guilty and, moreover, to do so in a manner consistent with recognized principles of justice.[3]

The net effect of this formulation of the prosecutor's obligations is the creation of a special tension in the government's presentation of its criminal case. This is most clearly manifested in the last stage of the trial, the closing arguments.[4] The jury, reflecting its confidence in the office of the prosecutor and its respect for the individual prosecutor in particular, properly regards him as unprejudiced and impartial.[5] Thus he must refrain from doing anything intentionally or unintentionally which might improperly influence the jury and deny the defendant a fair trial.[6]

The purpose of prosecutorial closing argument,

* J.D., 1972, Northwestern University; Member of the Illinois bar. The original research and draft of this article was undertaken and submitted to Professor Fred E. Inbau as part of the Senior Research Program at Northwestern University School of Law. This paper was presented, in modified form, at the 27th Annual Short Course for Prosecuting Attorneys held at Northwestern University School of Law July 31–August 5, 1972.

NOTE: Cases noted where the conviction was reversed solely on the basis of closing argument are marked with an asterisk (*).

[1] Taylor v. United States, 413 F.2d 1095 (D.C. Cir. 1969); Jennings v. United States, 364 F.2d 513 (10th Cir. 1966); Jones v. United States, 358 F.2d 383 (8th Cir. 1966); United States *ex rel.* Lusterino v. Dros, 260 F. Supp. 13 (S.D.N.Y. 1966); Kellar v. State, 226 Ga. 432, 175 S.E.2d 654 (1970); People v. Oden, 20 Ill. 2d 470, 170 N.E.2d 582 (1960); State v. Smith, 187 Neb. 152, 187 N.W.2d 753 (1971); State v. Walton, 5 Wash. App. 150, 486 P.2d 1118 (1971).

[2] Berger v. United States, 295 U.S. 78, 88 (1935); Taylor v. United States, 413 F.2d 1095 (D.C. Cir. 1969); White v. United States, 394 F.2d 49 (9th Cir. 1968) (counsel not required to remain neutral); Jennings v. United States, 364 F.2d 513 (10th Cir. 1966); Jones v. United States, 358 F.2d 383 (8th Cir. 1966); United States v. Bronston, 326 F. Supp. 469 (S.D.N.Y. 1971) (not obliged to dwell on matters which mitigate the thrust of government's proof); State v. Hughes, 104 Ariz. 535, 456 P.2d 393 (1969) (no duty of prosecutor to point out evidence favorable to defendant); State v. Gauger, 200 Kan. 515, 438 P.2d 455 (1968); State v. Smith, 187 Neb. 152, 187 N.W.2d 753 (1971); State v. Huson, 73 Wash. 2d 660, 440 P.2d 192, *cert. denied*, 393 U.S. 1096 (1968).

[3] ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 5; Lusterino v. Dros, 260 F. Supp. 13 (S.D. N.Y. 1966); People v. Burnett, 27 Ill. 2d 510, 190 N.E.2d 338 (1963).

[4] *See* People v. Cunningham, 123 Ill. App. 2d 190, 260 N.E.2d 10 (1970) (rule that prosecutor must treat accused fairly applies to closing argument as well as to the introduction of evidence).

[5] Hall v. United States, 419 F.2d 582 (5th Cir. 1969); United States v. Grossman, 400 F.2d 951 (4th Cir. 1968); People v. Askar, 8 Mich. App. 95, 153 N.W.2d 888 (1967); Roberson v. State, 185 So. 2d 667 (Miss. 1966). The duty to maintain a modicum of impartiality and fairness raises the question whether it is ever proper for a prosecutor actively engaged in a trial to participate in the same trial in any other capacity. In Pitman v. State, 487 P.2d 716 (Okla. Crim. App. 1971), the court affirmed the conviction of a lawyer for perjury. A dissenting opinion asserted that the defendant had been denied a fair trial, since the prosecutor testified in the case in chief, became a rebuttal witness and was qualified as an expert, interrogated all but two witnesses, and made the closing arguments. In accord with the dissent in *Pitman* is State v. Hayes, 473 S.W.2d 688 (Mo. 1971). *See also* Horner v. Florida, 312 F. Supp. 1292 (M.D. Fla. 1967), where the court disapproved prosecution by a prosecutor who had formerly been the defendant's attorney.

[6] Taylor v. United States, 413 F.2d 1095 (D.C. Cir. 1969); Jennings v. United States, 364 F.2d 513 (10th Cir. 1966); People v. Pecora, 107 Ill. App. 2d 283, 246 N.E.2d 865, *cert. denied*, 397 U.S. 1028 (1969); Roberson v. State, 185 So. 2d 667 (Miss. 1966); State v. Polsky, 82 N.M. 393, 482 P.2d 257, *cert. denied*, 82 N.M. 377, 482 P.2d 241 (1971); State v. Walton, 5 Wash. App. 150, 486 P.2d 1118 (1971).

not unlike that of the defense in this regard, is to enlighten the jury and to help the jurors remember and interpret the evidence.[7] Its precise value is difficult to determine, although courts long ago recognized defense closing argument as a constitutional right, "as much a part of the trial as the hearing of evidence."[8] Nevertheless, the value of closing argument to both prosecution and defense can be assessed when considered with reference to the other stages of the trial. While not many cases are won or lost through argument alone, it can be a decisive factor, particularly if the case is a close one. Since counsel is rarely certain which case is close it is unwise and impractical to overlook this last opportunity to plead a case.[9]

The restrictions on closing argument do not prevent vigorous presentation of the prosecutor's case to the jury. The prosecutor may, of course, discuss the evidence, pointing out discrepancies and conflicts in the testimony, and argue that the evidence in the record supports and justifies a conviction.[10] He may also dwell on the evil results of the crime, urge a fearless administration of the law, and comment on the conduct of the accused.[11]

Furthermore, summation style, content, and presentation vary with each advocate and are not prohibitively limited.[12] There is no uniform legal standard against which remarks can be measured.[13] It is recognized that a successful argument depends upon a skillful discussion of facts and law, and, especially in a criminal case, the argument, "to be palatable, may require the lubrication not only of appealing organization and presentation, but of emotion as well."[14] Thus, oratory and picturesque language and illustration are each within the boundaries of permissible argument.[15]

But great latitude and freedom of expression can create problems, thereby emphasizing the precarious position of the prosecutor:

> When a prosecutor . . . oversteps the bounds of strict legal propriety, the defense is quick to use the incident as reason for an appeal to a higher court. But if the defense lawyer does the same thing, to secure acquittal, there is no appeal. Once cleared, no defendant may be retried, no matter how flagrant his attorney's actions. So, many defense counsel do everything short of punishable contempt to provoke a prosecutor into a remark . . . which an appellate court might call erroneous influence on a jury.[16]

While misconduct during summation does not always require the reversal of conviction,[17] it is

[7] United States v. Sawyer, 443 F.2d 712 (D.C. Cir. 1971); State v. Whiters, 206 Kan. 770, 481 P.2d 992 (1971).

[8] United States v. Sawyer, 443 F.2d 712 (D.C. Cir. 1971) (constitutional right to summation in sixth amendment); United States *ex rel.* Spears v. Johnson, 327 F. Supp. 1021 (E.D. Pa. 1971) (excellent discussion of the importance of summation; court granted habeas corpus relief on basis of due process clause where judge found petitioner guilty in bench trial without permitting argument); Moore v. State, 7 Md. App. 330, 254 A.2d 717 (1969) (fact that counsel did not assert right to argue did not constitute waiver); Commonwealth v. McNair, 208 Pa. Super. 369, 222 A.2d 599 (1966) (bench trial). The right to make a closing argument is recognized equally in bench and jury trials.

[9] "In those cases where counsel can make the difference, it is the closing argument more often than any other single stage of the case that determines who wins and who loses." J. KAPLAN & J. WALTZ, THE TRIAL OF JACK RUBY 310 (1965) (hereinafter cited as WALTZ).

[10] Bridges v. State, 227 Ga. 24, 178 S.E.2d 861 (1970) (right and duty to argue version of what evidence at trial proves); State v. Brown, 94 Ida. 352, 487 P.2d 946 (1971); People v. Bundy, 295 Ill. 322, 129 N.E. 189 (1920).

[11] Terhune v. State, 117 Ga. App. 59, 159 S.E.2d 291 (1967); People v. Hairston, 46 Ill. 2d 348, 263 N.E.2d 840 (1970).

[12] United States v. Lewis, 423 F.2d 457 (8th Cir. 1970); United States v. Lawler, 413 F.2d 622 (7th Cir. 1969); United States v. Dibrizzi, 393 F.2d 642 (2d Cir. 1968); Tenorio v. United States, 390 F.2d 96 (9th Cir. 1968); State v. Brooks, 107 Ariz. 320, 487 P.2d 387 (1971); Fisher v. State, 241 Ark. 545, 408 S.W.2d 894 (1966), *cert. denied*, 389 U.S. 821 (1967); People v. Pike, 71 Cal. 2d 595, 455 P.2d 776, 78 Cal. Rptr. 672 (1969); People v. Brengettsy, 25 Ill. 2d 228, 184 N.E.2d 849, *cert. denied*, 372 U.S. 948 (1962); State v. Potts, 205 Kan. 47, 468 P.2d 78 (1970); Kinnett v. Commonwealth, 408 S.W.2d 417 (Ky. Crim. App. 1966); State v. Hudson, 253 La. 992, 221 So.2d 484 (1969); Cannon v. State, 190 So. 2d 848 (Miss. 1966); State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969); State v. Maynor, 272 N.C. 524, 158 S.E.2d 612 (1968); State v. Stephens, 24 Ohio St. 2d 76, 263 N.E.2d 773 (1970); State v. Berganthal, 47 Wis. 2d 668, 178 N.W.2d 16 (1970).

[13] Smith v. State, 282 Ala. 268, 210 So. 2d 826 (1968).

[14] WALTZ, *supra* note 9, at 310. An excellent discussion of the closing arguments in the Ruby trial appears at pages 310–36.

[15] Williams v. United States, 371 F.2d 141 (10th Cir. 1967) (proper to use a "metaphorical illusion," here an unreported "rabbit story," as illustrative of circumstantial evidence); People v. Womack, 252 Cal. App. 2d 761, 60 Cal. Rptr. 870 (1967); State v. Potts, 205 Kan. 47, 468 P.2d 78 (1970); State v. Gauger, 200 Kan. 515, 438 P.2d 455 (1968); State v. Hamilton, 249 La. 392, 187 So. 2d 417 (1966) (law does not hold counsel to niceties of grammar); Cooper v. State, 490 P.2d 762 (Okla. Crim. App. 1971).

[16] Waite, *How Ethical are These Lawyers?*, READER'S DIGEST 56–60 (November, 1957), quoted in 2 F. INBAU, J. THOMPSON & C. SOWLE, CASES AND COMMENTS ON CRIMINAL JUSTICE: CRIMINAL LAW ADMINISTRATION 1191–92 (3d. ed. 1968).

[17] State v. Whiters, 206 Kan. 770, 481 P.2d 992 (1971).

well established that improper argument alone may be sufficient grounds for reversal.[18] But according fair treatment to the defendant does not require advocacy compromise. A summation may be highly damaging to the accused and still be within the bounds of propriety.[19] Vigorousness and fairness are complementary qualities in an effective presentation, at least where the goal to be achieved is what it should be, a just conviction of the guilty.

This article will focus on the limitations which the courts, in an effort to enforce adherence to the duties outlined above, have imposed on prosecutorial closing argument in the less academic atmosphere of the criminal trial. The basic purpose of the article is to present, in abbreviated form, the law in this area as reflected in relatively recent court decisions. While no conscious effort was made to exclude analysis and critique, these were at most only secondarily important.

Henceforth the terms "proper" and "improper" are used to characterize the general judicial attitude toward a particular prosecutorial comment. Cases noted where the conviction was reversed solely on the basis of closing argument are marked with an asterisk (*).[20]

The Judicial Role in Regulating Closing Argument

The trial judge is given, and must exercise, considerable discretion in evaluating the propriety of argument and in curing any alleged defects.[21] The basic reason for this is the trial court's superior position to judge the effect of counsel's remarks or conduct. In accordance with general principles of review, an appellate court will not interfere unless it finds an abuse of discretion on the part of the trial judge which prejudiced the defendant and deprived him of a fair trial.[22]

The trial court's discretionary control also covers more specific aspects of the summation. First, it decides when the arguments will be made, that is, how soon after both sides have rested or after the jury instructions have been given, depending upon the jurisdiction.[23] Second, the court sets the time limits for the arguments, normally allowing equal time to both sides.[24] What is a reasonable time is usually a function of a number of factors, including the amount and character of the testimony and other evidence, the complexity of the issues, and the time already consumed in hearing the case. It is generally better for the court to be indulgent rather than frugal in granting time,[25] but even when it is frugal, the reviewing court will place special emphasis on whether the time limits were strictly enforced.[26]

---

[18] United States v. American Radiator and Standard Sanitation Corp., 433 F.2d 174 (3d Cir. 1970). Of the approximately 1300 cases researched in preparing this article, over 10 percent were reversed on argument alone. In a good many more cases closing argument was also a factor. For a discussion of appellate review, see generally notes 250–67 *infra*, and accompanying text.

[19] Evans v. Illinois, 24 Ill. 2d 215, 181 N.E.2d 80, *cert. denied*, 372 U.S. 922 (1963).

[20] Because of the breadth of this study it is possible that some cases were inadvertently omitted. Nevertheless, an attempt was made to include all appropriate cases, including those which conflict with the general view.

[21] United States v. Sawyer, 443 F.2d 712 (D.C. Cir. 1971); United States v. Smith, 433 F.2d 1266 (5th Cir. 1970); United States v. Wilshire Oil Co. of Texas, 427 F.2d 969 (10th Cir. 1970); United States v. Mills, 366 F.2d 512 (6th Cir. 1966); Parrott v. State, 246 Ark. 672, 439 S.W.2d 924 (1969); People v. Wilson, 66 Cal. 2d 749, 427 P.2d 820, 59 Cal. Rptr. 156 (1967); Lee v. People, 170 Colo. 268, 460 P.2d 796 (1969); State v. Reed, 157 Conn. 464, 254 A.2d 449 (1969); Hart v. State, 227 Ga. 171, 179 S.E.2d 346 (1971); State v. Hephner, 161 N.W.2d 714 (Iowa 1968); State v. Hamilton, 249 La. 392, 187 So. 2d 417 (1966); Nelson v. State, 5 Md. App. 109, 245 A.2d 606 (1968); State v. Johnson, 277 Minn. 230, 152 N.W.2d 768, *cert. denied*, 390 U.S. 990 (1967); Carr v. State, 208 So. 2d 886 (Miss. 1968); State v. Richards, 467 S.W.2d 33 (Mo. 1971); State v. Mayberry, 52 N.J. 413, 245 A.2d 481 (1968); State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969); State v. Williams, 276 N.C. 703, 174 S.E.2d 503 (1970); State v. Henderson, 156 N.W.2d 700 (N.D. 1968); State v. Gairson, 484 P.2d 854 (Ore. App. 1971); State v. Peterson, 255 S.C. 579, 180 S.E.2d 341 (1971), *cert. denied*, 404 U.S. 860 (1971); Hunter v. State, 222 Tenn. 672, 440 S.W.2d 1 (1969); State v. Lane, 4 Wash. App. 745, 484 P.2d 432 (1971).

[22] United States v. Davis, 260 F. Supp. 1009 (E.D. Tenn. 1966); Hunter v. State, 222 Tenn. 672, 440 S.W.2d 1 (1969). *See generally* cases cited in note 21 *supra*.

[23] United States v. Prentiss, 446 F.2d 923 (5th Cir. 1971) (not an abuse of discretion to refuse defense counsel permission to argue on the same day that court gave its oral charge).

[24] United States v. Salazar, 425 F.2d 1284 (9th Cir. 1970); United States v. Gleeson, 411 F.2d 1091 (10th Cir. 1969) (restricting to one hour where three defendants and four-day trial); People v. Fairchild, 254 Cal. App. 2d 831, 62 Cal. Rptr. 535, *cert. denied*, 391 U.S. 955 (1967); Hart v. State, 227 Ga. 171, 179 S.E.2d 346 (1971); State v. Kay, 12 Ohio App. 2d 38, 230 N.E.2d 652 (1967) (good discussion of this point).

[25] Turner v. State, 220 So. 2d 295 (Miss. 1969). In addition, it follows from the recognition of the defense summation as a constitutional right that the judge's discretion should not be so exercised that the right to argue is effectively denied.

[26] Batsell v. United States, 403 F.2d 395 (8th Cir.), *cert. denied*, 393 U.S. 1094 (1968) (limiting to one hour proper, especially where the defense was allowed forty minutes extra); People v. Stout, 66 Cal. 2d 184,

Additionally, the trial court may decide whether the summation shall be split among members of the prosecution team,[27] and also whether the defendant who is represented by counsel may himself participate in the summation.[28]

LIMITATIONS UPON PROSECUTORIAL CLOSING ARGUMENT

THE RELATIONSHIP OF OPENING ARGUMENT TO REBUTTAL ARGUMENT

The prosecution usually makes the first closing argument and is generally granted rebuttal time in which to respond to the defense closing argument.[29] All essential points must be fairly stated in the opening argument so that the defense has an adequate opportunity to respond.[30] During the rebuttal the prosecutor may in turn only respond to the defense summation. No new line of argument may be introduced.[31] Contradiction of the original argument by the prosecution rebuttal is also not permitted since this would, in effect, constitute a new line of argument to which the defense would have no opportunity to reply.[32] If defense counsel waives its summation the trial court may in its discretion determine whether or not the prosecution may make any further argument.[33]

COMMENTING ON THE LAW

Since the purpose of argument is to enlighten the jury, the prosecutor may comment on the applicable principles of law during summation, emphasizing the theory of the government's case and the criminal law and perhaps the purposes of the particular statutes involved.[34] However, it is improper for the prosecutor to misstate the law,[35]

424 P.2d 704, 57 Cal. Rptr. 152 (1967) (time limit not error where not enforced); Robinson v. State, 415 S.W.2d 180 (Tex. Crim. App. 1967) (even if prosecutor exceeded time limit, no error where he concluded three sentences, or 123 words, after objection).

[27] State v. Davis, 462 S.W.2d 798 (Mo. 1971) (letting another prosecutor make rebuttal argument was within the discretion of the trial court).

[28] Thompson v. State, 194 So. 2d 649 (Fla. App. 1967) (where defense counsel made opening argument, it was proper to refuse defendant permission to make rebuttal argument); People v. Johnson, 45 Ill. 2d 38, 257 N.E.2d 3 (1970) (where court carefully determined that defendant wished to make his own closing argument, it was not an abuse of discretion to refuse defense counsel permission to argue thereafter).

[29] This is because the government has the heavy burden of overcoming the presumption of innocence. Statutes adopting this procedure have been held constitutional against challenge on due process and right to counsel grounds. United States *ex rel.* Parsons v. Adams, 336 F. Supp. 340 (D. Conn.), *aff'd per curiam*, 456 F.2d 257 (2d Cir. 1971); Preston v. State, 260 So. 2d 501 (Fla. 1972). The order of argument may be reversed where the defense has not put on a case. However, in State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970), the court held that where there were several defendants and only one offered evidence, it was proper for the prosecution to open and conclude, in spite of a statute which gave the defense this right where the defense put on no case.

[30] State v. Peterson, 423 S.W.2d 825 (Mo. 1968) (in opening argument prosecutor did not mention punishment, but in final argument asked for maximum sentence after defense did not mention punishment; *held*, there was prejudicial error even though the defendant was only given a three-year sentence)*.

[31] State v. Randall, 8 Ariz. App. 72, 443 P.2d 434 (1968); People v. Bundy, 295 Ill. 322, 129 N.E. 189 (1920); People v. McFadden, 31 Mich. App. 512, 188 N.W.2d 141 (1971). *But see* Hart v. State, 227 Ga. 171, 179 S.E.2d 346 (1971) (no abuse of discretion in refusing to restrict rebuttal to matters raised by defense in argument).

[32] State v. Fair, 467 S.W.2d 938 (Mo. 1971) (prosecutor in opening argument said he would not ask for the death penalty, then in closing argument told the jury it could inflict the death penalty after the defense did not argue punishment)*; State v. Wadlow, 450 S.W.2d 200 (Mo. 1970) (error to permit argument regarding punishment in rebuttal where not raised by defense). *See* Hayes v. State, 470 S.W.2d 950 (Tenn. Crim. App. 1971) (court in its discretion may allow defense attorney to respond to matters improperly discussed by prosecutor in rebuttal).

[33] People v. Wilder, 119 Ill. App. 2d 422, 256 N.E.2d 103 (1970) (proper to permit rebuttal where defendant waived argument but record revealed that defense counsel did argue); Moore v. State, 461 P.2d 1017 (Okla. Crim. App. 1969).

[34] United States v. Weiser, 428 F.2d 932 (2d Cir. 1968); People v. Lopez, 249 Cal. App. 2d 93, 57 Cal. Rptr. 441 (1967); People v. Sanchez, 65 Cal. 2d 814, 423 P.2d 800, 56 Cal. Rptr. 648 (1967); People v. June, 34 Mich. App. 313, 191 N.W.2d 52 (1971).

[35] United States v. Bohle, 445 F.2d 54 (7th Cir. 1971) (misstating burden of proof on insanity); United States v. Gambert, 410 F.2d 383 (4th Cir. 1969) (that case would have been dismissed if allegations of indictment not proved)*; United States v. Moriarty, 375 F.2d 901 (7th Cir.) *cert. denied*, 388 U.S. 911 (1967) (misstating law regarding involuntariness of confession); United States v. Murphy, 374 F.2d 651 (2d Cir. 1967) (arguing that grants of immunity should be taken as evidence that a crime was committed); Evalt v. United States, 359 F.2d 534 (9th Cir. 1966) (misstating results of verdict of not guilty by reason of insanity)*; DeFranze v. State, 46 Ala. App. 283, 241 So. 2d 125 (1970) (misstating rules of evidence); State v. Makal, 194 Ariz. 475, 455 P.2d 450 (1969) (arguing defendant should be found guilty without regard to issue of insanity)*; State v. Sorensen, 104 Ariz. 503, 455 P.2d 981 (1969) (misstating law regarding introduction of character testimony)*; State v. Cortez, 101 Ariz. 214, 418 P.2d 370 (1966) (arguing that judge would have directed verdict were the evidence insufficient to convict); People v. Modesto, 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967), *cert. denied*, 389 U.S. 1009 (1967) (misstating law regarding insanity); People v. Asta, 251 Cal. App. 2d 64, 59 Cal. Rptr. 206 (1967) (suggesting that court in admitting evidence had weighed it for the jury); Washam v. State, 235 A.2d 279 (Del. 1967) (arguing that judge would have directed verdict were the evidence insuffi-

at least when done intentionally,[36] or to correctly state irrelevant law,[37] since this only confuses the jury and prejudices the accused. In any event, the prosecutor must not instruct the jury on the law, since this is the exclusive task of the court.[38]

While all jurisdictions permit comment upon the law within these bounds, there is some conflict concerning the propriety of actually reading to the jury from cases, texts, or statutes. Jurisdictions which prohibit reading assert that this rule establishes a standard of propriety separating the impartial role of the judge from the adversary role of counsel, thus insuring that the role of the judge in instructing the jury is not usurped by counsel and the impartiality of the forum not destroyed.[39] Nevertheless, it may be permissible to read from the instructions when they are given prior to the arguments.[40]

Jurisdictions which hold that it is within the trial court's discretion to permit the reading of the law from approved texts or reported cases from the jurisdiction's appellate courts, which are usually the courts of last resort, do so on the premise that counsel's alternative statements of correct law may be helpful to the jury rather than confusing.[41] When reading is permitted the court must be careful to insure that: (1) any reading and discussion of cases are kept within reasonable limits, both as to the number read and the time consumed;[42] (2) only cases on point from the jurisdiction or statements of law in accord with such are read;[43] and (3) the purpose of the reading is solely to clarify the law in the case and not to prejudice the jury against the accused.[44]

When counsel desires to read from cases to the jury, or when there is a question regarding the accuracy or relevancy of a proposed statement of law, the court should be given an opportunity in advance to designate the portions which may be read and the principles which may be discussed.[45]

---

cient to convict); People v. Weinstein, 35 Ill. 2d 467, 220 N.E.2d 432 (1966) (repeatedly misstating the burden of proof); State v. Kirtdoll, 206 Kan. 208, 478 P.2d 188 (1970) (failing to state all elements of offense); State v. Shilow, 252 La. 1105, 215 So. 2d 828 (1968) (misstating burden of proof); People v. Lewis, 37 Mich. App. 548, 195 N.W.2d 20 (1972) (misstating law regarding insanity)*; State v. Molatore, 474 P.2d 7 (Ore. App. 1970) (that acquittal on prosecution for sale of narcotics would constitute double jeopardy for possession prosecution)*; State v. Gosser, 50 N.J. 438, 236 A.2d 377 (1967) (should find defendant guilty even if believed him not guilty by reason of insanity); People v. Fields, 27 App. Div. 2d 736, 277 N.Y.S.2d 21 (1967) (jury should be governed by moral law "Thou Shalt Not Kill"); State v. Myers, 26 Ohio St. 2d 190, 271 N.E.2d 245 (1971) (misstating nature of presumption)*; Levasseur v. State, 464 S.W.2d 315 (Tenn. 1971) (misstating sentencing law). *But see* Meyer v. Commonwealth, 472 S.W.2d 479 (Ky. Ct. App. 1971) ("Thou Shalt Not Kill" proper in response to defense argument on the cruelty of the death penalty). *See* Murray v. State, 249 Ark. 887, 462 S.W.2d 438 (1971); People v. Hall, 1 Ill. App. 3d 949, 275 N.E.2d 196 (1971) (misstating law not error where defense counsel interrupted before thought completed).

[36] Parker v. State, 221 A.2d 599 (Del. 1966) (statement not calculated to mislead jury); People v. Pecora, 107 Ill. App. 2d 283, 246 N.E.2d 865, *cert. denied*, 397 U.S. 1028 (1969) (unintentional misstatements generally not error); Day v. State, 2 Md. App. 334, 234 A.2d 894 (1967) (that argument not entirely accurate is of little moment if not false or plainly prejudicial).

[37] State v. Harris, 258 La. 720, 247 So. 2d 847 (1971) (where penalty is responsibility of judge alone, sentencing law is not proper subject of argument); State v. Hagerty, 251 La. 477, 205 So. 2d 369 (1967) (proper to refuse to permit reading of irrelevant statutes). *See* Clay v. State, 122 Ga. App. 677, 178 S.E.2d 331 (1970) (trial court did not err in overruling defense objection to recital from previous case-law construction of statute that a strong presumption arises that charge is true when a party does not explain or refute evidence, even though there was a statutory prohibition to give substance of the statute in a criminal case, where defense counsel did not state the basis for his objection).

[38] State v. Smith, 422 S.W. 2d 50 (Mo. 1967). *Cf.* People v. Malone, 126 Ill. App. 2d 265, 261 N.E.2d 776 (1970) (proper to refuse defense counsel permission to comment on the meaning of reasonable doubt).

[39] People v. June, 34 Mich. App. 313, 191 N.W.2d 52 (1972) (reading statute improper); State v. Shelton, 71 Wash. 2d 838, 431 P.2d 201 (1967).

[40] *See* State v. Kearney, 75 Wash. 2d 168, 449 P.2d 400 (1969) (should not reverse solely because law read to jury from source other than instructions).

[41] United States v. Sawyer, 443 F.2d 712 (D.C. Cir. 1971); People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393, *cert. denied*, 389 U.S. 850 (1967); Wilson v. State, 223 Ga. 531, 156 S.E.2d 446 (1967) (proper to read from United States Supreme Court opinion); People v. Preston, 341 Ill. 407, 173 N.E. 383 (1930); Phillips v. State, 6 Md. App. 56, 250 A.2d 111 (1969) (proper to refer to opinions, including lower court opinions if none from appellate courts exist, and texts, since in Maryland jury is judge of law as well as facts).

[42] People v. Spaulding, 309 Ill. 292, 141 N.E. 196 (1923).

[43] People v. Lloyd, 304 Ill. 23, 136 N.E. 505 (1922) (improper to read from a federal lower court decision in state prosecution).

[44] Higgenbotham v. State, 124 Ga. App. 489, 184 S.E.2d 231 (1971) (portion sought to be read not germane to issues); McKeever v. State, 118 Ga. App. 386, 163 S.E.2d 919 (1968) (same); People v. Andrae, 305 Ill. 530, 137 N.E. 496 (1922) (proper to refuse prosecutor permission to read from opinion in prior prosecution of defendant for murder, though the case arose from the same incident, since the questions of law were distinct); People v. Rees, 268 Ill. 585, 109 N.E. 473 (1915) (error to read from opinion which held evidence sufficient to convict one jointly indicted with defendant)*.

[45] United States v. Sawyer, 443 F.2d 712 (D.C.

If counsel's view of the law differs from the court's view, only the latter should be presented.

COMMENTING ON THE EVIDENCE

> A trial is a patchwork of bits and pieces of evidence. A jury may not appreciate the significance of many of these scraps until they have been pieced together by an artful advocate.[46]

The prosecution and defense counsel are likely to take very different, possibly diametrically opposed, approaches to piecing together the evidence in closing argument. Hence, as noted previously, the court must confer great latitude in the manner, style, and content of summation.[47]

The general rule regarding comment on the evidence is that such comment is proper if it is either proved by direct evidence or is a fair and reasonable inference from the facts and circumstances proved and has bearing on an issue.[48] The prosecutor is permitted to argue from his own understanding and interpretation of the evidence[49] and the defense cannot be heard to complain merely because the prosecutor's reasoning is faulty or his deductions illogical, though the defense may definitely make such points in its own summation.[50]

An inference is defined as "a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted."[51] For example, where there was testimony that a fingerprint was found in a red substance, and that the victim was severely beaten, the inference that the print was left in blood was proper.[52] Similarly, it was within bounds to argue that someone other than the accused punched his time card where there was testimony that there was no way of knowing who punched a particular card;[53] that the defendant loaded his gun with buckshot where such was recovered from the victim's body;[54] and that, in view of testimony from a witness that she heard the sound of something hitting the wall and then the sound of the child crying, the defendant, despite his denials, threw his stepchild against the wall.[55] But there is some question whether it is proper to comment on the poor financial status of the accused as a possible motive for robbery or a similar offense.[56]

When the prosecutor is merely restating the evidence or testimony his remarks are entirely proper.[57] Also appropriate is comment on the evil results of the crime if apparent from the evidence.[58]

Cir. 1971); People v. Calpito, 9 Cal. App. 3d 212, 88 Cal. Rptr. 64 (1970) (the practice of reading portions of proposed instructions during argument is discouraged, but within trial court's discretion); People v. Spaulding, 309 Ill. 292, 141 N.E. 196 (1923).

[46] WALTZ, *supra* note 9, at 311.

[47] Note 12, *supra*, and accompanying text.

[48] United States v. Cotter, 425 F.2d 450 (1st Cir. 1970); United States v. Borwing, 390 F.2d 511 (4th Cir. 1968); United States v. Dibrizzi, 393 F.2d 642 (2nd Cir. 1968); Wakasan v. United States, 367 F.2d 639 (8th Cir. 1966); McCain v. State; 46 Ala. App. 627, 247 So. 2d 383 (1971); Gafford v. State, 440 P.2d 405 (Alaska 1968); State v. Propp, 104 Ariz. 466, 455 P.2d 263 (1969); People v. Hines, 66 Cal. 2d 348, 425 P.2d 557, 57 Cal. Rptr. 757 (1967); Wesley v. United States, 233 A.2d 514 (D.C. Ct. App. 1967); Manor v. State, 223 Ga. 594, 157 S.E.2d 431 (1967) (where defense counsel wanted to amend his opening statement after prosecutor did not offer to prove certain matters which had been proved in prior murder trial, it was not error to restrict argument to evidence which was submitted at second trial); People v. Porterfield, 131 Ill. App. 167, 268 N.E.2d 537 (1971); State v. Potts, 205 Kan. 47, 468 P.2d 78 (1970); Hunt v. Commonwealth, 466 S.W.2d 957 (Ky. Crim. App. 1971); State v. Smith, 257 La. 1109, 245 So. 2d 327 (1971); People v. Gill, 31 Mich. App. 395, 187 N.W.2d 707 (1971); State v. Coleman, 186 Neb. 571, 184 N.W.2d 732 (1971); State v. Mayberry, 52 N.J. 413, 245 A.2d 481 (1968); State v. Santillanes, 81 N.M. 185, 464 P.2d 915 (1970); People v. Griffin, 29 N.Y.2d 91, 272 N.E.2d 477, 323 N.Y.S.2d 964 (1971); State v. Stephens, 24 Ohio St. 2d 76, 263 N.E.2d 773 (1970); Cooper v. State, 490 P.2d 762 (Okla. Crim. App. 1971); State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971); State v. Kindvall, 191 N.W.2d 289 (S.D. 1971); Briggs v. State, 463 S.W.2d 161 (Tenn. App. 1970), *cert denied*, 400 U.S. 997 (1971).

[49] United States v. Baskin, 449 F.2d 729 (3d Cir. 1971); State v. Jackson, 258 La. 632, 247 So. 2d 558 (1971).

[50] People v. Washington, 71 Cal. 2d 1061, 458 P.2d 479, 80 Cal. Rptr. 567 (1969).

[51] BLACK'S LAW DICTIONARY 917 (Rev. 4th ed. 1968).

[52] People v. Gill, 31 Mich. App. 395, 187 N.W.2d 707 (1971).

[53] United States v. Alexander, 415 F.2d 1352 (7th Cir. 1969).

[54] Patrick v. State, 245 Ark. 923, 436 S.W.2d 275 (1969).

[55] People v. Winstead, 90 Ill. App. 2d 167, 234 N.E.2d 175 (1967).

[56] *Compare* People v. Fleming, 54 Ill. App. 2d 457, 203 N.E.2d 716 (1964) (comment on indebtedness proper) *with* McAllister v. State, 44 Ala. App. 511, 214 So. 2d 862 (1968) (reference to former affluence improper); State v. Copeland, 94 N.J. Super. 196, 227 A.2d 523 (1967) (no evidence of impecuniosity should be admitted or commented upon when it will tend to prove motive or willingness to commit crime); People v. Moore, 26 App. Div. 2d 902, 274 N.Y.S.2d 518 (1966) (reference to fact defendant a welfare recipient improper).

[57] United States v. Izzi, 427 F.2d 293 (2d Cir. 1970) (accusation that defendant had sought to diguise his handwriting in given exemplar was based on expert testimony); Palmore v. State, 283 Ala. 501, 218 So. 2d 830 (1969) (argument that defendant had tortured victim where injuries were shown); People v. Hines, 66 Cal. 2d 348, 425 P.2d 557, 57 Cal. Rptr. 757 (1967).

[58] People v. Daugherty, 43 Ill. 2d 251, 253 N.E.2d

Conversely it follows from the general rule that the prosecutor's remarks are improper if not based directly on the evidence,[59] if not reasonably inferred from the evidence,[60] or if they relate to matters outside the issues' in the case.[61] Such comments are speculation and conjecture which may confuse and mislead the jury.[62] Furthermore, argument going beyond the evidence tends to make the prosecutor a witness. His unsworn testimony and personal beliefs, although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.[63]

For these same reasons[64] it is improper to refer

389 (1969) (stating that prosecuting witness could be considered a passive homosexual as a result of defendant's taking indecent liberties with him where unsupported by the evidence); People v. Oparka, 85 Ill. App. 2d 33, 228 N.E.2d 291 (1967) (remarks that it would be a long time before rape victim recovered from the shock to her nervous system was improper); State v. Fleury, 213 Kan. 888, 457 P.2d 44 (1969) (argument that rape victim suffered mental impairment improper where no evidence; two judges in dissent thought the argument was prejudicial error).

[59] United States v. Hoskins, 446 F.2d 564 (9th Cir. 1971) (reference to conversation prosecutor had with witness before trial improper, but not reversible error where the witness at trial testified to everything prosecutor had said); United States v. Small, 443 F.2d 497 (3d Cir. 1971) (asserting defendant had been a fugitive for six weeks once he knew that he was wanted where not supported by evidence)*; Hanley v. United States, 416 F.2d 1160 (5th Cir. 1969) (going outside record to describe person as defendant's brother-in-law); Horner v. Florida, 312 F. Supp. 1292 (M.D. Fla. 1967) (facts not in record and unsupported charges)*; State v. Williams, 107 Ariz. 262, 485 P.2d 832 (1971) (reference to increase in crime rate in city where not in evidence); Wooten v. State, 224 Ga. 106, 160 S.E.2d 403 (1969) (should not introduce any new fact into record in argument); People v. Romero, 36 Ill. 2d 315, 223 N.E.2d 121 (1967) (unfounded assertions that defendant started his girlfriend on heroin and made a trip to get drugs); People v. Griffin, 29 N.Y.2d 91, 272 N.E.2d 477, 323 N.Y.S.2d 964 (1971) (where identification in issue, argument that defendant had recently inflicted wound above his eye to create a distinguishing facial mark, where not sustained by evidence and where jury obviously considered it, requesting a magnifying glass to examine a photograph of defendant)*; Bates v. State, 483 P.2d 1384 (Okla. Crim. App. 1971) (stating that defendant's adoptive parents thought him lazy and shiftless where no evidence). *See* People v. Rhone, 267 Cal. App. 2d 652, 73 Cal. Rptr. 463 (1968) (report of National Advisory Commission on Civil Disorders not a proper subject of comment); People v. Donovan, 35 App. Div. 2d 934, 316 N.Y.S.2d 121 (1967) (reference to Senate Rackets Investigation Committee and Vito Genovese family irrelevant and highly prejudicial).

[60] People v. Farrell, 349 Ill. 129, 181 N.E. 703 (1932) (assertion that it was natural to presume that piano boxes transported by defendant contained gasoline, where no evidence); State v. Iverson, 251 La. 425, 204 So. 2d 772 (1967) (had sheriff not taken statement on night of offense, defendant would have claimed at trial that victim was armed); State v. Jones, 277 Minn. 174, 152 N.W.2d 67 (1967) (where evidence showed that co-defendant's accomplice shot with right hand, and defendant was left-handed, improper to argue: "It may be a little awkward to handle a rifle or shotgun with either hand, but this isn't true with a handgun. We know this from television by the old-timers when they were in spots like this."); State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App. 1971) (argument that accused contracted hepatitis from injecting himself with heroin was improper where prosecutor was not permitted to elicit testimony that hepatitis could be so contracted and the crime charged was selling narcotics); People v. Schatz, 37 App. Div. 2d 584, 322 N.Y.S.2d 802 (1971) (suggesting defendants had motive for burning their own building and that it was over-insured where the only evidence was to the contrary)*.

[61] United States v. Craft, 423 F.2d 829 (9th Cir. 1970) (stating defendant refused induction after trip to induction center where charge was failing to report for induction); Maguire v. United States, 358 F.2d 442 (10th Cir. 1966) (even if jury believed defendant, his conduct would amount to extortion, where extortion was not charged); Carr v. State, 44 Ala. App. 40, 202 So. 2d 59, *cert. denied*, 390 U.S. 969 (1967) (reference to "Thou Shalt Not Kill" in robbery prosecution where victim died of unrelated causes); People v. Washington, 71 Cal. 2d 1061, 458 P.2d 479, 80 Cal. Rptr. 567 (1969) (that defendant was seeking a sexual thrill when he searched a female robbery victim during the commission of a prior crime)*; People v. McMillan, 130 Ill. App. 2d 633, 264 N.E.2d 554 (1970) (referring to defendant as "turning on teeny boppers" where charge was possession)*; Killie v. State, 14 Md. App. 465, 287 A.2d 310 (1972) (introducing homosexuality during argument in drug possession prosecution)*; People v. Plautz, 28 Mich. App. 621, 184 N.W.2d 761 (1970) (asserting defendant had stolen property where charge was receiving and concealing, where otherwise there was no way to infer possession in county in which case tried)*; State v. Polsky, 82 N.M. 393, 482 P.2d 257, (Ct. App. 1971); State v. Young, 7 Ohio App. 2d 194, 220 N.E.2d 146 (1966) (repeatedly arguing that defendant was guilty of aiding and abetting murder where charge was harboring a felon)*; Barron v. State, 479 P.2d 614 (Okla. Crim. App. 1971) (where charge was drunk driving, argument that defendant had run over and killed boy, which did not occur)*; Dishman v. State, 460 S.W.2d 855 (Tenn. App. 1970) (arguing sale of narcotics where crime charged was possession); Johnson v. State, 467 S.W.2d 247 (Tex. Crim. App. 1971) (use of "riot" in prosecution for injuring property belonging to another); Kemph v. State, 464 S.W.2d 112 (Tex. Crim. App. 1971) (referring to seduction of murder victim's sister where no evidence of such)*.

[62] Kirk v. State, 227 So. 2d 40 (Fla. App. 1969); Hanlon v. State, 441 P.2d 486 (Okla. Crim. App. 1968); People v. Schatz, 37 App. Div. 2d 584, 322 N.Y.S.2d 802 (1971).

[63] United States v. Cotter, 425 F.2d 450 (1st Cir. 1970); Rhodus v. People, 160 Colo. 407, 418 P.2d 42 (1966) (argument based upon prosecutor's own experience in many cases, improper); Wilson v. State, 261 Md. 551, 276 A.2d 214 (1971); People v. Schatz, 37 App. Div. 2d 584, 322 N.Y.S.2d 902 (1971); People v. Allen, 26 App. Div. 2d 573, 271 N.Y.S.2d 134 (1966).

[64] State *ex rel.* Black v. Tahash, 280 Minn. 155, 158 N.W.2d 504 (1968) (what is inadmissible directly

to specific evidence which was never introduced[65] or to the existence of other evidence not in the record.[66] It is also improper to refer to evidence which was excluded by the court,[67] except in certain instances where there is testimony regarding the excluded or unintroduced evidence.[68] It may be improper to refer to evidence which was improperly admitted,[69] or to evidence which was excluded by an agreement between counsel.[70] When there is more than one defendant, and evidence is admitted but restricted to use against less than all of the co-defendants, the prosecutor's remarks must conform to the restrictions.[71]

In conformity to the general rule and the enun-

---

cannot be injected by indirection; the prosecution is not permitted to implant insinuations and innuendoes which suggest to the jury that there exists other evidence of guilt which is not admissible).

[65] United States v. Hestie, 439 F.2d 131 (2d Cir. 1971) (comment on Jencks Act report); Reichert v. United States, 359 F.2d 278 (D.C. Cir. 1966) (references to witness's statement which was not in evidence)*; People v. Laursen, 264 Cal. App. 2d 932, 71 Cal. Rptr. 71 (1968) (accomplice's confession, not in evidence)*; State v. Hopper, 251 La. 77, 203 So. 2d 222 (1967) (there were many pictures which could not be shown to the jury); People v. Hider, 12 Mich. App. 526, 163 N.W.2d 273 (1968) (argument that inadmissible police report would speak for itself if defense cared to introduce it); People v. Tucker, 33 App. Div. 2d 823, 305 N.Y.S.2d 569 (1969) (reference to inadmissible prior statement by witness)*.

[66] United States v. American Radiator and Standard Sanitation Corp., 433 F.2d 174 (3rd Cir. 1970) (implying the existence of damaging evidence outside the record); State v. Hunt, 8 Ariz. App. 514, 447 P.2d 896 (1968) (there were certain things that could not be introduced); Songer v. State, 464 P.2d 763 (Okla. Crim. App. 1969); Joyner v. State, 436 S.W.2d 141 (Tex. Crim. App. 1969) (there were many things that could not be introduced at trial, and the prosecutor was mad and sorry that he could not bring them in)*; State v. Ranicke, 3 Wash. App. 892, 479 P.2d 135 (1970) (that case could have gone on for two weeks had prosecution presented all the evidence in detail and two hundred witnesses could have been called)*. *See* State v. Smith, 187 Neb. 152, 187 N.W.2d 753 (1971) (explaining police failure to search premises because they were prevented by law from doing so).

[67] Garris v. United States, 390 F.2d 862 (D.C. Cir. 1968) (use of excluded evidence in argument not waived by failure to object); Bowers v. Coiner, 309 F. Supp. 1064 (S.D. W. Va. 1970) (argument the defendant "brandished that gun" and "upon this evidence" jury should convict, where gun had been displayed during testimony by police officer but had then been ruled inadmissible)*; People v. Brown, 3 Ill. App. 3d 1022, 279 N.E.2d 765 (1972)*; People v. Carpenter, 131 Ill. App. 2d 187, 266 N.E.2d 478 (1970) (abstract only); State v. Perry, 274 Minn. 1, 142 N.W.2d 573 (1966) (references to polygraph test); State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App. 1971); People v. Adams, 21 N.Y.2d 397, 235 N.E.2d 214, 288 N.Y.S.2d 255 (1968)*; State v. Green, 70 Wash. 2d 955, 425 P.2d 913 (1967), *cert. denied*, 389 U.S. 1023 (1967) (alluding to fact defendant would not talk to detective when arrested, where detective's statement was inadmissible). *See* United States *ex rel.* Garcia v. Follette, 417 F.2d 709 (2d Cir. 1969) (reference to gun which had been excluded was trial error without constitutional dimension).

[68] People v. Sheets, 251 Cal. App. 2d 759, 59 Cal. Rptr. 777 (1967) (referring to tan coat on back seat of defendant's car where the coat was not in evidence but there was testimony regarding it); State v. Potts, 205 Kan. 47, 468 P.2d 78 (1970) (impeaching statement where question and answer were in record)*; People v. Ruppuhn, 25 Mich. App. 62, 180 N.W.2d 900 (1970) (mentioning blood and hairpiece where neither was in evidence, but there was testimony regarding them); State v. Olek, 288 Minn. 235, 179 N.W.2d 320 (1970) (state may comment on physical evidence which for technical reasons was excluded if there is properly admitted testimony referring to the excluded object); Dickey v. State, 444 P.2d 373 (Wyo. 1968) (where knife defendant admitted was his was shown to jury and testimony regarding it given, proper to refer to it in argument whether it was admitted or not).

[69] United States v. Guglielmini, 384 F.2d 602 (2d Cir. 1967) (argument based on evidence which should not have been admitted was improper); State v. Madison, 281 Minn. 170, 160 N.W.2d 680 (1968), *cert. denied*, 390 U.S. 990 (1968) (improper to admit testimony regarding identification of defendant from police pictures and to permit comment). *See* Lenzi v. State, 456 S.W.2d 99 (Tex. Crim. App. 1970) (argument proper if evidence admissible); State v. Hoover, 257 La. 877, 244 So. 2d 818 (1971) (referring to report as in evidence when not but testimony was. *Compare* Jackson v. State, 465 S.W.2d 642 (Mo. 1971) (proper to use and refer to physical evidence in argument, and absent a showing of inadmissibility it must be assumed that the evidence was properly before the jury) *with* State v. Propp, 104 Ariz. 466, 455 P.2d 263 (1969) (the fact that evidence might have been excluded if objected to does not preclude the prosecutor from referring to it in argument). Precluding comment on improperly admitted evidence may require too much foresight on the part of the prosecutor, though.

[70] People v. Mwathery, 103 Ill. App. 2d 114, 243 N.E.2d 429 (1968) (where the prosecutor agreed not to refer to a certain statement but did so anyway, the court said this action might amount to reversible error, but reversed on other grounds). In United States v. Spenard, 438 F.2d 717 (2d Cir. 1971), the court held that it was proper to argue to the jury that there was no insanity issue in the case regardless of the fact that (1) the government had previously agreed to dismiss the case if the defendant would accept a commitment to a state hospital, or (2) the government had a record of the defendant's prior mental disorder. The court reasoned that to hold otherwise would deny the government the opportunity to attempt to dispose of a case by trial or plea, on pain of being barred from subsequent prosecution. These two cases are not inconsistent, since *Mwathery* concerned an explicit agreement regarding the conduct of the trial, while *Spenard* involved at best an implicit understanding in pre-trial negotiations. For cases recognizing the general validity of agreements between counsel, *see* United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969) and Commonwealth v. Benton, 356 Mass. 447, 252 N.E.2d 891 (1969).

[71] People v. McKendall, 30 App. Div. 2d 717, 290 N.Y.S.2d 987 (1968) (reading portions of co-defendant's confession and suggesting that the "other person" mentioned in it was the defendant, where the court had restricted the evidence to the co-defendant who made the confession)*.

ciated policies, it is naturally improper to misstate the evidence[72] or contradict the record.[73] These may not be grounds for reversal, however, where the mistake is slight or inadvertent.[74]

There is one recognized exception to the rule that remarks not based in the evidence are improper; such remarks are proper if they concern matters of general knowledge or experience.[75] Usually such comments are made by the prosecutor for illustrative purposes or dramatic effect and refer to historical facts, public personalities, principles of divine law, biblical teachings, or prominent current events in the community or the nation.[76] In addition, the statements may also be

[72] United States v. Stanley, 455 F.2d 644 (4th Cir. 1972); Haynes v. United States, 427 F.2d 152 (9th Cir. 1970) (asserting that defendant's prior conviction was for possession of heroin rather than marijuana); Corley v. United States, 365 F.2d 884 (D.C. Cir. 1966) (erroneous account of alibi testimony where the case was close)*; Smith v. State, 282 Ala. 268, 210 So. 2d 826 (1968) (arguing that fingerprints were present when they were not)*; People v. Graves, 263 Cal. App. 2d 719, 70 Cal. Rptr. 509 (1968) (misstating defendant's testimony as to prior convictions); People v. Durant, 105 Ill. App. 2d 216, 245 N.E.2d 41 (1969), *aff'd sub. nom.* People v. Wilson, 46 Ill. 2d 376, 263 N.E.2d 856 (1970) (attributing to victim statements not in record); State v. Miner, 14 Ohio St. 2d 232, 237 N.E.2d 400 (1968) (misstating testimony of officer so that it seemed victim had identified defendant, when he had not done so)*; Mills v. State, 12 Md. App. 449, 279 A.2d 473 (1971) (attributing testimony to defendant rather than witness); Smith v. State, 446 S.W.2d 317 (Tex. Crim. App. 1969) (in prosecution for raping niece, stating that she was the defendant's daughter); State v. Ross, 290 A.2d 38 (Vt. 1972) (argument that defendant was an alcoholic, where no such evidence, in drunk driving prosecution)*. *See also* State v. Jenkins, 249 S.C. 570, 155 S.E.2d 624 (1967).

[73] Miller v. Pate, 386 U.S. 1 (1967) (referring to blood on shorts when prosecution knew it was actually paint)*; United States v. Guajardo-Melendez, 401 F.2d 35 (7th Cir. 1968) (arguing that testimony of undercover agent implicated defendant when it did not); King v. United States, 372 F.2d 383 (D.C. Cir. 1966) (stating psychiatrist's testimony in a fashion plainly contrary to record)*; Smith v. State, 282 Ala. 268, 210 So. 2d 826 (1968) (argument that one of defendant's fresh fingerprints was found on window shade at scene of crime, where no evidence)*; Kirk v. State, 227 So. 2d 40 (Fla. App. 1969) (assertion that defense had represented witness who had not been called as vital to its case where false)*; State v. Hephner, 161 N.W.2d 714 (Iowa 1968) (that chief prosecution witness was acquitted with defendant when he was not); People v. Green, 27 Ill. 2d 39, 187 N.E.2d 708 (1963) (asserting informer not still a government employee when federal agent had testified that he was); People v. Kirby, 4 Mich. App. 201, 144 N.W.2d 651 (1966) (argument that defendant was not ever in a certain city, as his alibi asserted, was not only an expression of opinion but contrary to information in prosecutor's possession); State v. Streitz, 276 Minn. 242, 150 N.W.2d 33 (1967) (that defendant had failed to take intoximeter test where defendant's testimony indicated that he had consented but was not given test)*; State v. Ward, 457 S.W.2d 701 (Mo. 1970) (misstating that defendant's parole has been revoked); People v. Williams, 37 App. Div. 2d 686, 323 N.Y.S.2d 377 (1971) (after using a prior statement to impeach witness, prosecutor argued that witness had testified as set forth in statement)*; Barron v. State, 479 P.2d 614 (Okla. Crim. App. 1971); State v. McGee, 52 Wis. 2d 736, 190 N.W.2d 893 (1971) (assertion that the only eyewitness had testified where the evidence showed that there were others). *See also* Bates v. State, 483 P.2d 1384 (Okla. Crim. App. 1971).

[74] United States v. Hudson, 432 F.2d 413 (9th Cir. 1970) (where prosecution stated carelessly his recollection of evidence, where there was no such evidence, it was not error because prosecution correctly stated that jury's recollection was to control, court gave the correct instruction, and defense counsel took advantage of an opportunity to reply to the alleged misstatement); People v. Beivelman, 70 Cal. 2d 60, 447 P.2d 913, 73 Cal. Rptr. 521 (1968) (unintentional misstatement); Fernandez v. People, 490 P.2d 690 (Colo. 1971) (misstatements not error where done honestly and unintentionally and three witnesses correctly stated facts); People v. Weaver, 18 Ill. 2d 108, 163 N.E.2d 483 (1960) (misstatements not a material factor in conviction); People v. Pecora, 107 Ill. App. 2d 283, 246 N.E.2d 865, *cert. denied*, 397 U.S. 1028 (1969); Wickware v. Commonwealth, 444 S.W.2d 272 (Ky. Crim. App. 1969) (slightly inaccurate statement); State v. Hoover, 257 La. 877, 244 So.2d 818 (1971); Commonwealth v. Martin, 357 Mass. 190, 257 N.E.2d 444 (1970) (stating substantially what witness had said, though with some inadvertent errors); People v. Padula, 34 Mich. App. 302, 191 N.W.2d 73 (1971) (not intentionally inaccurate); State v. Davidson, 44 Wis. 2d 177, 170 N.W.2d 755 (1969) (calling defendant wrong name).

[75] United States v. Browning, 390 F.2d 511 (4th Cir. 1968); State v. Williams, 107 Ariz. 262, 485 P.2d 832 (1971); People v. Smith, 118 Ill. App. 2d 65, 254 N.E.2d 596 (1969) (abstract only) (exhorting the jury to use their own experience in use of telephone in weighing evidence given by defense witness in regard to phone going dead was proper and did not constitute the giving of expert testimony by the prosecutor though no evidence on the point was in the record); State v. Smith, 257 La. 1109, 245 So. 2d 327 (1971). *See* Embrey v. State, 283 Ala. 110, 214 So. 2d 567 (1968); Bagley v. State, 247 Ark. 113, 444 S.W.2d 567 (1969); State v. Maynor, 272 N.C. 524, 158 S.E.2d 612 (1968). *See also* cases cited in notes 76 & 77 *infra*.

[76] United States v. Weiser, 428 F.2d 932 (2d Cir. 1969); Wright v. State, 279 Ala. 543, 188 So. 2d 272 (1966) (Biblical analogy); Robinson v. State, 249 So. 2d 872 (Ala. Crim. App. 1971) (reference to recent fire bombings in city in arson prosecution); Martin v. State, 223 Ga. 649, 157 S.E.2d 458 (1967) (argument that returning defendant to society someday would be greater danger than threat of world communism and Viet Cong); People v. Lion, 10 Ill. 2d 208, 139 N.E.2d 757 (1957) (comment upon character testimony for defendant that "Alger Hiss, the convicted communist, had some perfect testimonials," was said to be perhaps improper). *But see* United States v. Cotter, 425 F.2d 450 (1st Cir. 1970) (argument at time of first moon landing in income tax evasion case that if people do not pay their taxes there will be no more moon landings, improper); McKeever v. State, 118 Ga. App. 386, 163 S.E.2d 919 (1969) (defendant more of a threat to lives of people of Atlanta

permitted where they concern the interpretation of the evidence in the case.[77]

PROSECUTORIAL CONDUCT DURING ARGUMENT

General Actions

The considerable latitude permitted the prosecutor in commentary is equally applicable to his conduct during summation. Thus it is generally proper for him to move freely about the courtroom. However, the prosecutor should not sit in the witness chair while delivering his argument since it might give the jury the impression that the argument is testimonial in nature or possibly suggest the truth of the statements made.[78] Also because of the potential impact on the jurors, addressing individual jurors has been repeatedly disapproved.[79] Similarly, remarks directed to the defendant are not condoned.[80]

As indicated above, in some circumstances the prosecutor may read the law to the jury from reported cases or approved texts.[81] It is also proper to read from and comment upon books, records, or documents which are properly before the court,[82] though any reference to a change of venue in the case is disallowed.[83] Counsel's recollection may be refreshed from the stenographer's minutes,[84] but it is proper to read from the transcript only when the defense concurs that the matter is not in dispute.[85] Where the testimony is disputed, reading is not permitted, on the theory that the jury will decide the thrust of such testimony.[86] While the prosecutor may refer to a memorandum or personal notes regarding the defense summation,[87] it is not proper to read testimony from a personal memorandum rather than the transcript since the memorandum may emphasize the prosecutor's version of the testimony.[88]

Use of Real and Demonstrative Evidence

The use of and reference to admitted real evidence is widely recognized as proper, so long as the action portrayed conforms with that indicated in the record.[89] For example, it was permissible

than Viet Cong, improper); State v. Spence, 271 N.C. 23, 155 S.E.2d 802 (1967) (proper to refuse defense counsel permission to argue the Sacco-Vanzetti case and history of the M'Naghten rule); State v. Jacobsen, 74 Wash. 2d 36, 442 P.2d 629 (1968) (while generally proper to refer to matters of common knowledge, and problems of auto deaths, legislative concern with such, and attempts to enforce the law, these references were improper in drunk driving prosecution). *See also* Paramore v. State, 229 So. 2d 855 (Fla. 1969) (parole a matter of common knowledge); Graham v. State, 422 S.W.2d 922 (Tex. Crim. App. 1968) (same).

[77] United States *ex rel.* Coleman v. Mancusi, 423 F.2d 985 (2d Cir. 1970) (proper to argue that gun had to be cocked before firing, even though no expert testimony, where it was obvious from introduction of the weapon); Shadle v. State, 280 Ala. 379, 194 So. 2d 538 (1967) (that color of defendant's hair had been and could be changed); People v. Washington, 71 Cal. 2d 1061, 458 P.2d 479, 80 Cal. Rptr. 567 (1969) (age of victim); Brinkley v. State, 233 A.2d 56 (Del. 1967) (that in photograph rust marks and bullet holes would appear the same); People v. Smith, 118 Ill. App. 2d 65, 254 N.E.2d 596 (1969).

[78] United States v. Ziak, 360 F.2d 850 (7th Cir.), *cert. denied*, 385 U.S. 834 (1966). *Cf.* Rivers v. State, 226 So. 2d 337 (Fla. 1969) (reading defendant's statement to jury while seated in witness chair was not a comment on defendant's failure to testify).

[79] People v. Sawyer, 256 Cal. App. 2d 66, 63 Cal. Rptr. 749 (1967) ("sir" and "ma'am" improper); People v. Davis, 46 Ill. 2d 554, 264 N.E.2d 585 (1970); People v. Comparetto, 193 N.W.2d 626 (Minn. 1971); Ford v. State, 227 So. 2d 454 (Miss. 1969); State v. Zadick, 148 Mont. 296, 419 P.2d 749 (1966); Montgomery v. State, 447 P.2d 469 (Okla. Crim. App. 1968).

[80] Pendergrast v. United States, 416 F.2d 776 (D.C. Cir.), *cert. denied*, 395 U.S. 926 (1969) (improper to refer to defendant as "Mr. Defendant"); People v. Hotz, 261 Ill. 239 (1914).

[81] *See* notes 34 & 45, *supra*, and accompanying text.

[82] Posey v. United States, 416 F.2d 545 (5th Cir. 1969) (confession of codefendant); People v. Bote, 376 Ill. 264, 33 N.E.2d 449 (1941) (statutory definitions of offenses, where same appeared in instructions); State v. McNeal, 167 N.W.2d 674 (Iowa 1969) (indictment); State v. Rouse, 256 La. 275, 236 So. 2d 211 (1970) (bill of information amended during trial). *See* People v. Gambos, 5 Cal. App. 3d 187, 84 Cal. Rptr. 908 (1970) (proper to refer to establishment of necessary element of offense by stipulation).

[83] People v. Munday, 280 Ill. 32, 117 N.E. 286 (1917).

[84] People v. Birger, 329 Ill. 352, 160 N.E. 564 (1928); Partin v. Commonwealth, 445 S.W.2d 433 (Ky. Crim. App. 1969) (just prior to argument, prosecutor listened through earphone to portion of tape recording of testimony, then referred to it in argument).

[85] People v. DeStefano, 85 Ill. App. 2d 274, 229 N.E.2d 325, *cert. denied*, 390 U.S. 997 (1967). *See* State v. McConnell, 178 N.W.2d 386 (Iowa 1970) (proper to give interpretation of what prosecutor thought witness meant by answer, where court refused to permit reading from record).

[86] People v. Smith, 105 Ill. App. 2d 8, 245 N.E.2d 23 (1966) (reading from transcript and commenting on defendant's testimony).

[87] People v. Beil, 322 Ill. 434, 153 N.E. 639 (1926).

[88] People v. Willy, 301 Ill. 307, 133 N.E. 859 (1921).

[89] People v. Brisco, 15 Mich. App. 428, 166 N.W.2d 475 (1968) (exposure of knife which was dumped from an envelope on counsel table within sight of jurors who noticed it was prejudicial error where the knife had been ruled inadmissible); Jackson v. State, 465 S.W.2d 642 (Mo. 1971); Commonwealth v. Glover, 446 Pa. 492, 286 A.2d 349 (1972) (display of a knife not in evidence during argument was improper but not reversible error where the jury knew no knife was involved in the case). *But see* People v. Morris, 10 Mich. App. 526, 159 N.W.2d 886 (1968) (conduct of prosecutor in using in demonstration a gun which had been suppressed was improper but not prejudicial

for the prosecutor, in describing an event, to pick up and swing a two-wheeled hand cart, suggesting the manner in which the wounds were inflicted, where this was in accord with the testimony.[90] It was also proper for the prosecutor, in attempting to demonstrate the manner in which the defendant's fingerprints were left on a door at the scene of the crime, to show how the door had been pushed back and forth, since there was testimony to this effect.[91] Furthermore, the prosecutor was permitted to jump repeatedly for about two minutes in a loud and noisy manner on a piece of paper he had thrown on the floor where such conformed with the description of the defendant's treatment of the victim.[92] On the other hand, it was error for the prosecutor to stand before the jury for three minutes holding a sawed-off shotgun in his hands since the conditions of the crime had not been adequately recreated.[93]

It may also be proper for the prosecutor to demonstrate the government's theory of the crime where there is no affirmative testimony but his action conforms to the state of the evidence. Thus, it was permissible for the prosecutor to rub a pistol with a shirt, both of which were in evidence, to demonstrate his theory supporting the reason why no prints were found on the gun.[94]

The primary question to be asked concerning reference to or use of real evidence is whether the manner of reference or use is such that the juror's fears and prejudices will be aroused in a way which impairs reasoned judgment.[95] While reference to and exhibition of some pieces of real evidence[96] or the repetition of an earlier demonstration are proper during argument,[97] the prosecutor must be careful to avoid unfair lengthy demonstration or emphatical comment.[98]

It is clear that the use of demonstrative evidence—visual aids not actually admitted into evidence—is appropriate.[99] The general requirements for the use of demonstrative evidence are that the conditions shown by the exhibit do not vary significantly from those that existed at the time of the events in question, and that the exhibit constitutes a "true and fair representation" of what it purports to show.[100] As a general proposition,

---

where defendant's motion that gun be removed from courtroom was granted and there was no indication to jury that the weapon was the one which was suppressed).

[90] Bradburn v. State, 269 N.E.2d 539 (Ind. 1971).

[91] People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968).

[92] Wright v. State, 422 S.W.2d 184 (Tex. Crim. App. 1967). The trial court reported to the appellate court that it could not determine the impression the jury may have received from this demonstration. The defense attorney, apparently grasping at straws, objected, "We object to this outrageous thing, and furthermore the evidence was that he was not on his chest, but that he was on his stomach."

[93] People v. Wicks, 115 Ill. App. 2d 19, 252 N.E.2d 698 (1969).

[94] People v. Roberts, __Ill. App. 2d__, 272 N.E.2d 768 (1971).

[95] *See* State v. Dillon, 93 Ida. 698, 471 P.2d 553 (1970) and State v. Hopper, 251 La. 77, 203 So. 2d 222 (1967), both discussing the admissibility of particularly gruesome photographs in criminal cases.

[96] People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968) (where identification in issue, showing jury police drawing of suspect and asking jury to compare it with defendant); People v. Moore, 35 Ill. 2d 399, 220 N.E.2d 443, *cert. denied*, 389 U.S. 861 (1967) (display of gun); People v. Robinson, 106 Ill. App. 2d 78, 246 N.E.2d 15 (1969) (photo of deceased in morgue showing bullet holes, in bench trial).

[97] United States v. Higuchi, 437 F.2d 835 (9th Cir. 1971) (contention that court abused its discretion in permitting prosecutor to use an overhead projector as a visual aid during argument in prosecution for transporting forged checks was "completely without merit"); State v. Orzen, 83 N.M. App. 458, 493 P.2d 768 (Ct. App. 1972) (no abuse of discretion in permitting prosecutor to show motion picture film in evidence during argument and to stop and reverse film and comment upon what was shown). However, the prosecutor should keep in mind the time limitations, and may not have an opportunity to fully repeat a demonstration during argument. *See* notes 24–26, *supra*, and accompanying text.

[98] People v. Wicks, 115 Ill. App. 2d 19, 252 N.E.2d 698 (1969); Adler v. State, 248 Ind. 193, 225 N.E.2d 171 (1967) (in robbery prosecution, thumbtacking picture of robbery victim's body to a board which jury could see for 45 minutes while instructions were read, and then showing it again and discussing it during argument, was error); Joyner v. State, 436 S.W.2d 141 (Tex. Crim. App. 1969) (discussing danger of pistol, pointing it at defendant and pulling trigger, improper).

[99] State v. Logan, 156 Mont. 48, 473 P.2d 833 (1970) (proper to let prosecutor use a chart not in evidence but based on evidence as a visual aid in connection with bullet holes in body of victim, illustrating computations made by state in connection therewith); State v. Woodards, 6 Ohio St. 2d 14, 215 N.E.2d 568 (1966) (proper during argument to use a bottle, straw, pen, dowel, and a pair of calipers, none of which were in evidence, in a demonstration, in rape prosecution where there was only circumstantial evidence); Garcia v. State, 428 S.W.2d 334 (Tex. Crim. App. 1968) (while discussing penetration and presence of sperm in vagina, prosecutor went to blackboard and made a dot which was supposed to be a sperm, and asked jury to observe it and see if it moved; proper as an illustration of medical testimony); State v. Richardson, 44 Wis. 2d 75, 170 N.W.2d 775 (1969) (where prosecutor was discussing identification, argument as to whether either or both of police officers in courtroom had mustache did not compel mistrial on ground of introduction of new evidence, even if officers were turned away from the jury until the argument was made and then simultaneously turned around).

[100] D. LOUISELL, J. KAPLAN & J. WALTZ, EVIDENCE

courts apply the same rules regarding these questions in criminal cases as they do in civil cases.[101]

COMMENTING ON WITNESSES

The examination of witnesses is likely to take up a good part of any trial. Commentary on the testimony, character, and credibility of the witnesses will often require a proportional amount of the prosecutor's summation. Proper remarks by the prosecutor are those which are reasonably justified by the evidence or testimony, and are restricted to presenting an interpretation of the testimony, pointing out conflicts and inconsistencies, and discussing the reliability of the witnesses.[102]

The ultimate issue of credibility is for the jury alone.[103] For the same policy reasons previously discussed,[104] the prosecutor's personal beliefs and opinions as to the truthfulness of the testimony and the character of the witnesses must be avoided; otherwise the veracity of the prosecutor may be placed in issue.[105]

Within these limitations the prosecutor may comment favorably[106] or unfavorably[107] on any

1304-05 (Appendix A) (2d ed. 1972). See Cady, *Objections to Demonstrative Evidence*, 32 MO. L. REV. 333 (1967), and articles cited therein; M. BELLI, MODERN TRIALS §§ 360-85 (1954).

[101] State v. Woodards, 6 Ohio St. 2d 14, 215 N.E.2d 568 (1966).

[102] Chatman v. United States, 411 F.2d 1139 (9th Cir. 1969); Gibson v. United States, 403 F.2d 569 (D. C. Cir. 1968) (may question whether witness telling truth but only to remind jury that credibility is for them alone); People v. Ellis, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966); Valdez v. People, 168 Colo. 429, 451 P.2d 750 (1969) (proper to comment on how well and in what manner a witness measures up to the tests of credibility); Fulks v. State, 481 P.2d 769 (Okla. Crim. App. 1971); State v. Edwards, 471 P.2d 843 (Ore. App. 1970); State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971); State v. Walton, 5 Wash. App. 150, 486 P.2d 1118 (1971). *See* Barron v. State, 479 P.2d 614 (Okla. Crim. App. 1971). *But see* United States v. Jones, 433 F.2d 1107 (D.C. Cir. 1970) (arguments regarding veracity of witnesses improper).

[103] Gibson v. United States, 403 F.2d 569 (D.C. Cir. 1968).

[104] *See* People v. Montevecchio, 32 Mich. App. 163, 188 N.W.2d 186 (1971). *See also* notes 62 & 63 *supra*, and accompanying text.

[105] United States v. Hoskins, 446 F.2d 564 (9th Cir. 1971) (repeatedly asserting personal belief in accuracy of testimony of government witnesses was improper, but here not deliberate and at any rate invited); United States v. Miceli, 446 F.2d 256 (1st Cir. 1971) (that accomplice of defendant who testified for government had made an arrangement to testify truthfully); United States v. American Radiator and Standard Sanitation Corp., 433 F.2d 174 (3d Cir. 1970) (personally vouching for credibility); United States v. Daniel, 422 F.2d 816 (6th Cir. 1970) ("I believe him, and I submit to you that this aspect of his testimony is worthy of belief"); Clark v. United States, 391 F.2d 57 (8th Cir. 1968); United States v. Murphy, 374 F.2d 651 (2d Cir. 1967) ("I think" may be proper phrase where it is clear that prosecutor is merely introducing a statement of what conclusions he is led to by the evidence); Stout v. People, 171 Colo. 142, 464 P.2d 872 (1970) (complaining witnesses in rape were good and fine girls and not types defendant and his witnesses said they were); People v. Montevecchio, 32 Mich. App. 163, 188 N.W.2d 186 (1971) (remarks characterizing defendant as a professional whose friends had perjured themselves in testifying as to defendant's alibi were made as factual statements which would lead jury to believe prosecutor believed defendant guilty)*; People v. Stroble, 31 Mich. App. 94, 187 N.W.2d 474 (1971) (personal belief that detective had told truth); People v. Poe, 27 Mich. App. 422, 183 N.W.2d 628 (1970) (personal belief that prosecution witness not entitled to credibility); People v. Hickman, 34 App. Div. 2d 831, 312 N.Y.S.2d 644 (1970) (where case rested entirely on credibility, vouching for such credibility and stating personal knowledge whether there were other eyewitnesses)*; People v. Davis, 29 App. Div. 2d 556, 285 N.Y.S.2d 719 (1967) (opinion as to truthfulness of complainant's testimony); Sisk v. State, 487 P.2d 1003 (Okla. Crim. App. 1971) (stating personal belief in validity of testimony to reinforce it); Shepard v. State, 437 P.2d 565 (Okla. Crim. App. 1967) (argument that a witness was a "plant and we know it"); State v. Gairson, 484 P.2d 854 (Ore. App. 1971); State v. Walton, 5 Wash. App. 150, 486 P.2d 1118 (1971).

It would seem to follow that it is equally inappropriate for the prosecutor to place his veracity in issue more directly, as by taking the stand and testifying, but this does not appear to be the rule. United States v. Brown, 451 F.2d 1231 (5th Cir. 1971) (vouching for credibility and giving personal opinion)*; Patriarca v. United States, 402 F.2d 314 (1st Cir.) *cert. denied*, 393 U.S. 1022 (1968) (if witness whose testimony was attacked by defense was lying, so were FBI and United States Attorney's Office); Terry v. Commonwealth, 471 S.W.2d 730 (Ky. Crim. App. 1971) (personal knowledge that persons referred to by alibi witness were "rotten to the core"); State v. Hudson, 253 La. 992, 221 So. 2d 484 (1969) (prosecutor had tried enough capital cases and had a good enough reputation in courtroom that he would not tell a witness what to say on the stand and try to fool jurors); Beal v. State, 432 S.W.2d 94 (Tex. Crim. App. 1968) (where evidence contained prosecutor's testimony that defendant's general reputation for truth and veracity was bad, proper to state personal knowledge that defendant was an habitual liar; one dissent argued that the prosecutor had gone beyond his own testimony). *See* People v. Smith, 26 App. Div. 2d 588, 272 N.Y.S.2d 33 (1966) (placing veracity of coprosecutor in issue by telling jury it would have been his duty to inform them if he had made any promises to defendant's accomplice to induce him to testify)*. *See also* United States v. D'Antonio, 362 F.2d 151 (7th Cir.) *cert. denied*, 385 U.S. 900 (1966) (prosecutor determined truth of witnesses before he put them on stand, improper); and State v. Dobbin, 251 Ore. 56, 444 P.2d 541 (1968) (state vouches for credibility of all witnesses it calls, improper). *Cf.* note 6 *supra*, and cases discussed therein.

[106] United States v. Crisp, 435 F.2d 354 (7th Cir. 1970) (that government witness has testified truthfully

witness who testified for either the government[108] or the defense.[109] This includes comment upon the inconsistent accounts of the crime,[110] possible sources of bias,[111] and prior convictions,[112] as well as participation in the crime[113] and courtroom conduct.[114] It has also been considered appropriate to make reference to invocation of the fifth amendment by the witness,[115] at least in those instances

was proper where prosecutor did not say or insinuate that his statement was based upon personal knowledge); United States v. Guiliano, 383 F.2d 30 (3d Cir. 1967) (regarding testimony of informers with admitted records, "It takes a thief to catch a thief"); United States v. DeAlesandro, 361 F.2d 694 (2d Cir. 1966) (to acquit defendant jury would have to find witnesses perjurors); Jackson v. State, 359 F.2d 260 (D.C.Cir. 1966) ("reputable" officers and "very sweet" complaining witness); Valdez v. People, 168 Colo. 429, 451 P.2d 750 (1969) (very accurate); Commonwealth v. Gerald, 356 Mass. 386, 252 N.E.2d 344 (1969) (that there was not one bit of conduct on part of witness that rang with anything but truth); Commonwealth v. Soroko, 353 Mass. 254, 230 N.E.2d 922 (1967) (that in any criminal case, witness should be given credit for testifying was proper); State v. Burgess, 290 Minn. 480, 185 N.W.2d 537 (1971) (according a citizen credit for doing his civic duty is not the same as an expression of personal opinion that a witness is credible); State v. Rhinehart, 70 Wash. 2d 649, 424 P.2d 906 (1967) (witness had nothing to gain by informing police he had committed sodomy with defendant). *But see* United States v. Jenkins, 436 F.2d 140 (D.C.Cir. 1970) (that if complaining witness had made any prior inconsistent statement, then defense would have used it to impeach was improper); Wright v. United States, 391 F.2d 542 (9th Cir. 1968) (that chief government witness was a government employee and therefore eminently credible, improper); Friedman v. United States, 381 F.2d 155 (8th Cir. 1967) (that if complaining witness had made any prior inconsistent statement, then defense would have used it to impeach was improper).

[107] United States v. Warren, 447 F.2d 278 (2d Cir. 1971) (that after defendant was caught, the best way for him to get out of his predicament was to hire the best scientists in the country to present their theories that he was psychotic and lost contact with reality during the crime); United States v. Strauss, 443 F.2d 986 (1st Cir. 1971) (defense witnesses members of criminal element); United States v. Blue, 440 F.2d 300 (7th Cir. 1971) (prosecutor said he was not asking jury to believe that government witnesses were "nice people"); United States v. Graydon, 429 F.2d 120 (4th Cir. 1970) (suggesting defendant's alibi witness had given false testimony); United States v. Lyon, 397 F.2d 505 (7th Cir. 1968) (in prostitution prosecution, that evidence was cluttered with disgusting, shocking, maybe dirty, disrespectful, dishonest testimony and ideas); People v. Marino, 95 Ill. App. 2d 369, 238 N.E.2d 245 (1968), *aff'd*, 44 Ill. 2d 562, 256 N.E.2d 770 (1970) (evidence justified references to two policemen as the "I don't remember twins" and to police chief as "shifty," and accusation that the three were corrupt); People v. Poe, 27 Mich. App. 422, 183 N.W.2d 628 (1970) (remark that prosecutor did not consider testimony of government witness reliable could not prejudice defendant); People v. Williams, 11 Mich. App. 62, 160 N.W.2d 599 (1968) (using phrase "ring around a rosy" to describe situation where defendant had testified for his witness in a witness's case); State v. Pitts, 256 S.C. 410, 182 S.E.2d 738 (1971) (discrediting government witness's testimony as to defendant's appearance). *But see* United States v. Arendale, 444 F.2d 1260 (5th Cir. 1971) (saying government considered defense witness such a scoundrel that he had to be watched, improper); People v. Nicolaus, 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967) (should not argue personalities, here regarding doctor who testified for defense); Fulks v. State, 481 P.2d 769 (Okla. Crim. App. 1971) (defendant's family "tried to frame up a story" and jury should not let them "come in here with some trumped up perjury defense" improper).

[108] Jones v. United States, 358 F.2d 383 (8th Cir. 1968). *See also* United States v. Blue, 440 F.2d 300 (7th Cir. 1971); Day v. State, 2 Md. App. 334, 234 A.2d 894 (1967) (proper to make derogatory remarks about prosecution and defense witnesses); State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971).

[109] State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968) (a matter about which a defense witness is properly questioned is a proper subject for comment).

[110] People v. Weinstein, 35 Ill. 2d 467, 220 N.E.2d 432 (1966), *after remand*, 110 Ill. App. 2d 382, 249 N.E.2d 687 (1969) (accounts by defendant while testifying).

[111] People v. Washington, 71 Cal. 2d 1061, 458 P.2d 479, 80 Cal. Rptr. 567 (1969) (doctor hired by defense was defense-oriented); People v. Winstead, 90 Ill. App. 2d 167, 234 N.E.2d 175 (1967); Jump v. Commonwealth, 444 S.W.2d 723 (Ky. Crim. App. 1969) (that defendant's witnesses, who were his friends, were naturally going to be friendly to him and might try to slant their testimony); State v. Rose, 270 N.C. 406, 154 S.E.2d 492 (1967) (defendant's brother was more likely to fabricate than was rape victim); State v. Litterlough, 6 N.C. App. 36, 169 S.E.2d 269 (1969) (witness was "living in sin" with defendant).

[112] United States v. Guiliano, 383 F.2d 30 (3d Cir. 1967).

[113] James v. People, 161 Colo. 105, 420 P.2d 229 (1966) (witness had "pleaded himself out"); Herzig v. State, 213 So. 2d 900 (Fla. App. 1968) (testimony highly questionable and witness had already been charged with and probably would be tried for a similar offense arising from the same incident); People v. Magby, 37 Ill. 2d 197, 226 N.E.2d 33 (1967).

[114] State v. Dillon, 93 Ida. 698, 471 P.2d 553 (1970) (referring to fact that a defense witness was in courtroom during the testimony of one witness in violation of sequester); State v. Edwards, 471 P.2d 843 (Ore. App. 1970) (giving evasive answers); State v. Ruud, 41 Wis. 2d 720, 165 N.W.2d 153 (1969) (where several defense witnesses appeared in court in "outlandish" costumes, proper to refer to them as defendant's "hippie friends").

[115] United States v. Ceniceros, 427 F.2d 685 (9th Cir. 1970) (where there was good reason to believe the fifth amendment privilege was being misused to create an unjustified inference favorable to the party calling the witness, the prosecutor properly noted this in his argument); United States *ex rel.* Irwin v. Pate, 357 F.2d 911 (7th Cir. 1966) (where there was no good reason to believe that state defendant's refusal to answer question was legally permissible, prosecutor could properly comment on the refusal to testify); State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App. 1971) (remarks proper where related only to defense

in which the prosecutor did not know that such action would be taken until the witness was called to the stand.[116] There is some question concerning the propriety of characterizing a witness as liar or perjurer, however, even if accurate.[117]

If justified by the evidence, reference to the fact that a witness was afraid to testify and was given protection may be condoned.[118] However, when a witness does not testify, it is improper to suggest what the testimony would have been since this is clearly beyond the evidence in the case.[119]

COMMENTING ON THE DEFENDANT

Failure to Testify at Trial

The United States Supreme Court has said that where the defendant does not testify at trial,

> the Fifth Amendment, in its direct application to the Federal Government and its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.[120]

The basic policies underlying this rule are the preservation of official integrity and morality requiring the government to independently prove its case, and the respect for and desirability of individual privacy.[121]

Several different standards have been espoused by lower courts to aid them in determining whether a transgression of this rule has occurred in particular situations. The federal courts and some state courts, adopting the above language, state the test in terms of the intention of the prosecutor and the

witness's credibility, with no inference drawn regarding the defendant).

[116] Lawrence v. Wainwright, 445 F.2d 281 (5th Cir. 1971) (cannot call witness closely identified with the defendant knowing witness will invoke fifth amendment); Cain v. App, 442 F.2d 356 (9th Cir. 1971) (in part prejudicial error to call witness knowing he would invoke fifth amendment, and then to capitalize on such in argument); Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970) (improper for either counsel to refer to lack of testimony from witness counsel knew would invoke the privilege; here, it was the defense which wanted to put a witness whom defendant claimed committed the crime on the stand, and the lower court's denial of permission was affirmed. Bazelon, C. J., and Wright, J., dissented, arguing that this was a different situation from that where the government wishes to call the witnesses); United States v. Krechevsky, 291 F. Supp. 290 (D. Conn. 1967) (improper for prosecutor to call witness knowing he will refuse to testify, and then to comment on the refusal); State v. Johnson, 243 Ore. 532, 413 P.2d 383 (1966) (calling witness who was alledged accomplice and then commenting)*; Mathis v. State, 469 S.W.2d 796 (Tex. Crim. App. 1971) (calling co-indictee without knowing what he would testify is prosecutorial misconduct). *See* United States v. Tierney, 424 F.2d 643 (9th Cir. 1970) (reference to grant of immunity to witness "so he couln't hide behind the fifth amendment" was not a comment on defendant's failure to testify); Cota v. Arizona, 304 F. Supp. 876 (D. Ariz. 1969) (comment on witness's refusal to testify was not prejudical to defendant where the facts sought in the questions to the witness were proved by other witnesses). *But see* Price v. State, 37 Wis. 2d 117, 154 N.W.2d 222 (1967) (proper to call witness knowing he will invoke privilege if fact is not emphasized in argument).

[117] People v. Ellis, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966) (repeated references to defendant's wife as a perjuror, and suggestion that perjury bore directly on issue of guilt, improper); People v. Conover, 243 Cal. App. 2d 38, 52 Cal. Rptr. 172 (perjuror, improper); State v. Miller, 271 N.C. 646, 157 S.E.2d 335 (1967) (should not call any witness a liar). *But see* People v. Drury, 250 Ill. App. 547 (1928), *aff'd.* 335 Ill. 539, 167 N.E. 823 (1929) (perjuror justified by evidence). *See* Crowe v. State, 400 S.W.2d 766 (Tex. Crim. App. 1966) (improper to state that a witness could be bribed).

[118] People v. Paine, 250 Cal. App. 2d 517, 58 Cal. Rptr. 753 (1967) (that witness was terrified of the defendant and his prior statement was more correct); People v. Hynes, 26 Ill. 2d 472, 187 N.E.2d 252 (1962) (fear, and protection given). *But see* People v. Glickman, 27 Ill. App. 2d 379, 169 N.E.2d 815 (1960) (unfounded references to fear of witnesses to testify improper); People v. Roberts, 26 App. Div. 2d 655, 272 N.Y.S.2d 625 (1966) (unfounded implication that an important witness was not called because his life would have been endangered, improper).

[119] United States v. Lawler, 413 F.2d 622 (7th Cir. 1969) (where defense counsel argued that seller of narcotics could not be obtained as defense witness, improper to say that defense did not subpoena seller because it knew he would assert fifth amendment); State v. Levy, 160 N.W.2d 460 (Ia. 1968) (testimony of defendant's wife would be damaging)*; People v. Fields, 27 App. Div. 2d 736, 277 N.Y.S.2d 21 (1967) (that murder victim would have testified against defendant but for his death)*; Robinson v. State, 489 P.2d 1358 (Okla. Crim. App. 1971) (testimony of defendant's wife would have been damaging). *See* State v. Hodnett, 82 N.M. 710, 487 P.2d 138 (Ct. App. 1971) (not misconduct where postconviction hearing showed that testimony of witnesses would not have been favorable to defendant, where prosecutor did not call them at trial and then commented on the failure of the defense to call them).

[120] Griffin v. California, 380 U.S. 609, 615 (1965).

[121] Tehan v. U.S. *ex rel.* Schott, 382 U.S. 406 (1966); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969) (every defendant has the right not to testify, but to simply put the prosecution to its proof); People v. Hardy, 271 Cal. App. 2d 322, 76 Cal. Rptr. 557 (1969) (preventing the exercise of a citizen's constitutional privilege from being judicially emphasized as affirmative evidence of guilt); Jones v. State, 197 So. 2d 308 (Fla. App. 1967) (preventing even the slightest suggestion of guilt); Kaneshiro v. Belisario, 51 Hawaii 649, 466 P.2d 452 (1970) (applying no comment rule to civil paternity proceeding on constitutional grounds). *See* McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193.

character of his commentary: was the language used by the prosecutor manifestly intended to be, or of such a character that the jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify?[122] In contrast, in Texas the language is viewed entirely from the standpoint of the jury, and the implication that the language might be construed as an implied or direct allusion to the defendant's failure to testify must be clear.[123] An even more restricted approach is taken in Alabama, where there must be almost direct identification of the defendant as the individual who has failed to testify; covert references are construed against the defendant, regardless of possible jury inference.[124]

Under any formulation of the standard it is clear that a blatant and obvious reference to the failure of the accused to testify at trial is improper, whether the remark is made in positive[125] or negative[126] manner. But the propriety of many other types of remarks which would appear to highlight the prohibited comment equally effectively is left open.

Statements which fall within this middle ground and are often deemed proper generally relate to the state of the evidence in the case where no defense has been presented. Included within this category are comments to the effect that the government's case is uncontradicted,[127] uncontroverted,[128] undenied,[129] or unrefuted,[130] or that the

[122] United States v. Chaney, 446 F.2d 571 (3d Cir. 1971); United States v. White, 444 F.2d 1274 (5th Cir. 1971); United States v. Tierney, 424 F.2d 643 (9th Cir. 1970); United States v. Gatto, 299 F. Supp. 697 (E.D. Pa. 1969); Martinez v. People, 162 Colo. 195, 425 P.2d 299 (1967). *See* United States v. Miceli, 446 F.2d 256 (1st Cir. 1971) (proper, absent direct or indirect focus); People v. Mills, 40 Ill. 2d 4, 237 N.E. 2d 697 (1968) (whether the reference was intended or calculated to direct the attention of the jury to defendant's failure to testify); State v. Flores, 76 N.M. 134, 412 P.2d 560 (1966)*.

[123] Overstreet v. State, 470 S.W.2d 653 (Tex. Crim. App. 1971).

[124] King v. State, 45 Ala. App. 348, 230 So. 2d 538 (1970). *But see* State v. Acosta, 101 Ariz. 127, 416 P.2d 560 (1966) (any direct or indirect statement amounting to an allusion to defendant's failure to testify may be reversible error).

[125] Smith v. Decker, 270 F. Supp. 225 (N.D. Tex. 1967) (reading portion of charge to jury which stated no inference from failure to testify)*; Miller v. State, 240 Ark. 590, 401 S.W.2d 15 (1966) (that defendant had chosen not to take the stand and that was his privilege)*; People v. Stout, 66 Cal. 2d 184, 424 P.2d 704, 57 Cal. Rptr. 152 (1967)*; Carter v. State, 199 So. 2d 324 (Fla. App. 1967) (defendant had constitutional right not to testify and exercise of that right cannot be held against him)*; State v. Raymond, 258 Ia. 1339, 142 N.W.2d 444 (1966)*; People v. Hopkins, 124 Ill. App. 2d 415, 259 N.E.2d 577 (1970) (that any defendant had the right to take the stand)*; State v. Jones, 80 N.M. 753, 461 P.2d 235 (Ct. App. 1969) (there is no testimony at all from either one of these sterling defendants)*; State v. Smith, 10 Ohio App. 2d 186, 226 N.E.2d 807 (1967) ("this man never took the stand to tell you that")*; Sisk v. State, 487 P.2d 1003 (Okla. Crim. App. 1971) (twice saying there was not testimony to refute what victims said, and recognizing there were no eyewitnesses, and "the defendant did not make an announcement in your presence that he did not need to take the stand, but he has that right")*. *Compare* Jacobs v. United States, 395 F.2d 469 (8th Cir. 1968) (where four defendants, arguments that there are only four people in courtroom who know where missing merchandise is and they are not about to tell, was not a comment on failure to testify)*; Locklear v. United States, 393 F.2d 729 (5th Cir. 1968) (inadvertent remark that jury should determine guilt or innocence by defendant's attitude on witness stand, where defendant did not testify); White v. State, 118 Ga. App. 515, 164 S.E.2d 158 (1968) (in opening argument—"We don't know what his defense is going to be. We haven't heard from him in this case"—proper where it did not carry with it the notion of an adverse inference) *with* State v. Spring, 48 Wis. 2d 333, 179 N.W.2d 841 (1970) ("We have not had the benefit of any statement on the part of the defendant" improper).

[126] Dill v. State, 10 Md. App. 362, 270 A.2d 489 (1970) ("if there are reasons why innocent people do not testify before the court, I do not know what they would be")*; State v. Waddell, 11 N.C. App. 577, 181 S.E.2d 737 (1971) ("Now I'm not commenting on the defendant's failure to testify, I'm only asking why they did not produce any explanation.")*. *But see* United States v. Tierney, 424 F.2d 643 (9th Cir. 1970).

[127] United States v. Miceli, 446 F.2d 256 (1st Cir. 1971) (no testimony in defendant's favor on a point in issue); United States v. Persico, 425 F.2d 1375 (2d Cir. 1970); United States v. Heithaus, 377 F.2d 484 (3d Cir. 1967) (uncontradicted and undenied); United States v. Parisi, 365 F.2d 601 (6th Cir. 1966); Gore v. State, 45 Ala. App. 131, 226 So.2d 674 (1969) (uncontradicted and no one has denied); Moore v. State, 244 Ark. 1197, 429 S.W.2d 122 (1968) (uncontradicted and undenied); People v. Stout, 66 Cal. 2d 184, 424 P.2d 704, 57 Cal. Rptr. 152 (1967) (defendant's failure to discredit or contradict state's proof of venue where in issue); People v. Palmer, 47 Ill. 2d 289, 265 N.E.2d 358 (1969); Williams v. State, 464 S.W.2d 244 (Ky. Crim. App. 1971) (uncontroverted and undenied and no defense presented); State v. Craig, 406 S.W.2d 618, (Mo. 1966); State v. Botts, 184 Neb. 78, 165 N.W.2d 358 (1969); Watts v. State, 487 P.2d 981 (Okla. Crim. App. 1971). *But see* State v. McElroy, 96 N.J. Super. 582, 233 A.2d 677 (1967) (that there had not been one scintilla of evidence on behalf of the defendant to contradict the state's case)*.

[128] United States v. Day, 384 F.2d 464 (3d Cir. 1967); Ruiz v. United States, 365 F.2d 103 (10th Cir. 1966); United States *ex rel.* Baskerville v. Fritz, 329 F. Supp. 33 (E.D.N.Y. 1971); People v. Erickson, 254 Cal. App. 2d 395, 62 Cal. Rptr. 108 (1967). *But see* Osgood v. State, 192 So. 2d 64 (Fla. App. 1966) (The witness "told you right here, and it's uncontroverted before you now, that these defendants told him they committed the crime.")*.

[129] Gore v. State, 45 Ala. App. 131, 226 So. 2d 674 (1969); Williams v. State, 464 S.W.2d 244 (Ky. Crim. App. 1971); Foster v. Commonwealth, 415 S.W.2d

government's witnesses were not shaken by cross-examination.[131] When making such statements, however, the prosecutor must exercise care, for if the defendant is the only person who could contradict or deny the evidence, the comment is improper.[132] If it is apparent that there are other witnesses who could contradict the government's case, the remark is within bounds.[133] When it is not clear to the jury that there were other witnesses, jurisdictions disagree as to propriety.[134] Jurisdictions also differ on the question whether the prosecutor may add that the defendant was present at the scene of the crime.[135]

Even more direct comments concerning the defense are permitted. For example, the prosecutor may be permitted to state positively that the evidence is uncontradicted by referring to the fact that no defense was presented,[136] or by commenting on the difference in the order of argument when the defense presents no evidence.[137] Moreover, statements may be made regarding the defense attorney which would be prohibited if made about the defendant,[138] such as a statement

373 (Ky. Ctim. App. 1967) (no witness had taken the stand to deny); State v. Hampton, 430 S.W.2d 160 (Mo. 1968).

[130] United States v. Guiliano, 383 F.2d 30 (3d Cir. 1967); People v. Northern, 256 Cal. App. 2d 28, 64 Cal. Rptr. 15 (1967); State v. McDavis, 463 S.W.2d 809 (Mo. 1971).

[131] Parks v. Wainwright, 429 F.2d 1240 (5th Cir. 1970) (nothing had been adduced on cross-examination to contradict the testimony on direct); Woodside v. State, 206 So. 2d 426 (Fla. App. 1968); Parks v. State, 206 So. 2d 431 (Fla. App. 1968). *See* Cook v. State, 43 Ala. App. 304, 189 So. 2d 595 (1966) (all witnesses agreed on testimony).

[132] United States v. Flannery, 451 F.2d 880 (1st Cir. 1971)*; Holden v. United States, 388 F.2d 240 (1st Cir. 1968); Padgett v. State, 45 Ala. App. 56, 223 So. 2d 597 (1969)*; White v. United States, 248 A.2d 825 (D.C. Ct. App. 1969); Osgood v. State, 192 So. 2d 64 (Fla. App. 1966); People v. Jacoboni, 34 Mich. App. 84, 190 N.W.2d 720 (1971); People v. Alexander, 26 Mich. App. 321, 182 N.W.2d 1 (1970); State v. Costello, 415 S.W.2d 816 (Mo. 1967); State v. Hart, 154 Mont. 310, 462 P.2d 885 (1969)*; State v. Dymond, 110 N.H. 228, 265 A.2d 9 (1970); People v. Yore, 36 App. Div. 2d 818, 320 N.Y.S.2d 601 (1971); Commonwealth v. Reichard, 211 Pa. Super. 55, 233 A.2d 603 (1967)*. *But see* People v. Stanbeary, 126 Ill. App. 2d 244, 261 N.E.2d 765 (1970) (such remark proper).

[133] United States v. Cusumano, 429 F.2d 378 (2d Cir.) *cert denied*, 400 U.S. 830 (1970); Ruiz v. United States, 365 F.2d 103 (10th Cir. 1966); United States v. Gatto, 299 F. Supp. 697 (E.D. Pa. 1969); State v. Skinner, 251 La. 300, 204 So. 2d 370 (1967); People v. Marr, 13 Mich. App. 642, 164 N.W.2d 678 (1968); Glass v. State, 411 S.W.2d 728 (Tex. Crim. App. 1967).

[134] Rodriguez-Sandoval v. United States, 409 F.2d 529 (1st Cir. 1969) ("uncontroverted" was plain error where not clear from the record that there was someone other than defendant who could have been called as a witness, especially since the prosecutor hammered the point home at least five times)*; State v. Sinclair, 49 N.J. 525, 231 A.2d 565 (1967) (should clearly appear that someone other than defendant could have taken the stand). *But see* United States v. Handman, 447 F.2d 853 (7th Cir. 1971) (referring to accomplice's testimony as uncontradicted where nothing in record showed anyone other than defendant could deny it)*; United States *ex rel.* Leak v. Follette, 418 F.2d 1266 (2nd Cir. 1969) (not error even if in practical fact, though not in theory, no one other than defendant could have contradicted); United States v. O'Brien, 255 F. Supp. 755 (E.D. Mich. 1965) (even where in fact only defendant could contradict, not error unless jury would be likely to conclude from the statement in the context of the argument that such was the situation); State v. Ashby, 77 Wash. 2d 33, 459 P.2d 403 (1969) (other persons could conceivably have denied statement, though not clear from the record).

[135] People v. Durham, 13 Ill. App. 2d 1033, 269 N.E.2d 348 (1971) (proper); Commonwealth v. French, 357 Mass. 356, 259 N.E.2d 195 (1970) (same). *See* State v. Shilow, 252 La. 1105, 215 So. 2d 828 (1968) (absence of evidence to contradict the state's version of defendant's whereabouts); Johnson v. State, 9 Md. App. 327, 264 A.2d 280 (1970) (where prosecutor was merely reviewing the evidence, proper to ask, "If defendant was not at the scene of the crime, where was he?"); Barron v. State, 479 P.2d 614 (Okla. Crim. App. 1971) ("if he was there why didn't he just say it?" was a comment on defendant's alibi, not his failure to testify). *But see* People v. Baker, 7 Mich. App. 471, 152 N.W.2d 43 (1967) (where person with whom defendant allegedly committed acts of gross indecency testified, improper for prosecution to argue that only two people knew what happened and one of them testified).

[136] United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969) (defense offered no evidence except from cross-examination); McCracken v. State, 431 P.2d 513 (Alaska 1967); People v. Kostos, 21 Ill. 2d 496, 173 N.E.2d 466 (1961); Williams v. State, 464 S.W.2d 244 (Ky. Crim. App. 1971); State v. Huddelston, 462 S.W.2d 691 (Mo. 1971). *See* State v. Martin, 85 S.D. 587, 187 N.W.2d 576 (1971) (that if one doesn't have any evidence to talk about he tries to make out complaining witness to be a liar). *But see* State v. Murphy, 13 Ohio App. 2d 159, 234 N.E.2d 619 (1967) ("Have you heard anything from the defense? Did they tell you anything? Did you hear any reference or any testimony on behalf of this defendant?")*; Lime v. State, 479 P.2d 608 (Okla. Crim. App. 1971) ("there is no excuse and they offer no excuse for the manner in which this was done")*; State v. Persiano, 91 N.J. Super. 299, 220 A.2d 116 (1966) ("Normally we have two sides to a story. Here, we only have one side. There is no defense.").

[137] Williams v. State, 200 So. 2d 636 (Fla. App. 1967), *denial of habeas corpus aff'd. sub. nom.* Williams v. Wainwright, 416 F.2d 1042 (5th Cir. 1969) (that defendant was entitled to opening and final arguments where he puts on no evidence or testimony "other than perhaps his own," and prosecution's summation would be sandwiched since defendant put on no evidence). *See* Taylor v. United States, 390 F.2d 278 (8th Cir. 1968) (order of opening statements and closing arguments and when defense might have a chance to speak was proper comment).

[138] Hollbrook v. United States, 441 F.2d 371 (6th

to the effect that defense counsel did not prove during the trial what he had alleged he would in his opening statement.[139]

An interesting situation arises when the defendant appears *pro se*. While it has been held improper to point out that the defendant is so appearing, the prosecutor is permitted to refer to and discuss what the defendant says as an advocate. Any other approach would render nugatory the prosecutor's valuable right to attack the defense's theory of the case, obviously permitted when the defendant is represented by counsel. The jury may also be told that the defendant counsel's presentation is not evidence but argument only.[140] If the defendant persists in making statements which amount to the offering of testimony not presented during trial the prosecutor may then respond directly to the defendant's failure to testify.[141]

When there are multiple defendants not all of whom testify, the courts generally hold that reference to the fact that some testified is improper, since attention is thereby directed to those who did not.[142] If such a reference warrants a reversal, it is unclear whether the convictions of those who testified must be reversed along with the convictions of those who did not.[143]

There is one special relaxation of the prohibition on comment on the defendant's failure to testify at trial. Where the recent unexplained possession of stolen property raises a presumption of guilt, the prosecutor may so state.[144]

Cir. 1971) (that "jury was entitled to hear from the defendants," where context indicated that prosecution was referring to defense counsel); McCracken v. State, 431 P.2d 513 (Alaska 1967) (counsel could say nothing on behalf of his client); Lipscomb v. State, 467 S.W.2d 417 (Tex. Crim. App. 1971) (failure of defense counsel to express claim of innocence); Barrientes v. State, 462 S.W.2d 292 (Tex. Crim. App. 1971) (counsel "can tell us," referring to where defendant received items connected with burglary); Bass v. State, 427 S.W.2d 624 (Tex. Crim. App. 1968) (counsel had not explained how marijuana seeds got into defendant's pocket); Meyer v. State, 416 S.W.2d 414 (Tex. Crim. App. 1967) (counsel "makes the insinuation that this defendant has told him he wasn't guilty, but he won't take the stand under oath and tell you that"). *Compare* Taylor v. State, 279 Ala. 390, 185 So. 2d 414 (1966) ("I think you believe what the witness said is true, you haven't heard anyone say here that it wasn't except the attorney who was representing the defendant", and "Are you going to let the man say or let the attorney say, 'I am not guilty of this crime'?") *with* State v. Hart, 154 Mont. 310, 462 P.2d 885 (1969) (counsel failed to offer any evidence to controvert incriminating testimony of state's witness, was indistinguishable from a prohibited reference where defendant was the only one who could contradict)* *and* Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971) (improper to say jury had never heard counsel ask defendant whether he was responsible for the crime).

[139] State v. McGonigle, 103 Ariz. 267, 440 P.2d 100 (1968); Gathright v. State, 245 Ark. 840, 435 S.W.2d 433 (1968) (proper to say there was no testimony on a point on which counsel had said there would be); State v. Marshall, 15 Ohio App. 2d 187, 239 N.E.2d 755 (1968). *But see* People v. Levy, 28 Mich. App. 339, 184 N.W.2d 325 (1970) (improper to say counsel had failed to prove what he had said he would).

[140] People v. Garrison, 252 Cal. App. 2d 511, 60 Cal. Rptr. 596 (1967).

[141] United States v. Warner, 428 F.2d 730 (8th Cir. 1970) (inquiring whether jury had heard from the witness stand most of what defendant said in argument was probably erroneous, but remarks would have been proper if applied to counsel not defending himself, and were cured by court); United States *ex rel.* Miller v. Follette, 397 F.2d 363 (2d Cir. 1968), *aff'g* State *ex rel.* Miller v. Follette, 278 F. Supp. 1003 (E.D.N.Y. 1968) (proper to remark that witnesses who testified under oath were to be believed rather than petitioner who did not so testify); Petition of DuBois, 84 Nev. 562, 445 P.2d 354 (1968) (proper that defendant had had an opportunity to take stand where defendant made many improper comments); State v. Schultz, 46 N.J. 254, 216 A.2d 372, *cert. denied*, 384 U.S. 918 (1966) (persistent remarks by defendant appearing *pro se* which amount to unsworn testimony is waiver of self-incrimination privilege); State v. Polk, 485 P.2d 1241 (Ore. App. 1971) (proper to say defendant had made unsupported statements and jury should not consider them as evidence because defendant was not under oath).

[142] United States v. Wertz, 447 F.2d 451 (9th Cir. 1971) (argument that co-defendant confessed and suffered through grueling cross-examination and defendant should do so as well)*; Scott v. Perini, 439 F.2d 1066 (6th Cir. 1971) (comment on co-defendant's failure to testify visited a constitutional wrong on defendant who testified at trial)*; Doty v. United States, 416 F.2d 887 (10th Cir. 1969) (statement that evidence was uncontradicted as to all the defendants except for the two who testified)*; Collins v. United States, 383 F.2d 296 (10th Cir. 1967) (where two of three defendants testified, comment on failure of one to testify required the reversal of his conviction alone)*; United States v. Edwards, 366 F.2d 853 (2d Cir. 1966) (co-conspirator uncontradicted, improper); People v. Haran, 27 Ill. 2d 229, 188 N.E.2d 707 (1963) (refusal of co-defendants to testify and drawing adverse inference to defendant)*; People v. Mirenda, 23 N.Y.2d 439, 245 N.E.2d 194, 297 N.Y.S.2d 532 (1969) (that three of five defendants testified)*. *See* United States v. Haili, 443 F.2d 1295 (9th Cir. 1971) ("you know why he was hesitant to testify in this case" referred to co-defendant who testified, not to defendant who did not, but was improper anyway); Moody v. United States, 376 F.2d 525 (9th Cir. 1967) (improper to say defendant's accomplice was not rebutted). *But see* State v. Tollett, 71 Wash. 2d 806, 431 P.2d 168, *cert. denied*, 392 U.S. 914 (1967) (inadvertent comment that "all testified—excuse me, not testified" was improper); State v. Burrell, 102 Ariz. 136, 426 P.2d 633 (1967) (where counsel for both defendants elicited common defense through testimony of co-defendant, it was harmless to say that the defendant "has said nothing").

[143] *See* Collins v. United States, 383 F.2d 296 (10th Cir. 1967).

[144] United States v. Davis, 437 F.2d 928 (7th Cir.

Testimony at Trial

The defendant who testifies at trial is subject to cross-examination and impeachment,[145] and the prosecutor may comment on this testimony[146] in accordance with the same rules applicable to comments on the testimony of other witnesses.[147] Remarks should be restricted to the defendant's credibility.[148] Characterizing the testimony is proper if the characterization is based on the evidence and is not an assertion of personal belief.[149]

Where the defendant's testimony refutes only part of the government's proof, silence with regard to other damaging evidence which is within the defendant's knowledge is subject to adverse comment.[150] But if the defendant's testimony is topically restricted, the prosecutor may not comment on the failure to testify on other matters.[151] Similarly, where there are several defendants and only some of them assert a particular defense, the prosecutor must restrict any comments accordingly.[152]

It should be noted that it is not necessary for the defendant to formally take the stand in order for some comment to be proper. A mere "testimonial appearance" by the defendant may open the door for comment on his failure to deny other evidence or to take the stand.[153] Nonetheless, in

---

1971) (that possession had not been adequately explained, and guilt could be inferred from that alone); Bretti v. State, 192 So. 2d 6 (Fla. App. 1966); Aiken v. State, 226 Ga. 840, 178 S.E.2d 202 (1970), *cert. denied*, 401 U.S. 982 (1970); People v. Tate, 45 Ill. 2d 540, 259 N.E.2d 791, *cert. denied*, 401 U.S. 915 (1970); State v. Branch, 465 P.2d 821 (Mont. 1970); State v. Richard, 109 N.H. 322, 251 A.2d 326 (1969) (proper to urge jury to consider such where prosecutor expressly recognized privilege not to testify and only urged jury to consider absence of evidence from other sources to explain possession); State v. DiRienzo, 53 N.J. 360, 251 A.2d 99 (1969); Rodriguez v. State, 417 S.W.2d 165 (Tex. Crim. App. 1967) ("this is what's called a recent unexplained possession of stolen goods case").

[145] Gruenwald v. United States, 353 U.S. 391 (1956).

[146] Chatman v. United States, 411 F.2d 1139 (9th Cir. 1969); State v. Jackson, 258 La. 632, 247 So. 2d 558 (1971); Gray v. State, 463 P.2d 897 (Alaska 1970).

[147] Reilly v. State, 212 So. 2d 796 (Fla. App. 1968); State v. Davison, 457 S.W.2d 674 (Mo. 1970). *But see* People v. Marino, 95 Ill. App. 2d 369, 238 N.E.2d 245 (1968), *aff'd*, 44 Ill. 2d 562, 256 N.E.2d 770 (1970).

[148] United States v. Deloney, 389 F.2d 324 (7th Cir. 1968); State v. Dutton, 106 Ariz. 463, 478 P.2d 87 (1970) (proper to comment on inconsistencies); People v. Forbis, 109 Ill. App. 2d 220, 248 N.E.2d 298 (1969); State v. Whiters, 206 Kan. 770, 481 P.2d 922 (1971); Dreitz v. Commonwealth, 477 S.W.2d 506 (Ky. Crim. App. 1972) (argument that defendant testified so well because of his extensive experience in courtrooms on trial for prior crimes)*; Commonwealth v. Stout, 356 Mass. 237, 249 N.E.2d 12 (1969) (suggesting that state's case was so strong that defendant and his lawyer had decided he should give up his constitutional right not to testify, improper); State v. Harrison, 72 Wash. 2d 737, 435 P.2d 547 (1967).

[149] Davison v. United States, 368 F.2d 505 (9th Cir. 1966) ("lies"); United States v. Nemetz, 309 F. Supp. 1336 (W.D. Pa. 1970) (defendant's testimony was incredible in view of the evidence); State v. Totress, 107 Ariz. 8, 480 P.2d 668 (1971); People v. Goodwin, 261 Cal. App. 2d 723, 68 Cal. Rptr. 247 (1968) (incredible though expected after a plea of not guilty); People v. Sinclair, 27 Ill. 2d 505, 190 N.E.2d 298 (1963) ("cock and bull story"); Raimondi v. State, 12 Md. App. 322, 278 A.2d 664 (1971) (defendant and his witnesses were "political bosses, dishonest and unworthy of belief"); Carr v. State, 208 So. 2d 886 (Miss. 1968) ("fantastic"); State v. Rose, 270 N.C. 406, 154 N.E.2d 492 (1967) (would not believe anything defendant said); Hoover v. State, 449 S.W.2d 60 (Tex. Crim. App. 1969) (a "bunch of hogwash"). *But see* Gibson v. United States, 403 F.2d 569 (D.C. Cir. 1968) (a recent fabrication to lure the jury and hoodwink them, improper); Harris v. United States, 402 F.2d 656 (D.C. Cir. 1968) (a lie and fabrication amounted to a personal opinion of defendant's guilt and was improper); Maguire v. United States, 358 F.2d 442 (10th Cir. 1966); People v. Ellis, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966); State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966) ("If you believe I told him that I hope you will turn him loose," improper).

[150] Caminetti v. United States, 242 U.S. 470 (1917); Reilly v. State, 212 So. 2d 796 (Fla. App. 1966); People v. Jackson, 103 Ill. App. 2d 209, 243 N.E.2d 551 (1968), *cert. denied*, 397 U.S. 957 (1969) (failure to respond to question asked by prosecutor proper); Chandler v. State, 7 Md. App. 646, 256 A.2d 695 (1969) (where testimony vague and evasive, proper to argue that defendant was lying and should not be believed).

[151] Calloway v. Wainwright, 409 F.2d 59 (5th Cir.), *cert. denied*, 395 U.S. 909 (1969) (where defendant took stand solely for the purpose of testifying on voluntariness of his confession, defendant did not waive privilege, and error for prosecutor to comment on failure to testify on anything other than voluntariness)*; People v. Eaton, 275 Cal. App. 2d 584, 80 Cal. Rptr. 192 (1969) (where defendant took stand only to testify regarding pre-trial identification, and prosecutor did not cross-examine otherwise, improper to comment that defendant did not deny charges against him); Young v. People, 488 P.2d 567 (Colo. 1971) (comments on defendant's failure to deny prosecution witnesses, and his invocation of privilege when questioned about the crime, were proper where nothing in record revealed any ruling by court that defendant could take stand solely to testify on issue of voluntariness of his confession, and it was not reasonably apparent that defendant has been misled).

[152] United States v. Leach, 429 F.2d 956 (8th Cir. 1970).

[153] *Compare* United States *ex rel.* Mitchell v. Pinto, 438 F.2d 814 (2d Cir. 1971) (where defendant did not testify, he did not waive privilege by rising and standing next to a witness to demonstrate his resemblance to him) *with* State v. Fioravanti, 46 N.J. 109, 215 A.2d 16 (1965), *denial of habeas corpus aff'd*, 404 F.2d 675 (2d Cir. 1967) (appearance by defendant in trousers supposed to have been worn by the robber but which

those jurisdictions where the defendant may submit an unsworn statement to the court without waiving the privilege, it has been held that the prosecutor, although able to discuss, criticize, and comment on the statement, may not comment directly on the decision to make such a statement rather than take the stand.[154]

Other Crimes

A common method to impeach a witness is to elicit testimony or otherwise demonstrate that the witness has been previously convicted of a crime or crimes. When the defendant testifies, or does not testify but attempts to show his good character and reputation, the prosecutor may use this method of impeachment and in summation refer to the prior crimes.[155] The evidence must be properly before the court, and no comment should be made if no evidence has been brought forward,[156] or if the evidence was improperly admitted.[157]

Prosecutors often attempt three rather subtle methods of calling juror attention to the defendant's prior crimes in cases in which no such evidence was presented. The first is to refer to the accused's "rap sheet" or to the appearance of his picture in police files. Each of these has been condemned repeatedly by the courts.[158] The second method, comment upon testimony that a witness met the defendant during incarceration, is also improper.[159] The third, equally improper in most cases, is suggestion that the defendant is an habitual criminal or professional miscreant.[160]

---

did not fit defendant, in support of claim that defendant's companion committed robbery, constituted a testimonial appearance warranting judge's comments that defendant had failed to deny other evidence). *See* People v. Garrison, 246 Cal. App. 2d 343, 54 Cal. Rptr. 731 (1966), *cert. denied*, 389 U.S. 915 (1967) (while it is proper to refer to a demonstration which is in evidence, improper to refer to defendant's refusal to put on stocking mask until state's witnesses had left courtroom).

[154] Ferguson v. Georgia, 365 U.S. 570 (1961) (under Georgia law, prosecutor may comment on anything defendant says in unsworn statement); Prather v. State, 223 Ga. 721, 157 S.E.2d 734 (1967); Crowe v. State, 117 Ga. App. 648, 161 S.E.2d 514 (1968)*. *See* Johnson v. State, 122 Ga. App. 542, 178 S.E.2d 42 (1970).

[155] State v. Brooks, 197 Ariz. 320, 487 P.2d 387 (1971) (defendant tended to flirt with the truth, and he did so the previous week and a jury found him guilty, proper where defendant testified as to his recent conviction); People v. Jones, 123 Ill. App. 2d 123, 260 N.E.2d 8 (1970) (proper to refer to defendant as a "twice convicted fellow" and a "convicted stickup man" where two prior convictions in evidence); Jefferson v. State, 452 S.W.2d 462 (Mo. 1970) (proper to refer to robbery and kidnapping where in evidence in robbery prosecution); State v. Laurence, 423 S.W.2d 807 (Mo. 1968); People v. LeBeause, 34 App. Div. 2d 596, 308 N.Y.S.2d 270 (1970) (proper to refer to conviction admitted by defendant in testimony); Kennedy v. State, 443 P.2d 127 (Okla. Crim. App. 1968); Poole v. Commonwealth, 211 Va. 262, 176 S.E.2d 917 (1970) (may introduce evidence of prior crime to attack defendant's character if he has testified or has attempted to show his good character).

[156] United States v. Schartner, 426 F.2d 470 (3d Cir. 1970) (improper to permit reading of a portion of defendant's statement which mentioned a prior conviction); Rogers v. United States, 411 F.2d 228 (10th Cir. 1969) (references to jail stays are improper where no convictions shown); Horner v. Florida, 312 F. Supp. 1292 (M.D. Fla. 1967); People v. Rolon, 66 Cal. 2d 690, 427 P.2d 196, 58 Cal. Rptr. 596 (1967) (reference to prior conviction of defendant for burglary where defendant now pleaded not guilty to present burglary charge, where it was provided by statute that if defendant admits prior conviction and now pleads not guilty, no reference can be made to prior conviction)*; People v. Laursen, 264 Cal. App. 2d 932, 71 Cal. Rptr. 71 (1968) (that defendant was ex-con); Washam v. State, 235 A.2d 279 (Del. 1967); Shumate v. Commonwealth, 433 S.W.2d 340 (Ky. Crim. App. 1968) (that defendants had committed same crime before and would do it again and were professionals where no evidence); Commonwealth v. Balakin, 356 Mass. 547, 254 N.E.2d 422 (1969) (referring to certain defendants as more reprehensible than others in such a way as to suggest prior criminal records); People v. Milkovich, 31 Mich. App. 582, 188 N.W.2d 124 (1971) (reference to defendant's four-page driving record); People v. Askar, 8 Mich, App. 95, 153 N.W.2d 888 (1967); People v. Schatz, 37 App. Div. 2d 584, 322 N.Y.S.2d 802 (1971) (that each defendant had a long history of arson where no evidence); Tooley v. Commonwealth, 448 S.W.2d 683 (Tenn. App. 1969) (reference to rape in unrelated murder prosecution); State v. Shuttle, 126 Vt. 379, 230 A.2d 794 (1967).

[157] People v. Helm, 84 Ill. App. 2d 322, 227 N.E.2d 792 (1967), *aff'd.* 40 Ill. 2d 39, 237 N.E.2d 433 (1968) (court martial conviction should not have been read to jury and commented upon).

[158] Shaddox v. State, 244 Ark. 747, 427 S.W.2d 198 (1968) (rap sheet)*; Jones v. State, 194 So. 2d 24 (Fla. App. 1967) (mug shots)*; People v. Marra, 27 Mich. App. 1, 183 N.W.2d 418 (1970) (reference to photo of defendant identified by complaining witess as being in "mug file"); State v. Madison, 281 Minn. 170, 160 N.W.2d 680, *cert. denied*, 390 U.S. 990 (1968) (defendant had been identified by victim from police file photos); People v. Wright, 21 N.Y.2d 1011, 238 N.E.2d 330, 290 N.Y.S.2d 930 (1968) (defendant had been identified by victim from police file photos)*; Humphrey v. State, 452 P.2d 173 (Okla. Crim. App. 1969) ("rap sheet" and prior convictions)*. *But cf.* Bridges v. State, 202 So. 2d 225 (Fla. App. 1967) (referring to pictures posted in police station did not infer prior convictions or bad character).

[159] Barfield v. United States, 391 F.2d 251 (5th Cir. 1968); People v. Dunn, 26 App. Div. 2d 285, 275 N.Y.S.2d 285 (1966) (witness's testimony that defendant said he had met co-defendant while they were being returned to prison)*.

[160] People v. Tyson, 130 Ill. App. 2d 140, 264 N.E.2d 403 (1970) ("professional auto thief" where only one prior conviction shown, improper); Lynch v. Common-

Even if the evidence is properly in the record the prosecutor must be cautious not to assume facts in connection with the prior crimes beyond those shown by the evidence.[161] Similarly, the prosecutor must confine his remarks to the purposes for which the proof was admitted, which usually restricts his comments to the credibility of the defendant.[162] The only exception in which the remarks may relate more directly to guilt is where the evidence of prior similar convictions is considered probative of intent or motive to commit the present offense.[163]

The prosecutor is not restricted to referring only to prior cases in which a conviction of the defendant was obtained. Consistent with the above limitations, comments on indictments and on other law violations which the defendant admits are proper.[164]

Conduct, Character and Appearance of the Defendant

The prosecutor may wish to discuss the defendant's conduct for two reasons. First, actions in the course of the crime and the investigation of it may be probative of guilt. Second, evidence of conduct in general may refute the accused's assertion of good character and reputation.

The same rule governing comments on the evidence is applicable to comments on the character of the defendant—the remarks must be based in the evidence or be reasonable inferences therefrom.[165] The statements may relate to the accused's conduct in the course of or after the crime which is the basis for the prosecution.[166] Whether

wealth, 472 S.W.2d 263 (Ky. Crim. App. 1971) ("professional" improper where no evidence, though possibly warranted by other information known to prosecutor); Shumate v. Commonwealth, 433 S.W.2d 340 (Ky. Crim. App. 1968); State v. Nickens, 403 S.W.2d 582 (Mo. 1966) ("repeater")*; State v. Miller, 271 N.C. 646, 157 S.E.2d 335 (1967) ("habitual storebreakers")*; State v. Foster, 2 N.C. App. 109, 162 S.E.2d 583 (1968) ("professional hoods or crooks")*. *See* People v. Hardy, 271 Cal. App. 2d 322, 76 Cal. Rptr. 557 (1969) ("pros" proper where evidence showed that defendants were engaged in systematic operations); Collins v. State, 220 Tenn. 23, 413 S.W.2d 683, *cert. denied*, 389 U.S. 824 (1967) (professionals proper where defendants testified they were employed to burglarize store).

[161] Baker v. State, 43 Ala. App. 550, 195 So. 2d 815 (1966) (improper to state details of admitted convictions where not in evidence); Davis v. State, 214 So. 2d 41 (Fla. App. 1968) (where defendant admitted prior conviction, but no evidence as to the specific nature of the crime was admitted, argument that "less than 44 days after he got out of prison he is back robbing and doing the very same thing for which he was put in there the first time")*.

[162] State v. Coury, 4 Ariz. App. 339, 420 P.2d 582 (1966); People v. Asta, 251 Cal App. 2d 64, 59 Cal. Rptr. 206 (1967) (prosector stated that defendant had prior convictions for similar offense and judge did little to dispel impression that jury could consider such as evidence of guilt); People v. Forbis, 109 Ill. App. 2d 220, 248 N.E.2d 298 (1969); Conway v. State, 7 Md. App. 400, 256 A.2d 178 (1969) (prosecutor stated that defendant had prior convictions for similar offense and judge did little to dispel impression that jury could consider such as evidence of guilt)*; State v. Cheek, 413 S.W.2d 231 (Mo. 1967); State v. Sinclair, 57 N.J. 56, 269 A.2d 161 (1970); People v. Childers, 28 App. Div. 2d 725, 281 N.Y.S.2d 706 (1967) (prosecutor stated that defendant had prior convictions for similar offense and judge did little to dispel impression that jury could consider such as evidence of guilt)*; Cantrell v. State, 463 S.W.2d 145 (Tenn. App. 1970) (discussion of parole was irrelevant to credibility).

[163] United States v. Williams, 435 F.2d 1001 (5th Cir. 1970) (evidence of other like offenses may be admitted to show criminal intent); Patterson v. United States, 361 F.2d 632 (8th Cir. 1966) (evidence of other like offenses may be admitted to show criminal intent).

[164] United States v. Williams, 435 F.2d 1001 (5th Cir. 1970) (admitted violations of law for which defendant had not been arrested or prosecuted); State v. Allison, 1 N.C. App. 623, 162 S.E.2d 63 (1968) (in bench trial, stating that several other cases were pending against the defendant). *But see* Rogers v. United States, 411 F.2d 228 (10th Cir. 1969); People v. Lewis, 25 Ill. 2d 396, 185 N.E.2d 168 (1962) (both defendants well-known in a certain part of the city because of their many arrests, improper).

[165] Sablan v. People of Territory of Guam, 434 F.2d 837 (9th Cir. 1970) (comment on defendant's conduct after crime improper where no evidence); United States v. Cook, 432 F.2d 1093 (7th Cir. 1970) (prosecution can comment legitimately and speak fully though harshly about defendant's action and conduct where supported by the evidence); Van Nattan v. United States, 357 F.2d 161 (10th Cir. 1966) (defendant a dope addict where no evidence of such in robbery prosectuion); State v. McGill, 101 Ariz. 320, 419 P.2d 499 (1966) (same); Smith v. State, 118 Ga. App. 464, 164 S.E.2d 238 (1968) (that defendant was "pushing women" in burglary prosecution, the only evidence being that defendant was an informer in prostitution cases)*; People v. Smith, 24 Ill. 2d 198, 181 N.E.2d 77 (1962); Webb v. Commonwealth, 451 S.W.2d 397 (Ky. Crim. App. 1970) (suggesting that defendant a draft evader improper).

[166] People v. Talbot, 64 Cal. 2d 691, 414 P.2d 633, 51 Cal. Rptr. 417 (1967) (brutality of defendant's acts and that he had never shown remorse, proper); People v. Mentola, 47 Ill. 2d 579, 268 N.E.2d 8 (1971) (flight); People v. Sawyer, 42 Ill. 2d 289, 251 N.E.2d 230, *cert. denied*, 396 U.S. 928 (1969); People v. Carter, 38 Ill. 2d 496, 232 N.E.2d 692, *cert. denied*, 391 U.S. 965 (1967) (confession); Commonwealth v. Brown, 354 Mass. 337, 237 N.E.2d 53 (1968) (calling defendant an "expert in furs" proper where evidence showed defendant had advised co-defendant which furs to take during robbery of furrier); State v. Mastrian, 285 Minn. 51, 171 N.W.2d 695, *cert. denied*, 397 U.S. 1049 (1969) ("merchant of murder" where defendant had hired another to kill); Hoover v. State, 449 S.W.2d 60 (Tex. Crim. App. 1969) (defendant had never shown any remorse, improper); State v. Dixon, 20 Utah 2d 248, 436 P.2d 805 (1968) (flight); State v. Barnhardt, 73

or not the defendant testifies at the trial, the prosecutor may be able to refer to the defendant's pre-trial statements or to conversations with law enforcement officers.[167] The prosecutor may also comment on the accused's conduct in court,[168] as well as conduct at other times and places.[169]

There is some disagreement among the courts concerning whether the use of invective or epithets in characterizing the accused is proper, even when based upon proven conduct.[170] Whatever the view of a particular jurisdiction, a great variety of disparaging language has been permitted,[171] perhaps

Wash. 2d 936, 442 P.2d 959 (1968) (defendant had never shown any remorse, improper); State v. Noyes, 69 Wash. 2d 441, 418 P.2d 471 (1966) (illicit sex relations with witness).

[167] United States v. Chaney, 446 F.2d 571 (3d Cir. 1971) (an exculpatory statement made with the intent to divert suspicion or mislead the police, when shown to be false, may have probative force and be commented upon); United States v. Smith, 441 F.2d 539 (9th Cir. 1971) (statement to FBI agent properly in evidence); United States v. Toler, 440 F.2d 1242 (5th Cir. 1971) (at no time had defendant denied filing a pre-trial statement in evidence, not a comment on defendant's failure to testify); United States v. Blassick, 422 F.2d 652 (7th Cir. 1970) (agent's testimony not denied); Vitali v. United States, 383 F.2d 121 (1st Cir. 1967) (proper to draw inference of ownership of premises where stolen goods found from defendant's conversation with officers and his conduct at time of arrest); Hayes v. United States, 368 F.2d 814 (9th Cir. 1966) (statements made when informed crime committed compared with alibi at trial); Wright v. State, 279 Ala. 543, 188 So. 2d 272 (1966) (pre-trial statements); Shaddox v. State, 244 Ark. 747, 427 S.W.2d 198 (1968) (that defendant had made statement to witness); People v. Gills, 241 Cal. App. 2d 711, 50 Cal. Rptr. 872 (1966) (conversation with arresting officer); People v. Asey, 85 Ill. App. 2d 210, 229 N.E.2d 368 (1967) (pre-trial questioning); State v. Whiters, 206 Kan. 770, 481 P.2d 992 (1971) (inconsistencies in defendant's testimony and explanation at time of arrest); Commonwealth v. Belton, 352 Mass. 263, 225 N.E.2d 53 (1967) (inconsistencies in alibi asserted at trial and statements at time of arrest); People v. Badge, 15 Mich. App. 29, 165 N.W.2d 901 (1968) (pre-trial statement); State v. Edwards, 435 S.W.2d 1 (Mo. 1968) (reference to original interrogation of defendant proper where related to evidence); Ervine v. State, 463 S.W.2d 2 (Tex. Crim. App. 1971) (that defendant had testified against himself in pre-trial statements properly in evidence).

[168] United States v. Izzi, 427 F.2d 293 (2d Cir. 1970) (accusation that defendant had sought to disguise his handwriting in giving exemplars); Hayes v. United States, 368 F.2d 814 (9th Cir. 1966) (defendant's conduct during agent's testimony); State v. Totress, 197 Ariz. 8, 480 P.2d 668 (1971); People v. Thomas, 65 Cal. 698, 423 P.2d 233, 56 Cal. Rptr. 305 (1967) ("regular smart aleck" proper as a characterization of defendant's conduct during cross-examination); People v. Garrison, 246 Cal. App. 2d 343, 54 Cal. Rptr. 731 (1966), *cert. denied*, 389 U.S. 915 (1967).

[169] People v. Fortson, 110 Ill. App. 2d 206, 249 N.E.2d 260 (1969) (that drinking shown by evidence gave defendant a little extra power to perform rape); People v. Porterfield, 13 Ill. App. 2d 167, 268 N.E.2d 537 (1968) (illicit sexual relations with victim); Coates v. Commonwealth, 469 S.W.2d 346 (Ky. Crim. App. 1971) (suggesting defendant charged with possession only was trafficking in narcotics)*; People v. Pena, 3 Mich. App. 26, 141 N.W.2d 677 (1966) (rhetorical question how many narcotics sales defendant had made in 41 days between the sale charged and his arrest, improper); People v. Damon, 24 N.Y.2d 256, 247 N.E.2d 651, 229 N.Y.S.2d 830 (1969) (implying that because defendant had been in prison he was homosexual or abnormal deviate)*; People v. Chance, 37 App. Div. 2d 572, 322 N.Y.S.2d 433 (1971) (suggesting defendant charged with possession only was trafficking in narcotics)*; People v. Canty, 31 App. Div. 2d 976, 299 N.Y.S.2d 524 (1969) (where prosecutor went beyond merely asking jury to disbelieve defendant who admitted committing adultery, and turned defendant's admitted acts into equivalence of guilt of violating Ten Commandments, he was using defendant's acts to indicate his propensity to commit murder, not just to impeach his credibility); State v. Milbradt, 68 Wash. 2d 684, 415 P.2d 2, *cert. denied*, 385 U.S. 905 (1966) (references to homosexual tendencies proper where discussed by defense psychiatrist).

[170] Carter v. United States, 437 F.2d 692 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 912 (1971) (should avoid inappropriate references); People v. Rodriquez, 10 Cal. App. 2d 18, 88 Cal. Rptr. 789 (1970) (may use appropriate epithets where warranted by the nature of the case and the evidence adduced; prosecutor is allowed to urge his case with vigor); People v. Elder, 25 Ill. 2d 612, 186 N.E.2d 27, *cert. denied*, 374 U.S. 814 (1962) (use of invective discouraged); People v. Jefferson, 69 Ill. App. 2d 490, 217 N.E.2d 564 (1966) (abstract only: proper to reflect unfavorably on accused and to use invective); State v. Yates, 202 Kan. 406, 449 P.2d 575 (1968) (use of invective discouraged); State v. Burnett, 429 S.W.2d 239 (Mo. 1968) (should not apply unbecoming names to defendant); State v. Turnbull, 403 S.W.2d 570 (Mo. 1966) (improper to apply personal epithets or engage in abusive vilification of either parties or witnesses); State v. White, 151 Mont. 573, 440 P.2d 269 (1968) (should not use derogatory epithets); State v. Miller, 271 N.C. 646, 157 S.E.2d 335 (1967) (should not indulge in vulgarities, and should refrain from abusive, vituperative, and opprobrious language, and from indulging in invective); State v. Gibson, 75 Wash. 2d 174, 449 P.2d 692 (1969), *cert. denied*, 396 U.S. 1019 (1970).

[171] United States v. Cook, 432 F.2d 1093 (7th Cir. 1970) (where defendant plotted to kill wife by putting bomb on plane, proper to refer to him as a subhuman man and a true monster with a rancid, rotten mind); United States v. Lewis, 423 F.2d 457 (8th Cir. 1970) (junk pusher); Downie v. Burke, 408 F.2d 343 (7th Cir. 1969) (big ape and gorilla); United States v. Wolfson, 322 F. Supp. 798 (D.Del. 1971) ("crooks," "viruses" and "germs" proper); Miller v. State, 250 Ark. 199, 464 S.W.2d 594 (1971) (con artist); People v. Newman, 14 Cal. App. 3d 246, 92 Cal. Rptr. 205 (1971) (pill peddler and terror to community); People v. Rodriquez, 10 Cal. App. 3d 18, 88 Cal. Rptr. 789 (1970) (smart thief and parasite on the community); People v. Walker, 247 Cal. App. 2d 554, 55 Cal. Rptr. 726, *cert. denied*, 389 U.S. 824 (1967) (suede shoe boys and aluminum siding racketeers); People v. Gairson, 246 Cal. App. 2d 343, 54 Cal. Rptr. 731 (1966), *cert. denied*, 389 U.S. 915 (1967) (vicious murderous pig);

because a reviewing court is reluctant to find reversible error on characterization alone. Furthermore, such remarks may be appropriate if based upon the charge which the evidence tends to prove, rather than upon the conduct of the defendant as shown by the evidence. A common example is reference to one charged with armed robbery as a potential murderer.[172] An epithet which lacks a reasonable foundation in the evidence or the charge is improper; it is simply abusive and serves only to inflame and arouse the passions and prejudices of the jury.[173]

The prosecutor may comment on the reputation and character of the accused only when the defendant has put such matters in issue, and the comments must be reasonably justified by the evidence.[174]

If the defendant's physical appearance is gross in nature, the physical attributes are certainly obvious to the jury and emphasis should not be added through prosecutorial comment.[175] The exception is where identification is put in issue by the defendant himself or his counsel; under such circumstances it may be appropriate for the prosecutor to comment upon the appearance of the defendant.[176]

O'Bryant v. State, 222 Ga. 326, 149 S.E.2d 654 (1966) (thug); People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297 (1966) (where defense counsel compared defendant's conduct and ability to choose between right and wrong with chimpanzee, dog, and trained animal, based on psychiatrist's testimony, proper for prosecutor to reply that defendant had morals of a snake and was a slimy beast); Ferguson v. Commonwealth, 401 S.W.2d 225 (Ky. Crim. App. 1965) (beast); State v. Kohuth, 287 Minn. 520, 176 N.W.2d 872 (1970) (under some circumstances, it may be reversible error to characterize defendant as offender; here, it was proper to refer to defendant as robber where witness identified him); State v. Tate, 468 S.W.2d 646 (Mo. 1971) (mean punks and vicious men); Paul v. State, 483 P.2d 1176 (Okla. Crim. App. 1971) (goons); State v. Bradford, 256 S.C. 51, 180 S.E.2d 632 (1971) (mad dog); Grant v. State, 472 S.W.2d 531 (Tex. Crim. App. 1971) (beast); Olivia v. State, 459 S.W.2d 824 (Tex. Crim. App. 1970) (wolves, in sodomy prosecution); Easley v. State, 454 S.W.2d 758 (Tex. Crim. App. 1970) (savage). *But see* Marzuach v. United States, 398 F.2d 548 (1st Cir.), *cert. denied*, 393 U.S. 982 (1968) (big fish, improper); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968) (beast, improper); People v. Garreau, 27 Ill. 2d 388, 189 N.E.2d 287 (1963) (referring to defendant as a pervert, weasel, moron, and telling jury that defendant who raped his mother's friend, would rape a dog and would rape each and every member of the jury, there being no evidence in the record to support such remarks)*; State v. McGregor, 257 La. 956, 244 So. 2d 846 (1971) (unpredictable animal, improper); Carr v. State, 208 So. 2d 886 (Miss. 1968) (beastly nature, improper); People v. Hickman, 34 App. Div. 2d 831, 312 N.Y.S.2d 644 (1970) (junky, rat, and sculptor with a knife, improper); State v. Smith, 279 N.C. 163, 181 S.E.2d 548 (1971) (lower than the bone belly of a cur dog)*.

[172] People v. Carpenter, 131 Ill. App. 2d 187, 266 N.E.2d 478 (1970); People v. Sibley, 93 Ill. App. 2d 38, 236 N.E.2d 5 (1968). *See* People v. Romo, 256 Cal. App. 2d 589, 64 Cal. Rptr. 151 (1967) ("potential killers" where charged with assault with a deadly weapon).

[173] United States v. Birrell, 421 F.2d 665 (9th Cir. 1970) (where defense was insanity, that defendant should not be turned loose on society because of his homosexual proclivities invited a conviction because defendant was an homosexual)*; United States v. Hughes, 389 F.2d 535 (2d Cir. 1968) (defendant was doubly vicious because, knowing he was guilty, he demanded his constitutional rights, including right to trial, at which victim of alleged homosexual extortion ring was required to testify)*; People v. Trotter, 84 Ill. App. 2d 388, 228 N.E.2d 467 (1967) (referrence to defendant as a dope peddler where only possession charged)*.

[174] State v. Sorensen, 104 Ariz. 503, 455 P.2d 981 (1969) (where defendant testified and proscecutor did not offer evidence of his bad reputation, commenting that there were areas of character testimony which would have been material but which defendant did not discuss)*; People v. Bonham, 348 Ill. 575, 181 N.E. 422 (1932) (comment founded on evidence is proper where matter is in issue); State v. Lawrence, 423 S.W.2d 807 (Mo. 1968) ("this man who has manifested dishonesty in the past" was proper where prior convictions in evidence, and was not as attack on defendant's character and reputation); Poole v. Commonwealth, 211 Va. 262, 176 S.E.2d 917 (1970).

[175] Reed v. State, 197 So. 2d 811 (Miss. 1971) (should refrain from commenting on defendant's appearance when he is not a witness; here asking jury to look at defendant and stating he sat through the whole trial showing no emotion whatsoever)*; Commonwealth v. Gordon, 431 Pa. 512, 246 A.2d 325 (1968) ("Did you see those eyes on that killer?" improper).

[176] United States v. Borcelli, 435 F.2d 500 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971) (proper to comment on defendant's crooked foot and posture in courtroom where there were testimony and films of crime in evidence, and jury might have already noticed facts pointed out); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968); People v. Archibald, 129 Ill. App. 2d 400, 263 N.E.2d 711 (1970) (where defense argued that state's identification was inadequate, proper to ask jury to notice that defendant was a very identifiable person); People v. Jefferson, 69 Ill App. 2d 490, 217 N.E.2d 564 (1966) (defendant had worst face for an armed robber any man could have, proper); People v. Griffin, 29 N.Y.2d 91, 272 N.E.2d 477, 323 N.Y.S.2d 964 (1971). *But see* Chamberlain v. State, 46 Ala. App. 642, 247 So. 2d 683 (1971) (asking jury to remember defendant as he appeared in line-up picture in which his clothes were dirty and wrinkled, rather than the way he was in court with a polish job put on him by his lawyers, where not directed to issue of identity but was an unfair comparison of his appearance in court with his appearance in the picture, and imputed unethical conduct on part of defense counsel)*; Spencer v. State, 466 S.W.2d 749 (Tex. Crim. App. 1971) (stating that defense counsel would have had defendant in court with sunglasses or with a sack over his head if he could have, improper where identification in issue).

Failure to Cooperate Before Trial

As indicated earlier, the prosecutor may properly refer to statements made by the defendant before trial where such statements constitute a waiver of the fifth amendment right to remain silent.[177] The general rule, though, is that the defendant's silence before trial is not a proper subject for comment, at least his silence subsequent to arrest.[178] It is not clear whether the defendant's decision to testify at the trial constitutes a waiver of the right to remain silent before as well as during the trial, thus making comment on either situation proper.[179]

Similarly, the courts have generally condemned remarks referring to the failure of the accused to make an exculpatory statement at the time of arrest,[180] since this is merely another way of pointing out the defendant's silence. It has also been deemed improper to comment upon the defendant's invocation of the fifth amendment in prior judicial proceedings, regardless of whether the defendant was the accused or a witness.[181]

In those situations in which the courts have held that no privilege to refuse to cooperate exists, comment on such refusal, if properly proved, is permissible. Thus it is proper to point out that the defendant refused to participate in a lineup,[182] or, with the exception of the polygraph,[183] to remark

[177] *See* note 167 *supra*, and accompanying text.

[178] Gillison v. United States, 399 F.2d 586 (D.C. Cir. 1968) (where defendant testified he did not want to make a statement without presence of counsel, saying "that's the action of an innocent man who went looking for a job")*; People v. Haston, 69 Cal. 2d 233, 444 P.2d 91, 70 Cal. Rptr. 419 (1968) (commenting on extra-judicial silence and evasive answers in face of accusatory statements, and urging jury to draw adverse inference)*; State v. Dearman, 198 Kan. 44, 422 P.2d 573 (1967) (discussing defendant's refusal to make a statement at arrest without presence of attorney so as to create an adverse inference)*; People v. Rolston, 31 Mich. App. 200, 187 N.W.2d 454 (1971) (rule regarding failure to testify applies to pre-custody interrogation, though any statement made before trial may be admitted regardless of whether defendant takes the stand; here permitting prosecution to prove that defendant chose to exercise privilege to remain silent pretrial)*; People v. Williams, 26 Mich. App. 218, 182 N.W.2d 347 (1970) (asking jurors whether they would have just sat there or would have said something when approached by officer and told that he was investigating crime)*; State v. Russell, 282 Minn. 223, 164 N.W.2d 65, *cert. denied*, 396 U.S. 850 (1969) ("But what harm is there in talking if you are honest and above board and have nothing to hide" was improper as comment on codefendant's refusal to give name or answer questions during interview after arrest); State v. Davison, 457 S.W.2d 674 (Mo. 1970); State v. Macon, 57 N.J. 325, 273 A.2d 1 (1971) (improper to refer to defendant's calling an attorney as not the act of an innocent man); People v. Moore, 26 App. Div. 2d 902, 274 N.Y.S.2d 518 (1966); State v. Stephens, 24 Ohio St. 2d 76, 263 N.E.2d 773 (1970). *But see*, United States v. Marcus, 401 F.2d 563 (2d Cir. 1968) *cert. denied*, 393 U.S. 1040 (1969) (pointing out failure to answer questions before trial was not a comment on failure to testify); State v. Green, 70 Wash. 2d 955, 425 P.2d 913 (1967).

[179] *Compare* People v. Bell, 32 Mich. App. 375, 188 N.W.2d 909 (1971) (where defendant testified at trial, not error to comment that defendant refused to make any statements after arrest; no violation of either state or federal constitutions) *with* People v. Rolston, 31 Mich. App. 200, 187 N.W.2d 454 (1971) and State v. Stephens, 24 Ohio St. 2d 76, 263 N.E.2d 773 (1970).

[180] United States v. Arnold, 425 F.2d 204 (10th Cir. 1970) (if all defendant was doing was an experiment and not making a bomb, he would have told agents; not invited by defense argument that agents never asked defendant whether he was conducting an experiment)*; United States v. Winters, 420 F.2d 523 (3d Cir. 1970) (man without guilty knowledge would have denied seeing bag containing stolen money); United States v. Noland, 416 F.2d 588 (10th Cir. 1969) (failure to make exculpatory statement at time of arrest)*; People v. Crawford, 253 Cal. App. 2d 524, 61 Cal. Rptr. 472, *cert. denied*, 390 U.S. 1006 (1967) (failure to disclose alibi when arrested); Ester v. United States, 253 A.2d 537 (D.C. Ct. App. 1969) (comment on failure to make exculpatory statement after arrest prohibited; but comment on defendant's conduct when he saw police arrive was proper, since he was not then under arrest or in custody); People v. Christman, 23 N.Y.2d 429, 244 N.E.2d 703, 297 N.Y.S.2d 134 (1969) (that defendant had not told police of alibi at time of arrest)*; State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 163 N.W.2d 177 (1968) (if defendant elects not to give notice of alibi pursuant to notice of alibi statute, that fact cannot be commented upon, and if he elects to do so and subsequently does not assert alibi at trial, this is not to be commented upon either). *But cf.* State v. Crank, 13 Ariz. App. 587, 480 P.2d 8 (1971) (suggests that lack of exculpatory statement at time of arrest is proper for comment); State v. Burt, 107 N.J. Super. 390, 258 A.2d 711 (1969) (proper to say if shooting had been accidental, as defendant claimed at trial, he would have told police officers at the earliest opportunity).

[181] Stewart v. United States, 366 U.S. 1 (1961) (cross-examination of defendant which disclosed his failure to testify at two prior trials was in part reversible error); State v. Minamyer, 12 Ohio St. 2d 67, 232 N.E.2d 401 (1967) (refusal of defendant to testify before grand jury when he was complaining witness)*; State v. Davis, 10 Ohio St. 2d 136, 226 N.E.2d 736 (1967) (defendant refused to testify at his preliminary hearing)*; Messier v. State, 428 P.2d 338 (Okla. Crim. App. 1967) (refusal to testify in another's preliminary hearing); Dean v. Commonwealth, 209 Va. 666, 166 S.E.2d 228 (1968) (that defendant had invoked privilege in co-defendant's case). *See* Granton v. State, 415 S.W.2d 664 (Tex. Crim. App. 1967) (where defendant testified at punishment stage, improper to remark on his failure to testify at guilt stage). *But cf.* State v. Hines, 195 So. 2d 550 (Fla. 1967) (proper to cross-examine defendant regarding his failure to testify at preliminary hearing).

[182] United States v. Wade, 388 U.S. 218 (1967) (no privilege not to participate in line-up nor to speak for identification purposes); United States v. Parhms, 424 F.2d 152 (9th Cir. 1970).

[183] People v. Brocato, 17 Mich. App. 277, 169 N.W.2d 483 (1969) (neither results of polygraph nor any references to such are proper or admissible); State v. Perry, 274 Minn. 1, 142 N.W.2d 573 (1966) (same).

on the failure of the accused to cooperate in the performance of certain experiments or tests.[184]

Guilt

Consistent with the right to comment on the state of the evidence in the case, it is proper for the prosecutor to argue or express the opinion that the accused is guilty, but only where the prosecutor states or it is apparent that the opinion is based solely on the evidence.[185] As in other contexts, the prosecutor must not make the statement one of personal belief, thereby suggesting to the jury that there is other convincing evidence of the defendant's guilt which is not before them.[186] Accordingly, the test adopted by the federal courts for determining the propriety of the statement is whether the remark might reasonably lead the jury to believe that there was other evidence unknown or unavailable to it upon which the prosecutor's belief rested.[187]

While it is unclear whether the phrases "I think" and "I believe" are proper,[188] a statement of personal belief is not proper merely because the prosecutor offers it as fact without the use of such phrases.[189] Nor should the prosecutor emphasize

[184] Gilbert v. California, 388 U.S. 263 (1967) (taking of fingerprints not violative of fifth amendment); Newhouse v. Misterly, 415 F.2d 514 (9th Cir. 1969) (breathalyzer test); People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393, *cert. denied*, 389 U.S. 850 (1967) (same); State v. Holt, 261 Ia. 1089, 156 N.W.2d 884 (1968) (same); State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967) (failure to give voiceprint for identification); State v. Stanton, 15 Ohio St. 2d 215, 239 N.E.2d 92 (1968) (breathalyzer test); Waukesha v. Godfrey, 41 Wis. 2d 401, 164 N.W.2d 314 (1969) (same).

[185] United States v. Smith, 441 F.2d 539 (9th Cir. 1971) (a summation of discussion of evidence is proper, but personal belief is not); Adams v. State, 280 Ala. 678, 198 So. 2d 255 (1967) (trial judge attributing personal beliefs to each side and sanctioning such beliefs)*; State v. Abney, 103 Ariz. 394, 440 P.2d 914 (1968); Dunfee v. State, 242 Ark. 210, 412 S.W.2d 614 (1967); People v. Dillinger, 268 Cal. App. 2d 140, 73 Cal. Rptr. 720 (1968); Cokley v. People, 168 Colo. 52, 449 P.2d 824 (1969) ("trial courts should begin to take appropriate action against district attorneys who in closing argument persist in conveying their 'personal beliefs' based on their 'long experience' in criminal matters"); Manning v. State, 123 Ga. App. 844, 182 S.E.2d 690 (1971); State v. McKeehan, 91 Idaho 808, 430 P.2d 886 (1967); People v. Anderson, 48 Ill. 2d 488, 272 N.E.2d 18 (1971); State v. Allison, 260 Ia. 176, 147 N.W.2d 910 (1967); Koonce v. Commonwealth, 452 S.W.2d 822 (Ky. Crim. App. 1970); Holbrook v. State, 6 Md. App. 265, 250 A.2d 904 (1969) (prosecutor has undisputed right to argue that evidence convinces him of defendant's guilt, but should-not assert his personal opinion of guilt based on anything outside the evidence); Collins v. State, 87 Nev. 436 488 P.2d 544 (1971) (statements proper where made as a deduction or conclusion from the evidence); People v. Wade, 35 App. Div. 2d 401, 317 N.Y.S.2d 122 (1970); State v. Stephens, 24 Ohio St. 2d 76, 263 N.E.2d 773 (1970); State v. Miller, 460 P.2d 874 (Ore. App. 1969) (here, though a violation of a state bar rule, not reversible error); State v. Quatrocchi, 103 R.I. 115, 235 A.2d 99 (1967); Smith v. Commonwealth, 207 Va. 459, 150 S.E.2d 545 (1966); State v. McGee, 52 Wis. 2d 736, 190 N.W.2d 895 (1971) ("we know who killed decreased" improper); State v. Yancey, 32 Wis. 2d 104, 145 N.W.2d 145 (1966) (state of mind of counsel is not evidence). *See* United States v. Hysohion, 439 F.2d 274 (2d Cir. 1971); State v. Pullen, 266 A.2d 222 (Me. 1970); People v. Sheehy, 31 Mich. App. 628, 188 N.W.2d 231 (1971) (request for verdict of guilty not an assertion of personal belief); State v. Watkins, 156 Mont. 456, 481 P.2d 689 (1971). *But see* State v. Jones, 277 Minn. 174, 152 N.W.2d 67 (1967).

[186] United States v. Schartner, 426 F.2d 470 (3d Cir. 1970) ("I have a duty to protect the innocent and to see that the guilty do not escape, and I say to you with all the sincerity I can muster that if you do not convict the defendant the guilty will escape"); Devine v. United States, 403 F.2d 93 (10th Cir. 1968); People v. Conover, 243 Cal. App. 2d 38, 52 Cal. Rptr. 172 (1966) (would not have prosecuted defendant unless personally believed him guilty); People v. Brachter, 88 Ill. App. 2d 108, 232 N.E.2d 132 (1967) (not going to prosecute people who are innocent); People v. Bell, 84 Ill. App. 2d 48, 228 N.E.2d 574 (1966) (proper to say could see no room for reasonable doubt); State v. Schmidt, 259 Ia. 972, 145 N.W.2d 631 (1966) ("But if you believe, as I do" improper); People v. Slater, 21 Mich. App. 561, 175 N.W.2d 786 (1970) ("I do know this much: that fellow there is the guy who killed" victim)*; People v. Pankin, 4 Mich. App. 19, 143 N.W.2d 806 (1966) (convinced beyond a reasonable doubt of defendant's guilt, improper); State v. Moore, 428 S.W.2d 563 (Mo. 1968) (comment proper if it does not indicate other knowledge); State v. Smith, 279 N.C. 163, 181 S.E.2d 548 (1971) (prosecutor knew when to convict and when not to, improper); State v. Gairson, 484 P.2d 854 (Ore. App. 1971); Blackstock v. State, 433 S.W.2d 699 (Tex. Crim. App. 1968) (not going to prosecute people who are innocent); State v. Jacobsen, 74 Wash. 2d 36, 442 P.2d 629 (1968) (would not prosecute unless sure of guilt); State v. Tollett, 71 Wash. 2d 806, 431 P.2d 168 (1967), *cert. denied*, 392 U.S. 914 (1968); State v. Walton, 5 Wash. App. 150, 486 P.2d 118 (1971) (had never used the term demand in argument but in this case the facts demanded a verdict of guilty).

[187] Schmitt v. United States, 413 F.2d 219 (5th Cir. 1969); Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967)*.

[188] United States v. Barber, 303 F. Supp. 807 (D. Del. 1969) (generally improper to use "I believe" or "I personally believe"); State v. Prettyman, 198 N.W.2d 156 (Minn. 1972) (frequent prefacing of sentences with "I think" and "I think you'll find that" is impermissible even though appeared they were more idle cliche than deliberate expressions of personal opinion). *But see* McGlathery v. State, 435 S.W.2d 677 (Mo. 1969) (using "I think" several times was proper where merely introducing what the prosecutor was going to say); Collins v. State, 488 P.2d 544 (Nev. 1971) (not error to use "I feel," "I think," or "I submit" as introductory phrases).

[189] Harris v. United States, 402 F.2d 656 (D.C. Cir. 1968) (statements amounted to personal opinion and were improper); People v. Montevecchio, 32 Mich.

his personal assessment of the strength of the case,[190] or the various investigative procedures which lead him to believe the defendant guilty.[191]

COMMENTING ON THE DEFENSE AND DEFENSE COUNSEL

Failure to Produce Witnesses

Since the burden of proof is on the government, the defense has the right to comment on the state's unexplained failure to produce witnesses.[192] And even though the defense is not bound to present a case, it has been pointed out that the prosecutor may comment that no defense was presented, as a fair reference to the state of the evidence.[193] It has been specifically recognized as proper for the prosecutor to note that the defense did not use its power to subpoena witnesses,[194] or that the defense failed to produce any witnesses or specific witnesses.[195] The latter comment is particularly appropriate and damaging when the absent witness is a material one,[196] the most common example being the alibi witness.[197]

App. 163, 188 N.W.2d 186 (1971) (remarks made as factual statements)*.

[190] United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970) ("I don't know of a case where the evidence has been as strong"); People v. Bandhauer, 66 Cal. 2d 524, 426 P.2d 900, 58 Cal. Rptr. 332 (1967)*; People v. Miller, 26 Mich. App. 665, 182 N.W.2d 772 (1970) ("one of the strongest cases, one of the most obvious cases, these detectives have ever seen"); People v. Mantesta, 27 App. Div. 2d 748, 277 N.Y.S.2d 442 (1967) (never tried a robbery case which was as clear-cut). *But see* Williams v. United States, 237 A.2d 539 (D.C. Ct. App. 1968) (proper to say prosecutor felt strongly about case and it was "one of the strongest cases I believe I have ever had"); People v. Burnett, 27 Ill. 2d 510, 190 N.E.2d 338 (1963) (proper to state "there has never been a murderer in Cook County proven more clearly guilty").

[191] United States v. Sutton, 446 F.2d 916 (9th Cir. 1971) (grand jury); McMillan v. United States, 363 F.2d 165 (5th Cir. 1966) (government had already determined guilt but because of technical legalisms could not bring in all the evidence)*; People v. Yancy, 33 Mich. App. 352, 189 N.W.2d 827 (1971) (prosecutor's office went through a complicated determination on basis of existing evidence before it sought issuance of a warrant, proper where statement indicated doubt as to defendant's guilt immediately thereafter); People v. Humphreys, 24 Mich. App. 411, 180 N.W.2d 328 (1970) (if in opinion of police and prosecution defendant were innocent he would not be on trial)*; State v. Jackson, 127 Vt. 237, 246 A.2d 829 (1968) (information was brought after thorough investigation). *But see* United States v. Meisch, 370 F.2d 768 (3d Cir. 1966) (defendant was arrested three months after offense because state was "checking him out", proper); Ross v. State, 419 Ala. App. 88, 238 So. 2d 887 (1970) (if there had been any question it would have been prosecutor's sworn duty to ask for a dismissal); Ramos v. State, 419 S.W.2d 359 (Tex. Crim. App. 1967) ("If I have an indictment and after observing it I do not feel he's guilty—" proper where defense counsel interrupted).

[192] United States v. Bronston, 326 F. Supp. 469 (S.D.N.Y. 1971) (improper for prosecutor to offer unsworn testimony as to the whereabouts of a witness, and to comment on defendant's failure to call, but instruction that witness was hostile to defendant, and jury could draw adverse inference to state for failure to call, cured the defect); Slater v. State, 43 Ala. App. 513, 194 So. 2d 93 (1966); People v. Gonzales, 125 Ill. App. 2d 225, 260 N.E.2d 234 (1970).

[193] *See* notes 127–31 & 136 *supra*, and accompanying text.

[194] United States v. Panepinto, 430 F.2d 613 (3d Cir. 1970); State v. Hutchinson, 458 S.W.2d 553 (Mo. 1970); Santillan v. State, 470 S.W.2d 77 (Tex. Crim. App. 1971).

[195] Talbot v. Nelson, 390 F.2d 801 (9th Cir. 1968); Pace v. State, 121 Ga. App. 251, 173 S.E.2d 464 (1970); State v. Lincoln, 250 Ore. 426, 443 P.2d 178 (1968); Spencer v. State, 466 S.W.2d 749 (Tex. Crim. App. 1971). *See* State v. Pullen, 266 A.2d 222 (Me. 1970); State v. Dymond, 110 N.H. 228, 265 A.2d 9 (1970). *But see* People v. Swift, 319 Ill. 359, 150 N.E. 263 (1926) (improper).

[196] United States v. Seay, 432 F.2d 395 (5th Cir. 1970) (comment on failure to call defendants' wives, who were present at time of arrest, not improper); Ignacio v. Guam, 413 F.2d 513 (9th Cir. 1969) (failure of defense to call its own ballistics expert); People v. Grant, 268 Cal. App. 2d 470, 74 Cal. Rptr. 111 (1968), *cert. denied*, 396 U.S. 858 (1969) (material and logical witness); State v. Allison, 147 S.W.2d 910 (Iowa 1967) (avialable witness); State v. McLarty, 467 S.W.2d 58 (Mo. 1971) (material witness); Barron v. State, 479 P.2d 614 (Okla. Crim. App. 1971) (witness whose testimony would be expected to be favorable); Miller v. State, 458 S.W.2d 680 (Tex. Crim. App. 1970).

[197] United States v. Welp, 446 F.2d 867 (9th Cir. 1971) (failure to call defendant's father who was in court, and arguing for an adverse inference); Kroll v. United States, 433 F.2d 1282 (5th Cir. 1970) (where defense in mail fraud was that defendant tried to protect investors' funds, proper to say that no investors were called to testify); United States v. Cox, 428 F.2d 683 (7th Cir. 1970) (proper to argue that defendant's companion, who according to defendant's exculpatory statements could have provided alibi, remained anonymous); United States v. Banks, 426 F.2d 292 (6th Cir. 1970) (if defendant's alibi were really true, others than his wife and brother could have been called); People v. Chandler, 17 Cal. App. 3d 798, 95 Cal. Rptr. 146 (1971); People v. Romeo, 244 Cal. App. 2d 495, 53 Cal. Rptr. 260 (1966) (could draw adverse inference from failure to produce companions); Miller v. State, 224 A.2d 592 (Del. 1966) (proper to comment where state had affirmatively proved alibi false, and defense made no effort to call presumably accessible witnesses); People v. Nilsson, 44 Ill. 2d 244, 255 N.E.2d 432, *cert. denied*, 398 U.S. 954 (1970) (unclear under Illinois law whether proper to comment on failure to produce alibi witnesses); Frazier v. State, 3 Md. App. 470, 240 A.2d 306 (1968); State v. Artis, 57 N.J. 24, 269 A.2d 1 (1970); Simon v. State, 406 S.W.2d 460 (Tex. Crim. App. 1966) (where defendant's brother was called by state and defense did not cross-examine, proper to argue that if defendant's version of the crime were true he would have asked his brother to support his story). *See* Alsobrook v. State, 43 Ala. App. 473, 192 So. 2d 478 (1966). *But see* Simon v. United

In limiting the above, the courts have emphasized that any comments on an absent witness may be improper where the witness is equally available or accessible to the government, though the presumptions and burdens in proving availability are not clear.[198] If the witness is equally accessible it is not error for the prosecutor to reply to a question propounded by defense counsel during summation.[199] If defense counsel's question concerns the whereabouts of certain witnesses it is proper for the prosecutor to ask why the same persons were not produced by the defense.[200] Moreover, where the defendant attempts to explain the absence of a witness while testifying, the prosecutor may then refer to that absence, although such commentary is not otherwise permitted.[201]

Although it is generally improper to refer to the fact that certain co-defendants failed to testify,[202] the courts have permitted remarks concerning the failure of a defendant to produce his co-defendants as witnesses.[203] The courts have been harsher where the absent witness was not a defendant, but one who would have to incriminate himself.[204] Where the uncalled witness is the defendant's spouse, the propriety of a comment on the failure to call will depend upon the particular statute creating the husband-wife privilege.[205]

While the court may permit reference to the failure of the defense to produce a witness or witnesses, especially in light of the currently confused state of the law, it is dangerous for the prosecutor to go further by arguing that the testimony would have been adverse.[206] It is also perilous

States, 424 F.2d 796 (D.C. Cir. 1970) (improper to refer to failure to call alibi witness where equally accessible to both sides).

[198] United States v. Arendale, 444 F.2d 1260 (5th Cir. 1971) (adverse inference proper if witness not equally available); Wynn v. United States, 397 F.2d 621 (D.C. Cir. 1967) (proper where (1) peculiarly within the other party's power to produce and (2) would elucidate transaction); Slater v. State, 43 Ala. App. 513, 194 So. 2d 93 (1966) (failure to call equally accessible or available witness is not proper subject for comment; available or accessible does not mean merely amenable to subpoena, and depends upon a party's superior means of knowledge of existence and identity of witness, of testimony that might be expected, or upon relationship of witness to the party; here, refusing defense permission to comment upon refusal of state to call eyewitness who was a relative of victim and thus not equally accessible, where prosecutor only gave unsworn testimony as to reasons for absence)*; Conyers v. United States, 237 A.2d 838 (D.C. App. Ct. 1968) (proper if peculiarly within the power of the other party to produce); People v. Carr, 114 Ill. App. 2d 370, 252 N.E.2d 912 (1969) (proper where fair inference could be drawn that more accessible to defense); Commonwealth v. DeCaro, — Mass. —, 269 N.E.2d 673 (1971) (proper where indisputably available to defense); State v. Houston, 451 S.W.2d 37 (Mo. 1970) (improper where equally accessible); State v. Heiser, 183 Neb. 665, 163 N.W.2d 582 (1968).

[199] *See, infra*, notes 244–49 and accompanying text.

[200] People v. Mirmelli, 130 Ill. App. 2d 1, 264 N.W.2d 470 (1970); Easley v. State, 454 S.W.2d 758 (Tex. Crim. App. 1970). *See* State v. Murray, 200 Kan. 526, 437 P.2d 816 (1968); Commonwealth v. Subilosky, 352 Mass. 153, 224 N.E.2d 197 (1967) (reading statement of absent policeman was invited by defense statements); State v. Glisan, 465 P.2d 253 (Ore. App. 1970); State v. Lane, 4 Wash. App. 745, 484 P.2d 432 (1971) (argument that defense would have subpoenaed witnesses if their testimony favorable was invited by defense statements regarding withholding of evidence).

[201] People v. Swift, 319 Ill. 359, 150 N.E. 263 (1926).

[202] *See* note 142 *supra*, and accompanying text.

[203] Berry v. State, 123 Ga. App. 616, 182 S.E.2d 166 (1971) (proper); Minor v. Commonwealth, 478 S.W.2d 716 (Ky. Crim. App. 1972) (argument that defendant had not put his co-defendant on stand, while not condoned, was not reversible error); State v. Hudson, 253 La. 992, 221 So. 2d 484 (1969) (where codefendant pleaded guilty at beginning of trial, he could have been called and failure to do so was proper subject of comment).

[204] United States v. Smith, 436 F.2d 787 (5th Cir. 1971) (where defendant had previously escaped, it was improper in his prosecution for forgery to refer to failure to call certain witnesses where the court could not grant them immunity from prosecution for harboring and assisting a fugitive); Bradley v. United States, 420 F.2d 181 (D.C. Cir. 1969) (improper to argue that adverse inference could be drawn from failure to call witnesses who would have had to incriminate themselves); Morrison v. United States, 365 F.2d 521 (D.C. Cir. 1966) (where a defense witness invokes privilege on stand and government refuses to grant immunity, court should instruct both sides not to make a missing witness argument). *See generally* cases cited in notes 116, 118 & 119, *supra*.

[205] United States v. Seay, 432 F.2d 395 (5th Cir. 1970); People v. Powell, 14 Cal. App. 3d 693, 92 Cal. Rptr. 501 (1971) (comment improper in view of trial court's prior ruling); People v. Coleman, 71 Cal. 2d 1159, 80 Cal. Rptr. 920, 459 P.2d 248 (1969) (under statute, there is not privilege not to testify *for* spouse); James v. State, 223 Ga. 677, 157 S.E.2d 471 (1967) (where defendant could not require wife's presence as witness)*; State v. Levy, 160 N.W.2d 460 (Iowa 1968); State v. Freeman, 198 Kan. 301, 424 P.2d 261 (1967) (court would not reverse where not clear from record that missing witness was actually defendant's wife, but remark was nevertheless improper); Gossett v. Commonwealth, 402 S.W.2d 857 (Ky. Crim. App. 1966) (improper)*; State v. Jones, 257 La. 966, 244 So. 2d 849 (1971) (proper to comment on fact spouse refused to testify); Robinson v. State, 489 P.2d 1358 (Okla. Crim. App. 1971); Green v. State, 454 S.W.2d 750 (Tex. Crim. App. 1970) (proper).

[206] *See* People v. Carpenter, 13 Ill. App. 2d 187, 266 N.E.2d 478 (1970) and People v. Sanford, 10 Ill. App. 2d 101, 241 N.E.2d 485 (1968), both permitting somewhat questionable references to the failure to call certain witnesses because the prosecutor made no suggestion that their testimony would have been adverse. *See also* case cited in note 119 *supra*.

to argue for an adverse inference unless the prosecutor has obtained an advance ruling from the court.[207]

Failure to Produce Evidence

The same general rules governing the failure of the defense to produce witnesses also apply to its failure to produce evidence.[208] However, the question of accessibility has not received as much attention here.[209] One reason for this is that the prosecutor's remarks are more often viewed as invited by defense counsel,[210] though it must be remembered that the defense attorney may, and indeed must, comment on the government's failure to produce material evidence.[211] Two remarks commonly made concern the defendant's knowledge of the whereabouts of a missing gun,[212] and the absence of fingerprints.[213] In both situations the prosecutor is taking advantage of an opportunity to place blame for the government's failure to produce evidence on the defense. Whatever the remark, the prosecutor must be certain that it is supported as much as possible by the evidence in the case. For example, it is not proper to attribute the absence of fingerprints to the defendant unless it has been shown that there were no fingerprints.[214]

Defense Counsel

It is permissible for the prosecutor to characterize the defense presented.[215] However, he has less latitude when the focus of his argument turns from the defense generally to the defendant's counsel.

Consistent with this approach, it has been held improper for the prosecutor to comment in argument on defense counsel's objection to the admission of evidence or testimony[216] or to portions of the prosecutor's summation.[217] Speculation on the

[207] Gass v. United States, 416 F.2d 767 (D.C. Cir. 1969) (should obtain advance ruling).

[208] Salzman v. United States, 405 F.2d 358 (D. C. Cir. 1968) (proper to argue that blood-soaked shirt described by complainant and one described by officers who visited defendant in hospital were the same, and that subsequent disappearance of shirt evidenced a consciousness of guilt); State v. Morgan, 444 S.W.2d 490 (Mo. 1969) (defense produced no evidence to show that any of state's evidence was incorrect, proper); State v. Sinclair, 49 N.J. 525, 231 A.2d 565 (1967).

[209] Simon v. State, 406 S.W.2d 460 (Tex. Crim. App. 1966) (failure to produce readily available evidence a proper subject for comment). *See* People v. Green, 7 Mich. App. 346, 151 N.W.2d 834 (1967) (proper to argue that there was no evidence of a weapon being found on the victim, where it was obvious that if something had been found it would have been introduced by the defense to support its story); Commonwealth v. White, 442 Pa. 461, 275 A.2d 75 (1971) (prosecutor's statement that he had an idea that defendant "could tell us where that weapon is" was excusable where the remark was not knowingly false, followed from state's theory that defendant was the killer, and was made in the heat of argument).

[210] United States v. Cedar, 437 F.2d 1033 (9th Cir. 1971) (reference to failure of defendant to offer a better map, where counsel criticized the government's map); People v. Durso, 40 Ill. 2d 242, 239 N.E.2d 842, *cert. denied*, 393 U.S. 1111 (1968) (failure to produce evidence on a material matter injected into the case by counsel gives rise to a right of response); State v. Wrose, 463 S.W.2d 792 (Mo. 1971) (proper to argue in response that professionals do not leave fingerprints); State v. Summerour, 107 R.I. 142, 264 A.2d 329 (1970) (failure to produce evidence that robber had goatee, where made in response).

[211] *See* note 192 *supra*.

[212] People v. Williams, 40 Ill. 2d 522, 240 N.E.2d 645, *cert denied*, 393 U.S. 1123 (1968) (that defendant could not afford to allow murder weapon to turn up and permit examination by ballistics expert, proper); Commonwealth v. White, 442 Pa. 461, 275 A.2d 75 (1971); State v. Burke, 101 R.I. 103, 220 A.2d 508 (1966), *cert. denied*, 393 U.S. 1110 (1968) (that prosecution knew that gun used by defendant was in mud at the bottom of a pond, improper); State v. Dombrowski, 44 Wis. 2d 486, 171 N.W.2d 349 (1969) (improper to infer that defendant could produce missing gun).

[213] State v. Wrose, 463 S.W.2d 792 (Mo. 1971); State v. Foster, 2 N.C. App. 109, 162 S.E.2d 583 (1968) (absence of fingerprints and establishment of alibi were evidence of professionalism)*.

[214] People v. Beier, 29 Ill. 2d 511, 194 N.E.2d 280 (1963) (that defendant must have wiped her prints from the gun was highly improper in the absence of any evidence that there were no prints on gun or that it had been wiped clean); People v. Roberts, __ Ill. App. 2d__, 272 N.E.2d 768 (1971).

[215] United States v. Hysohion, 439 F.2d 274 (2d Cir. 1971) (insult to jury's intelligence, proper); State v. Rosen, 110 N.J. Super. 212, 265 A.2d 151 (1968) (smoke screen, proper); State v. Persiano, 91 N.J. Super. 299, 220 A.2d 116 (1966) (same); Blankenship v. State, 432 S.W.2d 945 (Tex. Crim. App. 1968) (trumped-up defense, proper). *See* United States v. Marcello, 423 F.2d 993 (5th Cir.), *cert. denied*. 398 U.S. 959 (1970) (insult to jury's intelligence, improper); People v. Lombardi, 20 N.Y.2d 266, 282 N.Y.S.2d 519, 229 N.E.2d 206 (1967) (defense "born of desperation, and despair, filled with deceit, devoid of decency, devoid of truth, foul and vile," improper). See text accompanying notes 120 to 139 *supra* for a discussion of the potential conflict between the right to characterize the defense and the defendant's right not to testify at trial.

[216] People v. Sanders, 96 Ill. App. 2d 166, 238 N.E.2d 180 (1968) (evidence); Commonwealth v. Balakin, 356 Mass. 547, 254 N.E.2d 422 (1969) (testimony); State v. Jones, 277 Minn. 174, 152 N.W.2d 67 (1967) (evidence); Sharp v. State, 421 S.W.2d 663 (Tex. Crim. App. 1967) (testimony).

[217] United States v. Hughes, 441 F.2d 12 (5th Cir. 1971) (improper: "one of the main reasons for objecting to counsel's argument is because this distracts your thinking from what I am saying. This is one reason that some of those objections were made."); People v. Wilson, 116 Ill. App. 2d 205, 253 N.E.2d 472 (1969) ("having thoroughly screwed up my argument," improper).

reasons why counsel waived opening statement or summation is also not condoned.[218]

It is also improper to reflect unfavorably on the role of defense counsel, implying the use of improper or unethical tactics,[219] where such remarks are not justified by the evidence.[220] Personal attacks on defense counsel are highly improper.[221] If the defense attorney takes the stand, his testimony is a proper subject for comment under the rules applicable to commenting on witnesses generally.[222]

[218] People v. Fuerback, 66 Ill. App. 2d 452, 214 N.E.2d 330 (1966)*; People v. Matthews, 33 App. Div. 2d 679, 305 N.Y.S.2d 919 (1969) (opening statement); Wyatt v. State, 491 P.2d 1098 (Okla. Crim. App. 1971) (same).

[219] United States v. Wilshire Oil Co. of Texas, 427 F.2d 969 (10th Cir. 1970) (confusing issue and throwing sand in juror's eyes); United States v. Marcello, 423 F.2d 993 (5th Cir. 1970); United States v. DiGiovanni, 397 F.2d 409 (7th Cir.), *cert. denied*, 393 U.S. 924 (1968) (cheap trick); Cline v. United States, 395 F.2d 138 (8th Cir. 1968) (dishonest); Chamberlain v. State, 46 Ala. App. 642, 247 So. 2d 683 (1971); State v. Zumwalt, 7 Ariz. App. 348, 439 P.2d 511 (1968) (that defense counsel not an officer of court as prosecutor was); People v. Savage, 84 Ill. App. 2d 73, 228 N.E.2d 215 (1967) (repeatedly asserting that defense counsel was employing tactics designed to confuse jury)*; Reidy v. State, 9 Md. App. 169, 259 A.2d 66 (1969) (defense was a fiction manufactured by defense counsel)*; People v. Damon, 24 N.Y.2d 256, 247 N.E.2d 651, 299 N.Y.S.2d 830 (1969) (sandbagging witnesses); Bray v. State, 478 S.W.2d 89 (Tex. Crim. App. 1972)*; Grant v. State, 472 S.W.2d 531 (Tex. Crim. App. 1971) ("defense lawyer's job is to try to get your eye off the defendant," improper).

[220] State v. Reed, 157 Conn. 464, 254 A.2d 449 (1969) (proper to state that defense counsel's style of cross-examination deterred people from coming into court to testify, a fair comment on the record); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968) (cross-examination of expert witness was an exhibition to confuse jury, proper); People v. Toliver, __ Ill. App. 2d __, 273 N.E.2d 274 (1971) (where defense was that defendant had been involuntarily drugged by his companion, and did not have the requisite mental capacity to commit crime, proper to argue that a defendant who has been advised by a good attorney will not deny his presence at the crime scene but will raise this defense); State v. Smith, 431 S.W.2d 74 (Mo. 1968) (throwing dust in jurors' eyes proper).

[221] Adams v. State, 192 So. 2d 762 (Fla. 1966) (counsel had perverted and distorted things, and had violated his oath as a lawyer and as a human being)*; People v. Kirk, 361 Ill. 2d 292, 222 N.E.2d 498 (1966) (counsel taking doctrine of Adolph Hitler, in that if enough lies were told by enough people, they would be believed); Bonnenfant v. State, 86 Nev. 393, 469 P.2d 401 (1970) (impolite pun on counsel's name); People v. Lombardi, 20 N.Y.2d 266, 229 N.E.2d 206, 282 N.Y.S.2d 513 (1967) ("great defender of civil liberties" and dishonest)*; Dupree v. State, 219 Tenn. 492, 410 S.W.2d 890 (1967) (in spite of highly improper defense argument that he would not represent defendant if he thought him guilty, response that defense counsel lied when he said he believed defendant innocent)*.

[222] People v. McBride, 130 Ill. App. 2d 206, 264 N.E.2d 446 (1970) (took stand to impeach witness).

COMMENTING ON THE DUTY OF THE JURY

The prosecutor may not instruct the jury in the law,[223] but may instruct it as to its duty in the case since the prosecutor is responsible for law enforcement in the community.[224] It is proper to dwell upon the evil results of the crime and to urge a fearless administration of the criminal law,[225] and the prosecutor may remind the jury that it is there to protect the life and limb of every citizen, and that the people look to it for the protection against crime.[226] It is proper for the prosecutor to urge the jury to impose severe punishment where it is the province of the jury to assess or recommend punishment.[227] But because the jury verdict is to be reached solely through impartial deliberation on the evidence presented at trial, it is not proper for the prosecutor to suggest that the jury may consider matters outside the record, especially the existence of post-trial procedures, which might encourage the jury to render a guilty verdict.[228]

---

[223] *See* note 38 *supra*, and accompanying text.

[224] State v. Williams, 107 Ariz. 262, 485 P.2d 832 (1971); People v. Escarega, 273 Cal. App. 2d 853, 78 Cal. Rptr. 785 (1969) *cert. denied*, 397 U.S. 975 (1971) (proper to comment on serious and increasing menace of criminal conduct and necessity of jurors' strong sense of duty).

[225] People v. Hairston, 46 Ill. 2d 348, 263 N.E.2d 840 (1970); State v. Evans, 406 S.W.2d 612 (Mo. 1966); Randolph v. State, 464 S.W.2d 658 (Tex. Crim. App. 1971).

[226] People v. Bailey, 76 Ill. App. 2d 310, 222 N.E.2d 268 (1966); State v. Vermillion, 446 S.W.2d 788 (Mo. 1969).

[227] People v. Sullivan, 345 Ill. 87, 177 N.E. 733 (1931); State v. Royster, 57 N.J. 472, 273 A.2d 574 (1971); Robinson v. State, 415 S.W.2d 180 (Tex. Crim. App. 1967); State v. Cerny, 78 Wash. 2d 845, 480 P.2d 199 (1971).

[228] Evalt v. United States, 359 F.2d 534 (9th Cir. 1966); State v. Gaines, 6 Ariz. App. 561, 435 P.2d 68 (1967) (that co-defendant was on probation); People v. Modesto, 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967); Zide v. State, 212 So. 2d 788 (Fla. App. 1968) (probation); Faust v. State, 222 Ga. 27, 148 S.E.2d 430 (1966) (no references to reviewing courts should be made except to cite their decisions); People v. Panczko, 20 Ill. 2d 86, 169 N.E.2d 333 (1960) (referring to punishment for offense as negligible); People v. Krogol, 29 Mich. App. 406, 185 N.W.2d 408 (1971) (appeals); State v. Lewis, 443 S.W.2d 186 (Mo. 1969) (defendant should get heavy sentence because of possibility of parole)*; People v. Slaughter, 28 App. Div. 2d 1082, 285 N.Y.S.2d 146 (1967) (by pleading insanity defendant thought he would be committed and be on street again in 30 days)*; State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971) (appeals could go on until Doom's Day); Herandy v. State, 487 P.2d 1368 (Okla. Crim. App. 1971) (by good behavior and donating blood, defendant could get 10 year sentence reduced to 3 1/2 years, improper and justified reduction of sentence from 10 to 3 years, since prosecutor had misled jury); Lime v. State, 479 P.2d 608 (Okla. Crim.

APPEALS TO SYMPATHY AND PREJUDICE

It is obviously improper for the prosecutor to do or say anything in summation the sole effect of which is to inflame the passion of or arouse the prejudice of the jury.[229] Such remarks may encourage the jury to render a verdict based on its emotional response to unadmitted evidence which has no relationship to the guilt or innocence of the accused, rather than a verdict based upon reasoning from the record. The questions for review are to what extent, for what reasons, and with what effect were the arguments advanced.[230] While caution against such comments is always required, it has been said that special care is required in the prosecution of sex offenses.[231]

No attempt should be made to pressure the jury, such as by referring to the actions of other juries or to public sentiment regarding either the particular case or the jury system in general.[232] It has also been deemed improper to refer to the victim of the crime or the victim's family.[233] Furthermore, the prosecutor should not refer to the jurors or their families, hypothesizing the commission of the crime at issue against them.[234] Comments exciting racial, religious, or class prejudice have been repeatedly condemned,[235] as have

App. 1971) (parole); Williams v. State, 461 P.2d 997 (Okla. Crim. App. 1969) (statute governing credits for good conduct which required that jury be instructed as to its provisions and permitted prosecutor to comment on it in argument was a legislative encroachment upon judicial power and unconstitutional); Wilson v. State, 458 P.2d 315 (Okla. Crim. App. 1969) (credit for pre-trial incarceration); Bivens v. State, 474 S.W.2d 431 (Tenn. Crim. App. 1971) (that state has no right to appeal, improper); Graham v. State, 442 S.W.2d 922 (Tex. Crim. App. 1968) (parole); Simms v. State, 492 P.2d 516 (Wyo. 1972) (that state has no right to appeal, improper). *See* Rowe v. State, 250 Ind. 547, 237 N.E.2d 576 (1968) (if defendant were convicted of lesser offense only, he could be out in two years)*; Napier v. Commonwealth, 426 S.W.2d 121 (Ky. Crim. App. 1968) ("if you decide he's guilty, whatever you do, don't hang up on the punishment and make us try this case over again," improper). *But see* Terhune v. State, 117 Ga. App. 59, 159 S.E.2d 291 (1967) (that jury was not concerned with board of corrections, or with pardon and parole board, but only with guilt or innocence, proper).

[229] United States v. Fullmer, 457 F.2d 447 (7th Cir. 1972)*; United States v. Gambert, 410 F.2d 383 (4th Cir. 1969) (suggesting that judge believes defendant guilty)*; State v. Beers, 8 Ariz. App. 534, 448 P.2d 104 (1968); People v. Harris, 270 Cal. App. 2d 863, 76 Cal. Rptr. 130 (1969) (improper to state that the weapon was not being introduced for security reasons where there was no basis for such statement); Thompson v. State, 194 So. 2d 649 (Fla. App. 1967); Carnes v. Commonwealth, 406 S.W.2d 849 (Ky. Crim. App. 1966)*: People v. Slaughter, 28 App. Div. 2d 1082, 285 N.Y.S.2d 146 (1967); State v. Bentley, 1 N.C. App. 365, 161 S.E.2d 650 (1968); Seeley v. State, 471 P.2d 931 (Okla. Crim. App. 1970) (great number of traffic deaths in drunk driving prosecution); State v. Mancini, 108 R.I. 261, 274 A.2d 742 (1971) (prejudice obviously inheres if remarks are totally extraneous to issues in case and tend to inflame and arouse passions of jury); Conboy v. State, 455 S.W.2d 605 (Tenn. App. 1970); Wright v. State, 46 Wis. 2d 75, 175 N.W.2d 646 (1970) (reading profanity which witness attributed to defendant during course of crime may have been unnecessary).

[230] People v. Hyde, 1 Ill. App. 3d 831, 275 N.E.2d 239 (1971) (improper to refer to wife or family of murder victim whether reference is by evidence or argument, but mere fact that evidence of such appears in trial incidentally or is the subject of comment does not automatically require reversal).

[231] People v. Fortson, 110 Ill. App. 2d 206, 249 N.E.2d 260 (1969); People v. Askar, 8 Mich. App. 95, 153 N.W.2d 888 (1967).

[232] Wiggins v. State, 43 Ala. App. 382, 191 So. 2d 30 (1966) (low public esteem for the jury system); Burkhead v. State, 206 So. 2d 690 (Fla. App. 1968) (that there was a general feeling in the community that there was no justice, improper); People v. Letterich, 413 Ill. 172, 108 N.E.2d 488 (1952) (referring to other juries and possible public disapproval if jury did not convict); State v. Lamar, 260 Ia. 957, 151 N.W.2d 496 (1967) (speed with which guilty verdict had been returned in similar cases); State v. Raspberry, 452 S.W.2d 169 (Mo. 1970) (personal dangers might exist for jurors and their families if defendant acquitted); State v. Watson, 20 Ohio App. 2d 115, 252 N.E.2d 305 (1969) (asking jury to take account of community sentiment); Perbetsky v. State, 429 S.W.2d 471 (Tex. Crim. App. 1968) ("society demands that the defendant be punished" was proper, not referring to the specific local community); Hughes v. State, 409 S.W.2d 416 (Tex. Crim. App. 1966) (discussing public opinion regarding this case).

[233] State v. Hughes, 389 F.2d 535 (2d Cir. 1968); People v. Floyd, 1 Cal. 3d 694, 464 P.2d 64, 83 Cal. Rptr 608 (1970); People v. Hyde, 1 Ill. App. 3d 831, 275 N.E.2d 239 (1971); Lime v. State, 479 P.2d 608 (Okla. Crim. App. 1971) (victim's family); Perry v. State, 464 S.W.2d 660 (Tex. Crim. App. 1971) (what victim's family would want as punishment); Ramos v. State, 419 S.W.2d 359 (Tex. Crim. App. 1967) (family, improper). *But see* Commonwealth v. Gerald, 356 Mass. 386, 252 N.E.2d 344 (1969) (expressing regret that rape victim had been subject to degradation and humiliation because of public trial, proper).

[234] State v. Dillon, 104 Ariz. 33, 448 P.2d 89 (1968); People v. Jones, 7 Cal. App. 3d 358, 86 Cal. Rptr. 516 (1970) (sons of jurors and their girlfriends threatened); Clarke v. United States, 256 A.2d 782 (D.C. Ct. App. 1969); Grant v. State, 194 So. 2d 612 (Fla. 1967) (murder of jurors)*; Adams v. State, 192 So. 2d 762 (Fla. 1966) (murder of juror's families); Johnson v. State, 226 Ga. 511, 175 S.E.2d 840 (1970) (if defendant given only a life sentence, he might kill a juror or a member of juror's family); People v. Teague, 66 Ill. App. 2d 338, 214 N.E.2d 522 (1966) (rape of jurywomen and families of jurymen); Ader v. State, 225 N.E.2d 171 (Ind. 1967) (killing of sons of jurors); State v. Paxton, 453 S.W.2d 923 (Mo. 1970) (murder of jurors). *But see* Parks v. State, 400 S.W.2d 769 (Tex. Crim. App. 1966) (rape of jurywomen and families of jurymen, proper).

[235] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (class prejudice); United States v.

appeals to the interests of the jurors as taxpayers[236] or as members of a particular community.[237]

While it is generally permissible to argue that a conviction would deter others from the commission of similar crimes,[238] it has been held improper to suggest that if the defendant were acquitted he would commit further crimes[239] or that a verdict of guilty would serve as a good example to young people.[240] On the other hand, the prosecutor may comment on the brutal nature of the crime,[241]

Homer, 423 F.2d 630 (9th Cir. 1970) (asking whether defense counsel was trying to let defendants hide behind their race, improper); Brent v. White, 276 F. Supp. 386 (E.D. La. 1967) (reference to rape victim as a white girl where defendant was black was not prejudicial where she testified and it was evident that she was white); Fisher v. State, 241 Ark. 545, 408 S.W.2d 894 (1966), *cert. denied*, 389 U.S. 821 (1967) (argument that never before in county had black received a life sentence upon conviction, not error where jury recommended a 15 year sentence); People v. Brown, 86 Ill. App. 2d 163, 229 N.E.2d 922 (1967) (must be a showing of non-black jury for contention of racial prejudice to warrant consideration on appeal); State v. Kirk, 205 Kan. 681, 472 P.2d 237 (1970); Irwin v. Commonwealth, 446 S.W.2d 570 (Ky. Crim. App. 1969) (argument that defendants had been hiding because they knew "the jig was up" was proper where clear there was no derogatory intention); State v. Alexander, 255 La. 941, 233 So. 2d 891 (1970) (mispronouncing "Negroes" not improper); Riley v. State, 83 Nev. 282, 429 P.2d 59 (1967) (no showing of racial bias to black defendant in prosecution for rape of white girl where prosecution referred to race only once, while defense dwelled on it); People v. Hunter, 20 N.Y.2d 789, 230 N.E.2d 734, 284 N.Y.S.2d 93 (1967) (no error in refusing to allow defense to argue on racial dissimilarity of complainant and defendant as a point to be considered by jury in determining reliability of identification); People v. DePasquale, 54 Misc. 2d 91, 281 N.Y.S.2d 963 (1967) (reference to race, nationality or religion may be prejudicial even though not so intended, and should be avoided unless relevant to a matter in issue); Biggers v. State, 219 Tenn. 553, 411 S.W.2d 696 (1967), *aff'd by equally divided Court*, 390 U.S. 404 (1968) (argument that rape would not have been prosecuted in many parts of the country since both parties were black, improper); Rodgers v. State, 468 S.W.2d 852 (Tex. Crim. App. 1971) (identifying witnesses were black and could more certainly identify defendant who was black than could non-blacks, improper); Thornton v. State, 451 S.W.2d 898 (Tex. Crim. App. 1970) (asking if white robbery victim would have gotten out of car at night for 3 "nigger men" if they did not have guns, improper); Joyner v. State, 436 S.W.2d 141 (Tex. Crim. App. 1969) (since defendant was black and trial commenced only a few days after Detroit riots of 1967, arguing that the United States was on the verge of anarchy)*; Yanez v. State, 403 S.W.2d 412 (Tex. Crim. App. 1966) (Latin American punk, improper). *But see* Montgomery v. State, 447 P.2d 469 (Okla. Crim. App. 1968) (argument referring to witness as a Negro and of African descent was not error where not derogatory); Salinas v. State, 458 S.W.2d 933 (Tex. Crim. App. 1970) (argument referring to race was a plea for law enforcement and equal protection).

[236] People v. Strayhorn, 35 Ill. 2d 41, 219 N.E.2d 517 (1965) (expense of bringing in witnesses); State v. Perry, 274 Minn. 1, 142 N.W.2d 573 (1966) (taxpayer's money would be wasted if no conviction); State v. Garske, 74 Wash. 2d 901, 447 P.2d 167 (1968) (that society had paid half million dollars prosecuting the defendant). *See* Taglianetti v. United States, 398 F.2d 558 (1st Cir. 1968).

[237] Vierecle v. United States, 318 U.S. 236 (1943) (strong dictum that appeals to patriotism in time of war constitute misconduct); Taulbee v. Commonwealth, 438 S.W.2d 777 (Ky. Crim. App. 1969) (if jury wanted a Clark County lawyer to come over and defend a Clark County thief who broke into an Estill County place of business, that was their business)*; Gibson v. State, 430 S.W.2d 507 (Tex. Crim. App. 1968) (in prosecution for assault with intent to kill, argument that "we have another shooting on our hands right here in Dallas, the place that the world is referring to as the murder capital of the world," improper). *See* State v. Foster, 2 N.C. App. 109, 162 S.E.2d 583 (1968).

[238] Embrey v. State, 283 Ala. 110, 214 So. 2d 567 (1968); Reed v. State, 119 Ga. App. 368, 166 S.E.2d 900 (1969); Hamilton v. Commonwealth, 401 S.W.2d 80 (Ky. Crim. App. 1966) (proper to refer to effect of leniency by juries); State v. Harris, 413 S.W.2d 244 (Mo. 1967); Faucett v. State, 468 S.W.2d 92 (Tex. Crim. App. 1971) (telling jury they controlled heroin problem and up to them whether they wanted it in their community). *But see* State v. Clark, 291 Minn. 79, 189 N.W.2d 167 (1971) (improper to argue that conviction was necessary to stop the kind of conduct which defendant had committed); State v. Burnett, 429 S.W.2d 239 (Mo. 1968) (render a decision which would serve as a warning, improper); People v. Moore, 26 App. Div. 2d 902, 274 N.Y.S.2d 518 (1966) (should acquit if wanted to live in a community where crime ran rampant); State v. Peterson, 255 S.C. 579, 180 S.E.2d 341, *cert. denied*, 404 U.S. 860 (1971) (that prosecutor had other murder cases and what was done in this one would affect the outcomes of the others was improper); Bowling v. State, 458 S.W.2d 639 (Tenn. Crim. App. 1970) (predictions as to consequences of acquittal on lawlessness in community); State v. Huson, 73 Wash. 2d 660, 440 P.2d 192, *cert. denied*, 393 U.S. 1096 (1968) (jury would be responsible for many killings if the defendant were set free).

[239] Russell v. State, 233 So. 2d 154 (Fla. App. 1970) (would kill again)*; Chavez v. State, 215 So. 2d 750 (Fla. App. 1968)*; Martin v. State, 223 Ga. 649, 157 S.E.2d 458 (1967); Avey v. State, 1 Md. App. 178, 228 A.2d 614 (1967); People v. Askar, 8 Mich. App. 95, 153 N.W.2d 888 (1967); Lime v. State, 479 P.2d 608 (Okla. Crim. App. 1971) (would kill again); State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971) (defendant would kill prosecution witness if acquitted); State v. Bishop, 128 Vt. 221, 260 A.2d 393 (1969); State v. Walton, 5 Wash. App. 150, 486 P.2d 1118 (1971). *But see* State v. McDermott, 202 Kan. 399, 449 P.2d 545 (1969) (referring to fear of victim's stepdaughter if defendant were acquitted proper where in evidence).

[240] People v. Panczko, 20 Ill. 2d 86, 169 N.E.2d 333 (1960).

[241] People v. Washington, 71 Cal. 2d 1061, 458 P.2d 479, 80 Cal. Rptr. 567 (1969); People v. Nemke, 46 Ill. 2d 49, 263 N.E.2d 97 (1970); State v. Williams, 276 N.C. 703, 174 S.E.2d 503 (1970). *But see* Tenorio v. United States, 390 F.2d 96 (9th Cir. 1968) (comment on destruction and human waste resulting from heroin,

point out the number of crimes that go unpunished,[242] and stress the responsibility of the jury for law enforcement.[243]

Mitigating Factors

In addition to the above limitations, there are several doctrines which may affect the attitude of the trial and reviewing courts toward a remark which on its face would seem improper. These doctrines to some extent broaden the bounds of propriety while at the same time imposing some new limitations.

RETALIATORY STATEMENTS AND REMARKS

When counsel believes that opposing counsel has made an improper comment, it should be called to the attention of the court as soon as possible through an objection.[244] However, it is well established that the prosecutor has the right to make a fair reply to an argument previously made by the defense. Furthermore, the defense has no grounds for objection at trial or complaint on review where the prosecutor's remarks were invited or provoked by the improper comments of the defense, even though the prosecutor's remarks would otherwise be improper.[245] This principle applies generally to all the limitations discussed above.[246]

The courts have recognized, however, that this rule does not convert an improper remark into a proper one; an improper remark is still improper, even in retaliation.[247] But response or invitation is a factor to be considered in evaluating the impact of the remark on the jury and determining possible prejudice to the defendant.[248] Further, this is not to suggest that *any* remark offered in response to an improper defense comment will be considered specially. The prosecutor's statement must be a fair reply in order to avoid the danger of reversible error.[249]

---

improper); Perez v. State, 466 S.W.2d 283 (Tex. Crim. App. 1971) (worst murder prosecutor had ever seen, improper).

[242] United States v. Shirley, 435 F.2d 1076 (7th Cir. 1970) (increasing crime rate); State v. Towner, 202 Kan. 25, 446 P.2d 719 (1968).

[243] Wilson v. Commonwealth, 411 S.W.2d 33 (Ky. Crim. App. 1967); Commonwealth v. Feiling, 214 Pa. Super. 207, 252 A.2d 200 (1969). *See also* cases cited note 238, *supra*.

[244] People v. Bimbo, 314 Ill. 449, 145 N.E. 651 (1924).

[245] United States v. Homer, 423 F.2d 630 (9th Cir. 1970); United States v. Balistrieri, 403 F.2d 472 (7th Cir. 1968); Lane v. State, 46 Ala. App. 637, 247 So. 2d 679 (1971); Ricks v. State, 242 So. 2d 763 (Fla. App. 1971); State v. Horsey, 180 N.W.2d 459 (Ia. 1970); People v. Hardaway, 108 Ill. App. 2d 325, 247 N.E.2d 626 (1969); State v. Magee, 201 Kan. 566, 441 P.2d 863 (1968); Hunt v. Commonwealth, 466 S.W.2d 957 (Ky. Crim. App. 1971); Hunt v. State, 12 Md. App. 286, 278 A.2d 637 (1971); People v. Anderson, 29 Mich. App. 578, 185 N.W.2d 624 (1971); Cannon v. State, 190 So. 2d 848 (Miss. 1966); State v. Ellifrits, 459 S.W.2d 293 (Mo. 1970); Pacheco v. State, 82 Nev. 172, 414 P.2d 100 (1966); State v. Oland, 461 P.2d 277 (Ore. App. 1969); State v. Gibson, 75 Wash. 2d 174, 449 P.2d 692 (1969), *cert. denied*, 396 U.S. 1019 (1970); State v. Riley, 151 W. Va. 364, 151 S.E.2d 308 (1966).

[246] United States v. Hestie, 439 F.2d 131 (2d Cir. 1971) (inadmissible evidence); United States v. Zumpano, 436 F.2d 535 (9th Cir. 1970) (excluded evidence); United States v. Fort, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971) (referring to a stipulation regarding documents not in evidence even though stipulation had been made for one purpose and was commented upon for another); Rooks v. State, 250 Ark. 561, 466 S.W.2d 478 (1971) (improper inference); People v. McIntyre, 256 Cal. App. 2d 894, 64 Cal. Rptr. 530 (1967) (inadmissible report); Kurtz v. People, 494 P.2d 97 (Colo. 1972) (comment on failure to testify invited); State v. Sage, 162 N.W.2d 502 (Ia. 1968) (failure to testify); State v. Forichette, 279 Minn. 76, 156 N.W.2d 93 (1968) (statement not in evidence); State v. Richards, 467 S.W.2d 33 (Mo. 1971) (matter not in evidence); State v. Miller, 460 P.2d 874 (Ore. App. 1969) (unintroduced evidence); State v. Harrison, 83 S.D. 440, 160 N.W.2d 415 (1968) (defendant's unavailability before trial); Mays v. State, 428 S.W.2d 325 (Tex. Crim. App. 1968) (prior convictions); State v. Allen, 72 Wash. 2d 42, 431 P.2d 593 (1967), *cert. denied*, 391 U.S. 924 (1968) (ownership of weapon); State v. Fisher, 4 Wash. App. 512, 483 P.2d 166 (1971) (statements not supported by evidence); State v. Yancey, 32 Wis. 2d 104, 145 N.W.2d 145 (1966) (guilt).

[247] People v. Graves, 263 Cal. App. 2d 719, 70 Cal. Rptr. 509 (1968) (prosecutor has no right to correct defense misstatements with misstatements of his own); People v. Douglas, 36 App. Div. 2d 994, 320 N.Y.S.2d 977 (1971).

[248] Patriarca v. United States, 402 F.2d 314 (1st Cir.), *cert. denied*, 393 U.S. 1022 (1968); State v. Swanson, 9 Ohio App. 2d 60, 222 N.E.2d 844 (1967).

[249] United States *ex rel.* Mitchell v. Pinto, 438 F.2d 814 (2d Cir. 1971) (prosecution characterization of defendant's silence as a circumstance which jury could consider went beyond fair response to defense argument that counsel had advised defendant not to testify); United States v. Arnold, 425 F.2d 204 (10th Cir. 1970)*; Schultz v. Yeager, 293 F. Supp. 794 (D.N.J. 1967), *aff'd*, 403 F.2d 639 (3d Cir. 1968), *cert. denied*, 394 U.S. 961 (1969) (defense comments on failure to testify did not justify continouous and repeated references to such by prosecution); State v. Neil, 102 Ariz. 289, 428 P.2d 676 (1967); State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1966) (failure to testify)*; People v. Hill, 66 Cal. 2d 536, 426 P.2d 908, 58 Cal. Rptr. 340, *cert. denied*, 389 U.S. 993 (1967); People v. Flynn, 302 Ill. 549, 135 N.E. 101 (1922); State v. Wright, 251 La. 511, 205 So. 2d 381 (1967) (defense comments on failure to testify did not justify continuous and repeated references to such by prosecution)*; Dupree v. State, 219 Tenn. 492, 410 S.W.2d 890 (1967) (defendant's guilt)*; State v. Dennison, 72 Wash. 2d 842, 435 P.2d 526 (1967). *But see* Carter v.

APPELATE REVIEW OF THE RECORD

Curing and Preserving Improper Argument

The rule generally applicable in the criminal law, that a failure to make a timely objection waives consideration of the alleged defect on review, applies to prosecutorial conduct during argument.[250] The recognized exception to this rule is also applicable; that is, failure to object does not effect a waiver where the error is such that it could not have been cured and a refusal to review would deprive the defendant of a fair trial.[251]

The courts are only slightly receptive to the contention that an objection merely places greater emphasis on the subject matter of the alleged transgression.[252] The defense attorney is thus left in a dilemma, where the choice may be between waiving the error or making the prosecutor's point. This situation is further complicated by the requirement that an objection be timely, complete and specific.[253]

Assuming an objection is made,[254] the prosecu-

State, 488 P.2d 1306 (Okla. Crim. App. 1971) (defense discussion of flight justified state's discussion of failure to testify); People v. Ruppuhn, 25 Mich. App. 62, 180 N.W.2d 900 (1970) (defense argument regarding credibility of witnesses justified state's argument on defendant's character).

[250] Harris v. United States, 402 F.2d 656 (D.C. Cir. 1968); United States v. Chamley, 376 F.2d 57 (7th Cir. 1967); State v. Totress, 197 Ariz. 8, 480 P.2d 668 (1971); People v. Goodwin, 261 Cal. App. 2d 723, 68 Cal. Rptr. 247 (1968); State v. Brown, 94 Ida. 352, 487 P.2d 946 (1971); People v. DeKosta, __ Ill. App. 2d __, 270 N.E.2d 475 (1971); Jones v. State, 262 N.E.2d 538 (Ind. 1970) (failure to object means defense attorney did not think remark prejudicial); Barnett v. Commonwealth, 403 S.W.2d 40 (Ky. Crim. App. 1966); State v. Pullen, 266 A.2d 222 (Me. 1970); People v. Miron, 31 Mich. App. 142, 187 N.W.2d 497 (1971); State v. Forichette, 279 Minn. 76, 156 N.W.2d 93 (1968); Bonnenfant v. State, 86 Nev. 393, 469 P.2d 401 (1970); State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); Paul v. State, 483 P.2d 1176 (Okla. Crim. App. 1971); State v. Gairson, 484 P.2d 854 (Ore. App. 1971); Commonwealth *ex rel.* Sprangle v. Maroney, 423 Pa. 589, 225 A.2d 236 (1967); State v. Kindvall, 191 N.W.2d 289 (S.D. 1971); Randolph v. State, 464 S.W.2d 658 (Tex. Crim. App. 1971); State v. Jackson, 127 Vt. 237, 246 A.2d 829 (1968); Brown v. Commonwealth, 208 Va. 512, 158 S.E.2d 663 (1968), Wright v. State, 46 Wis. 2d 75, 175 N.W.2d 646 (1970).

[251] United States v. Fuentes, 432 F.2d 405 (5th Cir. 1970); Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968); People v. Romero, 36 Ill. 2d 315,223 N.E.2d 121 (1967); People v. Montevecchio, 32 Mich. App. 163, 188 N.W.2d 186 (1971); Davis v. State, 413 P.2d 920 (Okla. Crim. App. 1966); State v. Franks, 74 Wash. 2d 413, 445 P.2d 200 (1968).

[252] United States v. White, 444 F.2d 1274 (5th Cir. 1971) (prosecutor was not intending to comment on defendant's failure to testify, but because of point at which defense attorney objected, it seemed he was); Garris v. United States, 390 F.2d 862 (D.C. Cir. 1968) (failure to object did not waive error since objection would have given improper remarks undue emphasis)*; United States *ex rel.* Chiarello v. Mancusi, 288 F. Supp. 178 (S.D.N.Y. 1968) (court noted that ambiguous reference to failure to testify would probably never have been noticed by jury but for assiduous objection by defense); State v. Costello, 415 S.W.2d 816 (Mo. 1967) (error not properly preserved even though defense attorney's reluctance to object within the hearing of the jury was understandable); State v. Polsky, 82 N.M. 393, 482 P.2d 257, *cert. denied*, 82 N.M. 377, 482 P.2d 241 (1971); State v. McGee, 52 Wis. 2d 736, 190 N.W.2d 893 (1971); *cf.* United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970) (no waiver where "it is understandable that defense counsel may wish to avoid underscoring a prejudicial remark in the minds of the jury by drawing attention to it"); State v. Fowler, 110 N.H. 110, 261 A.2d 429 (1970) (recognizing that an immediate objection may draw attention to remark); State v. Davidson, 44 Wis. 2d 177, 170 N.W.2d 755 (1969) (proper for trial judge to elect not to emphasize remark by repeating it to jury, where objection was made at end of argument).

[253] Samuels v. United States, 398 F.2d 964 (5th Cir. 1968) (objection at end of argument not timely); United States v. Bully, 282 F. Supp. 327 (E.D. Va. 1968) (failure to specify grounds); Emerson v. State, 281 Ala. 29, 198 So. 2d 613 (1967) (failure to specify improper portions); State v. Williams, 107 Ariz. 262, 485 P.2d 832 (1971) (objection made after jury retired was not timely); Jones v. State, 248 Ark. 694, 453 S.W.2d 403 (1970) (not timely if raised after jury retires); Clay v. State, 122 Ga. App. 677, 178 S.E.2d 331 (1970) (waived where did not state basis for objection); State v. Williams, 276 N.C. 703, 174 S.E.2d 503 (1970) (exceptions not taken before verdict are lost); State v. Bumpers, 270 N.C. 521, 155 S.E.2d 173 (1967) (failure to object during argument); Carter v. State, 488 P.2d 1306 (Okla. Crim. App. 1971) (must move to exclude and ask for instruction to disregard in addition to objecting to preserve remark); State v. Mancini, 108 R.I. 261, 274 A.2d 742 (1971) (failure to request cautionary instruction waives error, even if objection); Bryant v. State, 455 S.W.2d 235 (Tex. Crim. App. 1970) (error not raised until motion for new trial waived); Sharp v. State, 421 S.W.2d 663 (Tex. Crim. App. 1967) (failure to specify grounds); Russo v. Commonwealth, 207 Va. 251, 148 S.E.2d 820 (1966) (must object at time of argument and ask for instruction to disregard); State v. Noyes, 69 Wash. 2d 441, 418 P.2d 471 (1966) (failure to request mistrial in addition to objection); State v. Ruud, 41 Wis. 2d 720, 165 N.W.2d 153 (1969) (waived where failed to move for mistrial before verdict).

[254] Since the failure of the court to take action is an implied ruling of propriety, State v. Shuttle, 126 Vt. 279, 230 A.2d 794 (1967), the trial court may have the duty to act *sua sponte* where an objection is not made and the argument is so prejudicial that it may be a denial of a fair trial, especially where the defendant is appearing *pro se*. United States v. Jenkins, 436 F.2d 140 (D.C. Cir. 1970); United States v. Smith, 433 F.2d 1266 (5th Cir. 1970); United States v. Cook, 432 F.2d 1093 (7th Cir. 1970); United States v. Wolfson, 322 F. Supp. 798 (D. Del. 1971); Grubbs v. State, 265 N.E.2d 40 (Ind. 1970); Conway v. State, 7 Md. App. 400, 256 A.2d 178 (1969); State v. Williams, 276 N.C. 703, 174 S.E.2d 503 (1970).

tor's transgression is considered cured where the trial court sustains the objection and either admonishes the jury to disregard, instructs the jury to disregard, or rebukes the prosecutor, or any combination of these which the trial court believes necessary to remove possible prejudice.[255] It is only when the error is so fundamental that it cannot be cured by these methods that the trial court need resort to the more drastic remedy of mistrial.

Besides corrective action by the court, it has been held in some cases that the prosecutor[256] or even the defense attorney[257] had taken sufficient action to himself remedy the error.

Miscellaneous Considerations Affecting the Appellate Decision

In determining whether substantial prejudice to the defendant resulted from the prosecutorial summation, reviewing courts have looked to six other factors besides the law and the exact words used. First, the courts consider the strength of the evidence in the case, applying the standard harmless beyond a reasonable doubt.[258] Thus, if the reviewing court finds overwhelming evidence of guilt, it will probably uphold the conviction, even though it may point to some improprieties which were properly preserved and before the court on review.[259] But if the case is a close one, the court will be more likely to reverse.[260] Some courts consider the punishment imposed in determining whether the jury was improperly influenced by the summation. Where an affirmative answer to this question appears and there is overwhelming evidence of guilt, the conviction will be sustained but the sentence will be modified.[261]

Second, the court will consider the remarks in the context of the entire summation or a large part of it in order to determine the true extent and meaning of the disputed comments.[262] Lengthy and repeated remarks are much more likely to result in reversal than are single or isolated references.[263]

Third, the appellate court will consider whether the trial judge took the proper corrective action on the one hand, or further compounded the error by overruling the defense objection or by insufficiently curing the transgression, on the other.[264]

[255] United States v. Haili, 443 F.2d 1295 (9th Cir. 1971) (instruction); United States v. Strauss, 443 F.2d 986 (1st Cir. 1971) (explaining what prosecutor meant); Turner v. United States, 441 F.2d 736 (5th Cir. 1971) (sustaining objection); United States v. DiGiovanni, 397 F.2d 409 (7th Cir.), *cert. denied*, 393 U.S. 924 (1968) (rebuke and instruction); People v. Hail, 1 Ill. App. 3d 949, 275 N.E.2d 196 (1971) (objection and later instruction); McCulley v. State, 272 N.E.2d 613 (Ind. 1971) (admonishment usually cures); State v. Franklin, 459 S.W.2d 314 (Mo. 1970) (failure to instruct *sua sponte* to disregard after sustaining objection was not error).

[256] Withdrawing and/or apologizing for remarks: United States v. Crane, 445 F.2d 509 (5th Cir. 1971); Nolan v. United States, 423 F.2d 1031 (10th Cir. 1970); Tellis v. State, 84 Nev. 587, 445 P.2d 938 (1968); State v. Green, 255 S.C. 548, 180 S.E.2d 179 (1971); Morris v. State, 432 S.W.2d 920 (Tex. Crim. App. 1968). Correcting misstatement: United States v. Smith, 441 F.2d 539 (9th Cir. 1971); United States v. Barber, 303 F. Supp. 807 (D. Del. 1969).

[257] United States v. Huidson, 432 F.2d 413 (9th Cir. 1970); Grant v. State, 472 S.W.2d 531 (Tex. Crim. App. 1971) (noting that improper remark was discussed by defense in summation); State v. Huson, 73 Wash. 2d 660, 440 P.2d 192 (1968) (defense made no objection but in summation told jury prosecution summation was unfair and an inflammatory tirade); Deja v. State, 43 Wis. 2d 488, 168 N.W.2d 856 (1969).

[258] Chapman v. California, 386 U.S. 18 (1967).

[259] United States v. White, 444 F.2d 1274 (5th Cir. 1971); United States v. Jones, 433 F.2d 1107 (D.C. Cir. 1970); People v. Morse, 70 Cal. 2d 711, 452 P.2d 607, 76 Cal. Rptr. 391, *cert. denied*, 397 U.S. 944 (1969); People v. Acker, 127 Ill. App. 2d 283, 262 N.E.2d 247 (1970); People v. Miron, 31 Mich. App. 142, 187 N.W.2d 497 (1971); People v. Douglas, 36 App. Div. 2d 994, 320 N.Y.S.2d 977 (1971); State v. Thompson, 278 N.C. 277, 179 S.E.2d 315 (1971); Bates v. State, 483 P.2d 1384 (Okla. Crim. App. 1971); State v. Gairson, 484 P.2d 854 (Ore. App. 1971); Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971), *cert. denied*, 405 U.S. 1046 (1972); State v. Kindvall, 191 N.W.2d 289 (S.D. 1971); Briggs v. State, 463 S.W.2d 161 (Tenn. App. 1970).

[260] United States v. Arendale, 444 F.2d 1260 (5th Cir. 1971); People v. Humphreys, 24 Mich. App. 411, 180 N.W.2d 328 (1970).

[261] Webb v. Commonwealth, 451 S.W.2d 397 (Ky. Crim. App. 1970); State v. Allison, 1 N.C. App. 623, 162 S.E.2d 63 (1968); Herandy v. State, 487 P.2d 1368 (Okla. Crim. App. 1971).

[262] Hollbrook v. United States, 441 F.2d 371 (6th Cir. 1971) (in context, remark did not have meaning attributed to it by appellant); State v. White, 102 Ariz. 162, 426 P.2d 796 (1967); Pace v. State, 121 Ga. App. 251, 173 S.E.2d 464 (1970) (reviewing court would not consider remark where record did not show it in context); State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966).

[263] Scott v. Perino, 439 F.2d 1066 (6th Cir. 1971) (lengthy and vigorous remark); United States v. Cook, 432 F.2d 1093 (7th Cir. 1970) (isolated); United States v. Elmore, 423 F.2d 775 (4th Cir. 1970) (same); Rodriquez-Sandoval v. United States, 409 F.2d 529 (1st Cir. 1969) (repeated); Schultz v. Yeager, 293 F. Supp. 794 (D.N.J. 1967), *aff'd*, 403 F.2d 639 (3rd Cir. 1968), *cert. denied*, 394 U.S. 961 (1969) (same); People v. Ellis, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966) (repeated).

[264] Shaddox v. State, 244 Ark. 747, 427 S.W.2d 198 (1967) (failed to cure sufficiently); Smith v. State, 118

Fourth, the court may take into account the length of the trial or the length of the argument.[265] It may be that a misstatement in a short trial is not serious error, since the jurors should have an independent recollection of the evidence. On the other hand, a lengthy argument after a long trial is more likely to be imperfect, and minor transgressions in this setting may also be excused.

Fifth, the court may consider the atmosphere of the courtroom throughout the trial, and may be more reluctant to find reversible error where the case was "hotly contested" on both sides.[266]

Finally, where the error in summation alone is not sufficient to require reversal, the court may then examine the cumulative effect of this impropriety in conjunction with other errors which occurred during the rest of the trial.[267]

Conclusion

It is clear that some fine distinctions have been made by the courts in an effort to reconcile the prosecutor's dual roles as impartial representative of the people and vigorous advocate for the state. The prosecutor may fail to meet both obligations in a particular case, performing one task to the exclusion of the other. The appellate court, however, does not sit primarily to enforce ethical or moral standards (though it may frequently speak to the question of what constitutes propriety), but rather to determine whether, all things considered, the defendant did in fact receive a fair trial. The case law of a particular jurisdiction will reveal few if any forms of speech or conduct during summation which are *per se* reversible error. It will suggest many forms which are potentially reversible error and generally improper. It is the combination of these with the particular facts of a case which will dictate the limits of propriety for the prosecutorial closing argument.

The most important learning to be gained by a study of the foregoing is that most prosecutorial conduct and comment is considered by reviewing courts in the context in which it occurred. Given the disparate approaches by the various jurisdictions in which these cases arose, it is impractical, if not impossible, to generalize upon the result which will be reached in any given case. Nevertheless, in most cases there is evident in the court decisions an honorable effort to protect the defendant's right to a free and unbiased trial, while at the same time refraining from excessive impingement on the prosecutor's obligation to vigorously present his case.

Ga. App. 464, 164 S.E.2d 278 (1968) (same); People v. McLean, 2 Ill. App. 3d 307, 276 N.E.2d 72 (1971); Rowe v. State, 250 Ind. 547, 237 N.E.2d 576 (1968) (overruled); Dill v. State, 10 Md. 362, 270 A.2d 489 (1970) (same); Reidy v. State, 8 Md. App. 169, 259 A.2d 66 (1969) (failed to cure sufficiently); State v. Casados, 188 Neb. 91, 195 N.W.2d 210 (1972); People v. Christman, 23 N.Y.2d 429, 244 N.E.2d 703, 297 N.Y.S.2d 134 (1969) (overruled).

[265] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (noting trial was a prolonged one); United States v. Heidson, 432 F.2d 413 (9th Cir. 1970) (trial lasted less than two days); People v. Hancock, 326 Mich. 471, 40 N.W.2d 689 (1959) (hotly-contested two-month trial); People v. Kearns, 280 N.Y. 763, 21 N.E.2d 525 (1939) (18-day trial).

[266] Clark v. United States, 391 F.2d 57 (8th Cir. 1968); People v. Johnson, 241 Cal. App. 2d 423, 50 Cal. Rptr. 598 (1966); Kostal v. People, 160 Colo. 64, 414 P.2d 123, *cert. denied*, 385 U.S. 939 (1966); State v. Hamilton, 249 La. 392, 187 So. 2d 417 (1966).

[267] *See, e.g.*, People v. Smith, 246 Cal. App. 2d 489, 54 Cal. Rptr. 740 (1966).