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Misconduct During Closing Arguments in Civil and Criminal Cases: Florida Case Law

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I. INTRODUCTION

Perhaps the most exciting and dramatic aspects of trial are the closing arguments. Passion and emotion can aid in persuading a jury to return a favorable verdict, but a "win at all costs" mind-set can lead to reversal on appeal.[1] Unfortunately, some attorneys continue to ignore the Supreme Court of Florida's decisions on the use of improper closing arguments.[2]

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1. *See* Gore v. State, 719 So. 2d 1197, 1203 (Fla. 1998) (quoting Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th Dist. Ct. App. 1984)) (reversing and commenting that the "prosecutor's 'over zealousness in prosecuting the State's cause worked against justice, rather than for it'"); Hoggins v. State, 718 So. 2d 761, 772 (Fla. 1998) (reversing in part because prosecutor made prohibited comments on defendant's post-Miranda silence during rebuttal closing argument); D'Ambrosio v. State, 736 So. 2d 44, 48 (Fla. 5th Dist. Ct. App. 1999) (reversing because prosecutor repeatedly referred to the defendant's defense as innuendo, speculation, and a sea of confusion); Milburn v. State, 24 Fla. L. Weekly D1936, D1937 (2d Dist. Ct. App. Aug. 18, 1999) (reversing because prosecutor improperly shifted the burden of proof regarding insanity defense); Barnes v. State, 743 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1999) (holding that prosecutor's disparaging statement of defense counsel constituted fundamental error and warranted reversal of the conviction); Izquierdo v. State, 724 So. 2d 124, 125 (Fla. 3d Dist. Ct. App. 1998) (vacating and remanding because the prosecutor "referred to the defense as a 'pathetic fantasy'" and "improperly appealed to the jurors sympathy"); Freeman v. State, 717 So. 2d 105, 105–06 (Fla. 5th Dist. Ct. App. 1998) (reversing because prosecutor improperly bolstered credibility of police officers); Boyer v. State, 713 So. 2d 1133, 1133–34 n.1 (Fla. 5th Dist. Ct. App. 1998) (reversing because prosecutor "accus[ed] the defendant of suborning the perjury of a defense witness . . . [;] personally express[ed] his belief that the defendant was guilty; . . . vouch[ed] for the credibility of a state witness; . . . appeal[ed] to the jury's sympathy and emotions; and . . . call[ed] the defendant and the defendant's witness liars"); Miller v. State, 712 So. 2d 451, 452–53 (Fla. 2d Dist. Ct. App. 1998) (reversing because prosecutor's closing argument ridiculed the defendant's voluntary intoxication defense and misstated the law); Baker v. State, 705 So. 2d 139, 139 (Fla. 3d Dist. Ct. App. 1998) (reversing because prosecutor's comments implied that "defense counsel was fishing for gullible jurors" was an improper comment and was not "an invited response to defense counsel's proper closing argument").

2. *See* Urbin v. State, 714 So. 2d 411, 422 (Fla. 1998); Campbell v. State, 679 So. 2d 720, 724 (Fla. 1996); Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992); Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989); Garron v. State, 528 So. 2d 353, 356 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985).

Attorney misconduct[3] may occur during discovery,[4] voir dire,[5] or examination of witnesses.[6] However, this article will focus solely on misconduct that occurs during closing arguments, discuss selected civil and criminal cases decided by Florida courts in 1998 and 1999, and also address earlier cases that are important to the issue.

II. THE LAWYER'S PROFESSIONAL RESPONSIBILITY FOR CONDUCT DURING TRIAL

> Come to law as a process, not with the sole purpose of winning every cause, but instead with a strong dedication to the rule of law. Make your client's case in the best way permitted by our law and ethics, but with the civility and personal restraint that marks the best of our profession. Return to the understanding that our professional role is most concerned with the process and with the belief that if we make the best case within the law and ethics, the probability is that the right result will be reached. Come back to law as a process.
>
> Look upon your role as that of a teacher, who will lead the court through the legal thicket. And then, just as Virgil left Dante, leave all legal proceedings with an air of grace, with an indelible perception of all that is good in legal advocacy. Leave your audience with a lasting impression of your dedication, not to the goal of victory above all else in the trial or hearing, but instead of an abiding deference to the rule of law, to the canons and ethics of professionalism, to the constraints and limits of circumstance and

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3. Misconduct, "when applied to an act of [an] attorney, implies dishonest act or attempt to persuade court or jury by use of deceptive or reprehensible methods." BLACK'S LAW DICTIONARY 901 (5th ed. 1979) (citations omitted). Misconduct of counsel means "[t]he conduct of counsel . . . which prevents the adverse party from having a fair trial, consisting in improper remarks, comments, or arguments . . . ." BALLANTINE'S LAW DICTIONARY (3d ed. 1969) *available in* LEXIS, Reference Library, General File. Professional misconduct means "[c]onduct that tends to bring reproach on the legal profession or to injure it in the favorable opinion of the public." BALLANTINE'S LAW DICTIONARY (3d ed. 1969) *available in* LEXIS, Reference Library, General File.

4. *See* McArthur v. State, 671 So. 2d 867, 870 (Fla. 4th Dist. Ct. App. 1996) (reversing where the State provided inaccurate and misleading information concerning the test results of the victim's clothing).

5. *See* Auto-Owners Ins. Co. v. Dewberry, 383 So. 2d 1109, 1109 (Fla. 4th Dist. Ct. App. 1978) (reversing where insured's counsel made repeated references to the amount of policy limits during voir dire).

6. *See* Boatwright v. State, 452 So. 2d 666, 668 (Fla. 4th Dist. Ct. App. 1984) (reversing because the prosecutor asked a witness whether the prior witnesses had lied).

> the primary codes of human conduct. Do that and there is a chance that we can erase the current low image of our profession and restore ourselves once again in the minds of fairminded people everywhere that ours is still the profession that gave the world a Thomas Moore, an Abraham Lincoln, a Louis Brandeis, and [a] Thurgood Marshall.[7]

The Florida Bar has 65,445 members who represent all lawyers licensed to practice in Florida.[8] One of the basic purposes of The Florida Bar is to assure high standards of professionalism in the practice of law for the benefit of the public.[9] Rule 4-3.4(e) of the *Florida Rules of Professional Conduct*[10] provides that: A lawyer shall not:

> [I]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.[11]

Rule 4-3.4(c) provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."[12] Additionally, rule 4-3.5(a) states that "[a] lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court."[13]

All lawyers who are members of The Florida Bar, or otherwise authorized to practice in any court of the State of Florida, must abide by the *Rules Regulating The Florida Bar*.[14] Additionally, the *McDade* Amendment,[15] provides that "[a]n attorney for the Government[16] shall be subject to

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7. Honorable Gary M. Farmer, Keynote Address at the *Nova Law Review* Annual Banquet (Mar. 20, 1999), *reprinted in* Honorable Gary M. Farmer, *Civility and Professionalism in Legal Advocacy*, 23 NOVA L. REV. 809, 816–17 (1999).

8. *Frequently Asked Questions* (visited July 27, 1999) <http://www.flabar.org>.

9. *Id.*

10. The *Rules of Professional Conduct* are found in chapter four of the *Rules Regulating The Florida Bar*.

11. FLA. R. PROF. CONDUCT 4-3.4(e).

12. *Id.* at R. 4-3.4(c).

13. *Id.* at R. 4-3.5(a).

14. *Id.* at preamble.

15. Codified at 28 U.S.C.A. § 530B (West Supp. 1999).

State laws and rules, and local Federal court rules governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."[17] Thus, federal prosecutors and public defenders must abide by the *Rules Regulating The Florida Bar* even if he or she is not a member of The Florida Bar.

III. THE REQUIREMENT TO REPORT ETHICAL VIOLATIONS TO THE FLORIDA BAR

Lawyers have an obligation to report ethical violations to The Florida Bar.[18] Rule 4-8.3(a) states that "[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects *shall* inform the appropriate professional authority."[19]

Judges also have a responsibility to act accordingly when confronted with unethical conduct.[20] The *Code of Judicial Conduct* states that "[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the *Rules Regulating The Florida Bar* should take appropriate action."[21] The *Code of Judicial Conduct* does not specify what the term "appropriate action" means.[22] The Fifth District Court of Appeal recently stated that a trial judge, "in the case of lawyers who do not heed less severe judicial efforts to correct such conduct . . . ,"[23] should refer the matter to The Florida Bar.[24]

A complaint against a Florida lawyer for unethical conduct is a serious matter. When an attorney makes an unethical improper argument during closing argument, The Florida Bar can enforce its rules through its

16. An "'attorney for the Government' includes any attorney described in section 77.2(a) of part 77 of Title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40." 28 U.S.C.A. § 530B(c).

17. *Id.* § 530B(a).

18. FLA. R. PROF. CONDUCT 4-8.3(a).

19. *Id.* at R. 4-8.3(a) (emphasis added).

20. MODEL CODE OF JUDICIAL CONDUCT Canon 3D(2) (1998).

21. *Id.*

22. *Id.*

23. Fravel v. Haughey, 727 So. 2d 1033, 1036 (Fla. 5th Dist. Ct. App. 1999).

24. *See also* Izquierdo v. State, 724 So. 2d 124, 125 n.1 (referring the prosecutor to The Florida Bar where it was the third time the Third District Court of Appeal had been "forced to deal with his indulgence in what is often euphemistically called 'overzealous advocacy,' but [was] really just unprofessional and unethical behavior").

disciplinary process.[25] "Discipline . . . can range from an admonishment to suspension from the practice of law for a definite or indefinite period of time, or disbarment."[26] Negative consequences may arise even if the conduct does not degenerate to the level of unethical conduct because "[c]ourts are often critical of trial conduct even if they do not find that it rises to the level of a violation of the *Rules of Professional Conduct*."[27] Moreover, attorney misconduct often becomes the focus of adverse media attention.[28]

IV. STANDARD OF REVIEW

Section 924.33 of the *Florida Statutes* provides that "[n]o judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant."[29]

Improper comments during closing arguments are subject to the harmless error rule as provided in section 59.041 of the *Florida Statute*:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the

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25. *Id.* at 125.

26. *Complaint Against A Florida Lawyer* (visited Sept. 21, 1999) <http://www.flabar.org>.

27. Timothy P. Chinaris & Elizabeth Clark Tarbert, *Professional Responsibility: 1998 Survey of Florida Law*, 23 NOVA L. REV. 162, 205 (1998). *See also* Copertino v. State, 726 So. 2d 330, 334 n.2 (Fla. 4th Dist. Ct. App. 1999), *review denied*, 735 So. 2d 1284 (Fla. 1999) (stating that the "prosecutor engaged in conduct throughout the trial suggesting too much a personal interest in winning, rather than detached advocacy for the state"); Wal-Mart Stores, Inc. v. Sommers, 717 So. 2d 178, 178 (Fla. 4th Dist. Ct. App. 1998) (describing plaintiffs' attorney as lacking "verbal dexterity").

28. *See* Carol Marbin Miller, *Appeals Court Urges Bar Discipline of Trash-Talking Broward Prosecutor*, DAILY BUSINESS REVIEW, Feb. 25, 1999, at A1 (outlining history of Broward County prosecutor's inappropriate comments during trials); *The Road to Hell is Paved with Lawyer Jokes*, CITY LINK, Feb. 24–Mar. 2, 1999, at 9 (discussing a Broward prosecutor's "penchant" for making disparaging comments about opposing counsel during closing arguments).

29. FLA. STAT. § 924.33 (1999).

> error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.[30]

In *State v. DiGuilio*,[31] the Supreme Court of Florida stated that the harmless error test "places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."[32] The Supreme Court of Florida has cautioned that the "harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence."[33] In *DiGuilio*, the Supreme Court of Florida pointed out that:

> [o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.[34]

Where the error is not constitutional in nature, section 924.051(7) of the *Florida Statutes* governs and the burden will be upon the defendant to show prejudice.[35]

> In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error[36] occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.[37]

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30. FLA. STAT. § 59.041 (1999).

31. 491 So. 2d 1129 (Fla. 1986).

32. *Id.* at 1135 (articulating harmless error test established by quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

33. *Id.* at 1136.

34. *Id.* (quoting People v. Ross, 429 P.2d 606, 621 (1967) (Traynor, J. dissenting)).

35. FLA. STAT. § 924.051(7) (1999).

36. Prejudicial error is defined as "an error in the trial court that harmfully affected the judgment or sentence." *Id.* § 924.051(1)(a).

37. *Id.* § 924.051(7).

V. INVITED RESPONSE DOCTRINE

In *United States v. Young*,[38] the United States Supreme Court explained the Invited Response Doctrine:

> [D]efense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments—two apparent wrongs—do not make for a right result. Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the "invited response" or "invited reply" rule.
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> . . . .
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> [T]he Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly. In this context, defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant.
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> . . . .
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> [T]he reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.[39]

Florida courts have refused to reverse convictions where they found the prosecutor was merely making a fair reply to the defendant's own closing argument.[40] It is important to note that a prosecutor must object to improper comments by defense counsel at the time defense counsel makes them in order for the trial judge to impose timely restrictions on defense counsel.[41] The Invited Response Doctrine "does not contemplate that a prosecutor will

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38. 470 U.S. 1 (1985).

39. *Id.* at 11–13.

40. *See* Ferguson v. State, 417 So. 2d 639 (Fla. 1982); St. Jean v. State, 721 So. 2d 448 (Fla. 3d Dist. Ct. App. 1998); Kent v. State, 702 So. 2d 265 (Fla. 5th Dist. Ct. App. 1997), *review denied* 717 So. 2d 533 (Fla. 1998); Meeks v. State, 667 So. 2d 1002 (Fla. 3d Dist. Ct. App. 1996).

41. Fryer v. State, 693 So. 2d 1046, 1051 (Fla. 3d Dist. Ct. App. 1997) (Sorondo, J., concurring specially).

sit silently while defense counsel pursues an impermissible line of argument so that he or she can then pursue his or her own impermissible and highly prejudicial response."[42]

In *Dix v. State*,[43] the defendant was charged and convicted of aggravated battery by shooting the victim in the chest.[44] During opening statement and closing argument, defense counsel argued the shooting was an accident.[45] The defendant did not testify at trial, but an eyewitness testified at trial about the shooting and about his conversation with the defendant while they were both in jail.[46] During closing argument, the prosecutor stated the eyewitness asked the defendant why he shot him, and the defendant replied he had a beef with the victim and did not like him.[47] The prosecutor then argued the shooting was not an accident.[48] Defense counsel moved for a new trial and argued that the prosecutor commented on the burden of proof and on the defendant's right to remain silent.[49] The circuit court granted the defendant's motion for new trial and the State appealed.[50]

The Fifth District Court of Appeal said the State had a right and a duty to respond to the explanation of the charges given by the defense because to ignore the defense would give it credence.[51] The court concluded the prosecutor did not refer to the absence of any testimony by the defendant.[52] The court found the prosecutor had merely commented on the defendant's statement to the eyewitness and compared that statement to the accident defense asserted by defense counsel.[53] The Fifth District reversed the trial court's order granting a new trial, and directed the trial court to enter a judgment on the jury verdict and sentence.[54]

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42. *Id.*
43. 723 So. 2d 351 (Fla. 5th Dist. Ct. App. 1998).
44. *Id.* at 352.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Dix*, 723 So. 2d at 352.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Dix*, 723 So. 2d at 352.
54. *Id.*

VI. PRESERVING THE ISSUE FOR APPEAL

The law is clear that absent a contemporaneous objection, improper comments during closing argument are not cognizable on appeal.[55] A timely objection allows the trial court an opportunity to give a curative instruction or admonish counsel.[56] "The only exception to this blanket procedural bar is where the comment constitutes fundamental error."[57] Notably, Florida's district courts of appeal are divided on the concept of fundamental error.[58]

In *Pait v. State*,[59] the Supreme Court of Florida explained that some unobjected-to comments may be so prejudicial that they warrant a new trial:

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55. Wal-Mart Stores v. Gutierrez, 731 So. 2d 151 (Fla. 3d Dist. Ct. App. 1999); Gutierrez v. State, 731 So. 2d 94, 95 (Fla. 4th Dist. Ct. App. 1999); Kelly v. State Farm Mut. Auto. Ins., 720 So. 2d 1145, 1147 (Fla. 5th Dist. Ct. App. 1998); King v. Byrd, 716 So. 2d 831, 836 (Fla. 4th Dist. Ct. App. 1998); Urbin v. State, 714 So. 2d 411, 418 n.8 (Fla. 1998).

56. Nixon v. State, 572 So. 2d 1336, 1340 (Fla. 1990).

57. Urbin v. State, 714 So. 2d 411, 418 n.8 (Fla. 1998). *See* Street v. State, 636 So. 2d 1297 (Fla. 1994); Eichelkraut v. Kash N' Karry Food Stores, 644 So. 2d 90 (Fla. 2d Dist. Ct. App. 1994); Wasden v. Seaboard Coast Line R.R., 474 So. 2d 825 (Fla. 2d Dist. Ct. App. 1985).

58. *See* Wal-Mart Stores v. Gutierrez, 731 So. 2d 151, 151–52 (Fla. 3d Dist. Ct. App. 1999) (finding that unobjected-to comments "were not so prejudicial or inflammatory as to constitute fundamental error"); Gutierrez v. State, 731 So. 2d 94, 95 (Fla. 4th Dist. Ct. App. 1999) (holding that an "improper comment on a defendant's right to remain silent is not fundamental error which may be raised on appeal without an objection at trial"); Henderson v. State, 727 So. 2d 284, 285–86 (Fla. 2d Dist Ct. App. 1999) (holding that where the prosecutor argued that the defendant "would not know the truth if it hit him up side the head," that an acquittal would mean that the witnesses were "all a pack of liars," and that the defendant had invented a "fairy tale" did not constitute fundamental error and the defendant waived review by failing to object); Ross v. State, 726 So. 2d 317, 319 (Fla. 2d Dist. Ct. App. 1998) (finding that although the defense failed to object when the prosecutor called the defendant and defense witnesses "pathetic," "insulting," "preposterous," "nonsense," and "bologna," the court found the repeated comments constituted fundamental error); Bell v. State, 723 So. 2d 896, 897 (Fla. 2d Dist. Ct. App. 1998) (holding that where the prosecutor vouched for an officer's testimony, told the jury to send a message, argued matters not in evidence, and commented on the defendant's exercise of his right to a jury trial, the court found the comments did not constitute fundamental error); Freeman v. State, 717 So. 2d 105, 105–06 (Fla. 5th Dist. Ct. App. 1998) (finding where the prosecutor's improper bolstering of a police officer's testimony and mention of an officer's funeral in the newspaper together with other improper remarks rose to the level of fundamental error); DeFreitas v. State, 701 So. 2d 593, 600–01 (Fla. 4th Dist. Ct. App. 1997) (holding numerous acts of prosecutorial misconduct were of such a nature and character that the cumulative and collective effect rose to the level of fundamental error); Knight v. State, 672 So. 2d 590, 590–91 (Fla. 4th Dist. Ct. App. 1996) (concluding that prosecutor's verbal attacks on defense counsel, arguing facts not in evidence, and bolstering the credibility of a police officer's testimony constituted fundamental error).

59. 112 So. 2d 380 (Fla. 1959).

> [W]hen an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as a ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge.[60]

Once a proper objection has been made, objecting counsel must move for a mistrial to preserve the issue for appeal.[61] The motion for mistrial may be made as late as the end of closing argument, thus avoiding interruption in the continuity of the argument and allowing an opportunity to evaluate the prejudicial nature of the objectionable remarks in the context of the entire argument.[62] However, where the objection is overruled, requiring a motion for mistrial is purposeless because "[t]he objection itself calls the court's attention to the error alleged to have prejudiced the party making the objection and to the possibility that a mistrial may be in order."[63]

VII. CLOSING ARGUMENT

Closing argument is the trial attorney's final opportunity "to argue the facts in evidence and/or reasonable inferences to be drawn therefrom."[64] However, this is not a license for an attorney to argue fiction.[65] The Eleventh Circuit Court of Appeals addressed the purpose of closing argument in *United States v. Bailey*.[66] In *Bailey*, the court stated that "'[t]he sole purpose of closing argument is to assist the jury in analyzing the evidence.'"[67] The court pointed out that "[w]hile a prosecutor may not exceed the evidence in closing argument, he may state conclusions drawn from the evidence."[68] The court continued and said that "[a]lthough a prosecutor may not make an argument directed to passions or prejudices of the jurors instead of an understanding of the facts and law, there is no prohibition on 'colorful and perhaps flamboyant' remarks if they relate to the evidence adduced at trial."[69]

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60. *Id.* at 385.
61. Holton v. State, 573 So. 2d 284, 288 n.3 (Fla. 1990).
62. Nixon v. State, 572 So. 2d 1336, 1340–41 (Fla. 1990).
63. *Holton*, 573 So. 2d at 288.
64. Willis v. State, 669 So. 2d 1090, 1094 (Fla. 3d Dist. Ct. App. 1996).
65. Dunsizer v. State, No. 97-03068, 1999 WL 94970, at *2 (Fla. 2d Dist. Ct. App. Feb. 26, 1999) (Casanueva, J., concurring).
66. 123 F.3d 1381 (11th Cir. 1997).
67. *Id.* at 1400 (quoting United States v. Iglesias, 915 F.2d 1524, 1529 (11th Cir. 1990)).
68. *Id.* (internal citations omitted).
69. *Id.* (internal citations omitted).

In *Bertolotti v. State*,[70] the Supreme Court of Florida described the purpose of the closing argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.[71]

A. *Civil Cases*

1. Expressing Personal Opinion vs. Confining Argument to the Evidence Presented

In *Simmons v. Swinton*,[72] the passenger and driver of a rear-ended motor vehicle sued the driver of the other vehicle.[73] The trial court granted a new trial based on improper statements by the defense counsel during closing argument, that the trial court concluded constituted fundamental error.[74] During closing argument, the defense attorney argued the plaintiff's treating physician had an ulterior motive in blaming her injuries on the accident.[75] The defendant's attorney argued the plaintiff's injuries were actually caused by falls resulting from medication prescribed by the treating physician.[76] On appeal, plaintiff's counsel argued the comments were egregious but "admitted that he did not object to the closing in order to preserve the error for appellate review."[77]

The Fifth District Court of Appeal held that defense counsel's arguments were proper because "the attorney confined closing argument to the evidence presented and reasonable inferences that could be drawn from

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70. 476 So. 2d 130 (Fla. 1985).

71. *Id.* at 134. *See* Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Mann v. State, 603 So. 2d 1141 (Fla. 1992); Jackson v. State, 522 So. 2d 802 (Fla. 1988); Cochran v. State, 711 So. 2d 1159 (Fla. 4th Dist. Ct. App. 1998); Williams v. State, 689 So. 2d 393 (Fla. 3d Dist. Ct. App. 1997); Hightower v. State, 592 So. 2d 689 (Fla. 3d Dist. Ct. App. 1991) (Gersten, J., dissenting); Rosso v. State, 505 So. 2d 611 (Fla. 3d Dist. Ct. App. 1987).

72. 715 So. 2d 370 (Fla. 4th Dist. Ct. App. 1998), *review denied* 727 So. 2d 911 (Fla. 1999).

73. *Id.* at 371.

74. *Id.*

75. *Id.* at 373.

76. *Id.*

77. *Simmons*, 715 So. 2d at 373.

the evidence."[78] The appellate court noted that opposing counsel should make an objection at the time the offensive comment is made to "allow the trial court to correct the offending counsel's behavior."[79] The Fifth District reversed and instructed the trial court to reinstate the verdict.[80]

2. Community Conscience Arguments

In *Kiwanis Club of Little Havana, Inc. v. Kalafe*,[81] Kalafe, a Brazilian-born singer and composer, sued Kiwanis Club and its representative for tortious interference with a contract and defamation.[82] The trial court entered a final judgment in favor of Kalafe, and Kiwanis Club appealed.[83]

During closing argument, Kalafe's counsel stated "[w]hat if in the past somebody was a Democrat or Brazilian, where do you draw the line? Use reason. Look at the evidence and realize this type of politics is uncalled for and shouldn't be used."[84] Kalafe's counsel also argued that "Eighth Street belongs to all of us. It is not their home and your verdict should reflect how you feel about this conduct."[85] Kalafe's counsel further argued that "people of Cuba[] . . . haven't been too lucky with politics . . . . The last thing in the world is that we should bring the type of politics here that causes the problems to begin with . . . ."[86]

The Third District Court of Appeal addressed the impropriety of Kalafe's counsel's remarks and stated "Florida courts have consistently rejected arguments that are nothing more than 'impassioned and prejudicial pleas intended to evoke a sense of community law through common duty and expectation.'"[87] The Third District characterized the comments as an impermissible reference to community conscience and noted the comments in the case "stray[ed] dangerously close to constituting reversible error."[88] The judgment was reversed on other grounds.

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78. *Id.*
79. *Id.* at 373–74.
80. *Id.* at 374.
81. 723 So. 2d 838 (Fla. 3d Dist. Ct. App. 1998).
82. *Id.* at 840.
83. *Id.*
84. *Id.* at 842 n.5.
85. *Id.*
86. *Kiwanis Club*, 723 So. 2d at 842 n.5.
87. *Id.* at 842 (quoting Norman v. Gloria Farms, Inc., 668 So. 2d 1016, 1021 (Fla. 4th Dist. Ct. App. 1996)).
88. *Id.*

3. Expressing Personal Opinion and Bolstering Credibility

Davis v. South Florida Water Management District[89] was a condemnation proceeding that involved a large tract of land in Palm Beach County taken for Everglades restoration purposes.[90] The landowner presented expert testimony that the fair market value of the land was eighteen million dollars.[91] The water district expert testified that the fair market value of the land was ten million dollars.[92] The landowner appealed the final judgment of the trial court and asserted that the water district's counsel placed "his own credibility into the argument, offered his personal opinion to the jury, and suggested that the jurors would ultimately pay for the verdict as taxpayers."[93] During closing argument, the landowner's counsel argued the "full bucket" compensation theory:

> Full compensation is your goal, as the constitution requires. It's kind of like a bucket of water. A bucket of water you fill to the brim, and you know if it spills over and you know when it's less. And what we want here is for the bucket to be full. And by full I simply mean, please find from the evidence, not from the hypothetical argumentation, but from actual sales in the marketplace, what this property would bring to these owners if it weren't taken as of February 7, 1996.[94]

The water district's counsel then argued:

> Ladies and gentlemen of the jury, it's easy to make an appeal that the property owner ought to receive a full bucket. And as a lawyer and an officer of the court, and an attorney who is proud to represent South Florida Water Management District and other condemning authorities and private property owners, I will tell you that $18 million overflows that bucket by $8 million because they're asking you to pay, they're asking you to consider the value of this property with elements of risk, and elements that aren't there and may never be there.[95]

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89. 715 So. 2d 996 (Fla. 4th Dist. Ct. App. 1998).
90. *Id.* at 997.
91. *Id.*
92. *Id.*
93. *Id.* at 998.
94. *Davis*, 715 So. 2d at 998.
95. *Id.*

Davis' counsel objected and moved for a mistrial arguing the comment "suggested that the jurors would pay an inflated amount in their role as taxpayers."[96] The trial court reserved the ruling and allowed the district's counsel to remedy that suggestion.[97] The water district's counsel then stated:

> Ladies and gentlemen of the jury, it's very clear that none of you have to pay anything, and when I said you, I meant you in the role of a willing buyer would have to pay. I understand that none of you are the buyers. This hypothetical buyer would have to pay that amount of money, and that would overflow, that would reduce the compensation using Mr. Brigham's analogy, more than overflow the barrel, the bucket, by almost $8 million or $9 million.[98]

The Fourth District Court of Appeal said it would be patently improper to suggest a jury consider that the jury award would come out of their pockets as taxpayers.[99] However, the Fourth District continued and said that "[a]lthough the 'asking you to pay' comment could be construed as reminding the jurors that they are taxpayers, here it does not rise to the level of reversible error."[100] The district court found the statement was in response to Davis' prior "characterization that the jurors had to fill the 'bucket' of full compensation" and was not prejudicial considering the clarification.[101] The Fourth District noted that using the phrase "award" would have been more prudent than using the phrase "to pay."[102]

Although the Fourth District affirmed the judgment, it recognized that the water district's counsel's statement that as an "officer of the court" and an attorney for a state agency was an improper attempt to bolster his own credibility.[103] The court found those statements "particularly offensive."[104] However, the Fourth District affirmed because opposing counsel had failed to object at trial and the remarks did not constitute fundamental error.[105]

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96. *Id.*
97. *Id.*
98. *Id.*
99. *Davis*, 715 So. 2d at 999.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Davis*, 715 So. 2d at 999.
105. *Id.*

4. Violating an Order in Limine

In *Leyva v. Samess*,[106] Mr. Leyva sustained personal injuries when he was involved in a collision with a vehicle operated by Daniel Samess and owned by his parents, Dr. Ronald Samess and Mrs. Claudette Samess.[107] The trial court granted defense counsel's motion in limine in part and prohibited Leyva's counsel from referencing during closing argument that the owner of the vehicle was a doctor.[108] However, the trial court allowed the use of the "doctor" reference during voir dire so that Leyva's counsel could determine if any of the jurors had been treated by Dr. Samess.[109]

During closing argument, Leyva's counsel said "I would like to explain to you, Dr. and Mrs. Samess are a party to this lawsuit . . . owners of a vehicle are responsible for any negligence on the part of their driver if the driver is driving their car with their knowledge and consent."[110] Plaintiff's counsel then stated "the Defendants have admitted that Dr. and Mrs. Samess own the vehicle."[111] Defense counsel objected to the violation of the motion in limine, and the trial court sustained the objection.[112] The defense moved for a new trial, and the trial court reserved ruling on the motion for new trial.[113] The jury returned a verdict in favor of the plaintiffs for $119,400, reduced by the twenty percent for comparative negligence.[114]

The trial court then granted the motion for new trial having determined that "one party's 'egregious' violation of an order in limine entitled the other party to a new trial."[115] The trial court found that plaintiff's counsel "had violated the [pretrial] order by referring to Ronald Samess as a doctor."[116] The trial court incorrectly determined "where an order granting a pretrial motion in limine has been established, a subsequent egregious violation of that order by one party entitles the other party to a new trial."[117]

The Fourth District Court of Appeal found the trial court abused its discretion when it granted the new trial because it used an incorrect standard of review when it reviewed the comments made in closing argument.[118] The

106. 732 So. 2d 1118 (Fla. 4th Dist. Ct. App. 1999).
107. *Id.* at 1119.
108. *Id.*
109. *Id.*
110. *Id.* at 1119–20.
111. *Leyva*, 732 So. 2d at 1120.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Leyva*, 732 So. 2d at 1120.
117. *Id.* at 1121.
118. *Id.* at 1121–22.

Fourth District Court of Appeal stated that "[n]ot every violation of a pretrial order in limine should automatically result in a new trial."[119] The Fourth District followed the "principle that in order to grant a new trial for improper comments in closing argument, the trial court must find that the argument was 'highly prejudicial and inflammatory.'"[120] During voir dire, the jury had already learned that Ronald Samess was a doctor.[121] Although plaintiff's comments violated the pretrial order, the Fourth District found that the brief references to the fact that the owner of the defendant vehicle was a doctor was not so "highly prejudicial or inflammatory" as to require a new trial.[122]

5. Invoking Sympathy to Inflate the Recovery of Damages

In *Knoizen v. Bruegger*,[123] Ms. Bruegger suffered severe and debilitating injuries when her motorcycle collided head-on with an automobile.[124] Ms. Bruegger's injuries included five major pelvic fractures, vaginal lacerations, a broken femur, and an open wrist fracture. Additionally, she lost physical support for her bladder and suffered a prolapsed bladder and uterus.[125]

During closing argument, Ms. Bruegger's attorney argued that the injuries were the "most devastating injury a woman can suffer"[126] and the injuries were devastating to her family and children.[127] He argued that the jury should not leave Ms. Bruegger alone to deal with the injuries she suffered.[128] Bruegger's attorney said "[d]on't leave her bare and naked, like this accident has already left her, and her children and her family. Don't leave her like that."[129] Knozien's counsel objected and argued that the remarks were improper attempts to invoke jury sympathy and an attempt to inflame the passions of the jury.[130] The trial court overruled Knozien's objection.[131]

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119. *Id.* at 1121.
120. *Id.* (quoting Grushoff v. Denny's, Inc., 693 So. 2d 1068, 1069 (Fla. 4th Dist. Ct. App. (1997)).
121. *Leyva*, 732 So. 2d at 1122.
122. *Id.*
123. 713 So. 2d 1071 (Fla. 5th Dist. Ct. App. 1998).
124. *Id.* at 1071.
125. *Id.*
126. *Id.* at 1072.
127. *Id.*
128. *Knoizen*, 713 So. 2d at 1072.
129. *Id.*
130. *Id.*
131. *Id.*

The Fifth District Court of Appeal found that testimony that the accident had a devastating effect upon Ms. Bruegger and her family supported the closing argument.[132] The court found the closing argument was only "marginally objectionable."[133] The court noted that "[a]ttorneys are given broad latitude during closing, but they must confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence."[134] The Fifth District also found that the appellant failed to establish the argument was so "'pervasive, inflammatory, and prejudicial to preclude the jury's rational consideration of the case.'"[135]

6. The Fourth District Court of Appeal Explains the Requirement for a Contemporaneous Objection

In *Murphy v. International Robotics Systems, Inc.*,[136] Judge Klein explained why the Fourth District Court of Appeal did not agree with other district courts when they reverse cases because of improper, but unobjected-to, closing argument of counsel.[137] The court stated that its explanation was made "in the hopes that a litigant considering an appeal to this court, whose best hope for reversal is unobjected-to argument of counsel, will carefully consider whether it is worth the cost."[138]

In *Murphy*, defense counsel accused one of the plaintiffs "of wanting to cash in a lottery ticket in this litigation and suggest[ed] that if the jurors awarded appellant damages based on a phony consultancy agreement they would be accessories, after the fact, to tax fraud."[139] At oral argument, the court asked why plaintiffs' counsel did not object.[140] Plaintiffs' counsel responded that it was "his practice not to object because the jury might hold it against his client."[141]

The court stated "improper, but unobjected-to, closing argument in a civil case is [not] something which is so fundamental that there should be an

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132. *Id.*

133. *Knoizen*, 713 So. 2d at 1072.

134. *Id.*

135. *Id.* (quoting Hagan v. Sun Bank of Mid-Fla., N.A., 666 So. 2d 580 (Fla. 2d Dist. Ct. App. 1996)).

136. 710 So. 2d 587 (Fla. 4th Dist. Ct. App. 1998), *review granted*, 722 So. 2d 193 (Fla. 1998).

137. *Id.* at 587 n.1.

138. *Id.* at 588.

139. *Id.* (internal quotations omitted).

140. *Id.*

141. *Murphy*, 710 So. 2d at 588.

exception to the rule requiring an objection."[142] The Fourth District relied upon the Supreme Court of Florida's explanation in *Castor v. State*:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at early state of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.[143]

The Fourth District Court of Appeal pointed out that the contemporaneous objection rule requires that an objection be made at the time of the remarks.[144] "If the [trial] court sustains the objection, there must be a motion for mistrial in order to preserve the issue on appeal."[145] However, "the motion for mistrial can be made later, at the close of argument, in order to give counsel time to think about whether to seek a mistrial."[146] The court noted that the last time the Supreme Court of Florida reversed for a new trial based on unobjected-to closing argument was in 1956.[147] Further, the court noted that the last time the Supreme Court of Florida considered the issue in a civil case was in 1961.[148]

The Fourth District then stated, "[t]here is an exception to the contemporaneous objection rule, for errors which are deemed fundamental and which can thus be raised for the first time on appeal."[149] The Supreme Court of Florida has defined fundamental error as "'error which goes to the foundation of the case, or goes to the merits of the cause of action,' which appellate courts should apply 'very guardedly.'"[150]

The Fourth District stated that its refusal to allow improper, unobjected-to closing argument of counsel to be raised for the first time on appeal was consistent with the supreme court.[151] The court noted that improper argument is a nationwide problem: "no other courts in this country allow improper argument to be raised for the first time on appeal in civil cases,"[152]

142. *Id.* at 589.
143. *Id.* (quoting Castor v. State, 365 So. 2d 701 (Fla. 1978)).
144. *Id.*
145. *Id.*
146. *Murphy*, 710 So. 2d at 589.
147. *Id.*
148. *Id.*
149. *Id.* at 590.
150. *Id.* (quoting Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970)).
151. *Murphy*, 710 So. 2d at 591.
152. *Id.*

and "few courts have even addressed the issue of whether it could be raised for the first time on appeal."[153] Following the Fourth District's opinion, the Fifth District Court of Appeal and the Third District Court of Appeal have followed the contemporaneous objection rule.[154]

B. *Criminal Cases*

1. Foul Blows vs. Hard Blows

In *Berger v. United States*,[155] Justice Sutherland delivered an opinion condemning improper argument:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[156]

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153. *Id.*

154. *See* Wal-Mart Stores, Inc. v. Gutierrez, 731 So. 2d 151 (Fla. 3d Dist. Ct. App. 1999) (citing Gaines v. Amerisure, Ins. Co., 701 So. 2d 1192, 1193 (Fla. 3d Dist. Ct. App. 1997)) (stating that "a review of the record shows that defense counsel failed to object to the majority of the allegedly improper comments, thereby not preserving them for appellate review"); Fravel v. Haughey, 727 So. 2d 1033, 1037 (Fla. 5th Dist. Ct. App. 1998) (noting "[t]his ruling will remand [sic] lawyers to raise timely objections when confronted with improper argument and create predictability with regard to the future disposition of similar cases by this court"); Kelly v. State Farm Mut. Auto. Ins., 720 So. 2d 1145, 1147 (Fla. 5th Dist. Ct. App. 1998) (stating that although some comments made during State Farm's closing argument "were indeed improper, no contemporaneous objections were made, and we do not find the comments as a whole constitute fundamental error").

155. 295 U.S. 78 (1935).

156. *Id.* at 88; *see also* Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998); Craig v. State, 685 So. 2d 1224, 1229 (Fla. 1996); Miller v. State, 712 So. 2d 451, 453 (Fla. 2d Dist. Ct. App. 1998); Cochran v. State, 711 So. 2d 1159, 1163 (Fla. 4th Dist. Ct. App. 1998); DeFreitas v. State, 701 So. 2d 593, 606 (Fla. 4th Dist. Ct. App. 1997); Hampton v. State, 680 So. 2d 581, 585 (Fla. 3d Dist. Ct. App. 1996); State v. Lozano, 616 So. 2d 73, 76 (Fla. 1st Dist. Ct. App. 1993); Rosso

2. Community Conscience Arguments

In *Del Rio v. State*,[157] the jury found the defendant guilty of first degree murder, attempted second degree murder with a firearm, attempted first degree murder with a firearm, and burglary of an occupied dwelling with an assault and with a firearm.[158] The Third District Court of Appeal affirmed Del Rio's conviction and sentence because the trial court provided curative instructions, and overwhelming evidence of the defendant's guilt was presented at trial.[159] However, the court wrote its opinion specifically to address the prosecutor's improper comments during closing argument.[160]

During closing argument, the prosecutor referred to the city as a place where "death is cheap."[161] He also commented on the jurors' personal stake in the matter when he said "[t]he law protects all of us or the law protects none of us."[162] The prosecutor further stated that "[i]n the south, we saw it when it happened to blacks. In Germany we saw it when it happened to the Jews."[163] The Third District repeated that "counsel should avoid impassioned and prejudicial arguments which impermissibly appeal to the jury's 'community conscience' or sense of 'civic responsibility.'"[164] The court strongly disapproved of the prosecutor's conduct in the case and sent the opinion to The Florida Bar.[165]

3. Leading the Jury to Believe the Defendant Has the Burden of Proving His Innocence

In *Thomas v. State*,[166] the jury found the defendant guilty of tampering with evidence.[167] The defendant was a passenger in an automobile driven by

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v. State, 505 So. 2d 611, 614 (Fla. 3d Dist. Ct. App. 1987); Clausell v. State, 455 So. 2d 1050, 1054 (Fla. 3d Dist. Ct. App. 1984), panel decision approved, en banc decision quashed, 474 So. 2d 1189 (Fla. 1985); Boatwright v. State, 452 So. 2d 666, 667–68 (Fla. 4th Dist. Ct. App. 1984); Harden v. State, 303 So. 2d 679, 680 (Fla. 4th Dist. Ct. App. 1974); Rolle v. State, 268 So. 2d 541, 542 (Fla. 3d Dist. Ct. App. 1972); Marsh v. State, 202 So. 2d 222, 224 (Fla. 3d Dist. Ct. App. 1967).

157. 732 So. 2d 1100 (Fla. 3d Dist. Ct. App. 1999).
158. *Id.* at 1100.
159. *Id.* at 1102.
160. *Id.* at 1101.
161. *Id.*
162. *Del Rio*, 732 So. 2d at 1101.
163. *Id.*
164. *Id.*
165. *Id.* at 1102 n.1.
166. 726 So. 2d 369 (Fla. 4th Dist. Ct. App. 1999).
167. *Id.* at 369.

his girlfriend.[168] The police stopped the car in the middle of the road with its lights off and engine running.[169] The only defense witness at trial was the defendant's girlfriend.[170] She testified at trial that she and Thomas were in the area to take a busboy with whom she worked home.[171]

The defendant's appeal centered upon the prosecutor's remark during the rebuttal portion of her closing argument when she said "[t]hey told you that she had gone there into this unknown neighborhood to drop off a busboy. Where is this busboy today? I don't know."[172] Defense counsel objected and moved for a mistrial.[173] The trial court immediately gave a curative instruction and later denied the motion for mistrial.[174]

Commenting on the defendant's failure to call a witness may be cause for reversal because such comments may lead a jury to believe the defendant has the burden of proving his innocence.[175] Although the Fourth District Court of Appeal has frequently taken a strong position against such comments, there are exceptions to the rule.[176] However, these exceptions are limited to circumstances in which defense counsel "opens the door" and thus, allows the prosecutor to comment in rebuttal.[177] The Supreme Court of Florida has stated:

> [T]his Court has applied a narrow exception to allow comment when the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state. A witness is not equally available when there is a special relationship between the defendant and the witness.[178]

The Fourth District Court of Appeal concluded the phantom busboy in *Thomas* did not have a special relationship with the defendant.[179] Further, the court concluded that "[a]lthough the defense raised the subject of the busboy and placed in issue its explanation for the otherwise suspicious

168. *Id.* at 369.
169. *Id.*
170. *Id.* at 370.
171. *Thomas*, 726 So. 2d at 370.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Thomas*, 726 So. 2d at 370.
177. *Id.*
178. *Id.* at 371 (quoting Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991)).
179. *Id.* at 371.

circumstances leading up to the incident," the prosecutor's comment was impermissible.[180] However, the court held that because the trial court immediately gave a curative instruction, the prosecutor's impermissible comment did not warrant reversal.[181]

4. Personal Attacks on the Defendant

In *Copertino v. State*,[182] the defendant was convicted of five counts of manslaughter by culpable negligence and six counts of culpable negligence.[183] He appealed on numerous grounds, including prosecutorial misconduct.[184] During closing argument, the prosecutor characterized the defendant as "young Mr. Hitler."[185] The court addressed the prosecutor's remark and stated:

> We understand the human tendency to identify with the victims of such senseless conduct and their families, as in this case where so many young people died. Prosecutors must nevertheless steel themselves against such emotions and direct their energies to presenting the state's case within the law. They are not given the right to voice the same emotions understandably expressed by the families of the victims.[186]

The court then noted that the prosecutor's trial conduct suggested a personal interest in winning, rather than detached advocacy for the State.[187] Although the Fourth District Court of Appeal found the remark was improper, it held that "[t]he state's evidence in this case is so compelling that the jury returned the only verdict possible."[188]

In *Gore v. State*,[189] the defendant had been found guilty of first degree murder and armed robbery and was sentenced to death by the trial court after a unanimous jury recommendation.[190] During closing argument of the guilt phase, the prosecutor referred to the defendant and said:

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180. *Id.* at 371–72.

181. *Thomas*, 726 So. 2d at 372.

182. 726 So. 2d 330 (Fla. 4th Dist. Ct. App. 1999), *review denied*, 735 So. 2d 1284 (Fla. 1999).

183. *Id.* at 332.

184. *Id.*

185. *Id.* at 334.

186. *Id.*

187. *Coppertino*, 726 So. 2d at 334 n.2.

188. *Id.* at 334.

189. 719 So. 2d 1197 (Fla. 1998).

190. *Id.* at 1198.

> You know, Ladies and Gentlemen, there's a lot of rules and procedures that I have to follow in court, and there's a lot of things I can say or can't say, but there's one thing the Judge can't ever make me say and that is he can never make me say that's a human being.[191]

The Supreme Court of Florida stated that "engag[ing] in vituperative or pejorative characterizations of a defendant or witness" is clearly improper for the prosecutor.[192] Because of the collective effect of the prosecutor's improper questioning of the defendant during cross-examination and the improper closing argument, the supreme court reversed the case and remanded it for a new trial.[193] The supreme court noted that the prosecutor's "'over zealousness in prosecuting the State's cause worked against justice, rather than for it.'"[194]

5. Commenting on Defendant's Right to Remain Silent

In *State v. Hoggins*,[195] the defendant was convicted of attempted first degree murder with a firearm, armed robbery, aggravated assault with a firearm, and resisting arrest without violence.[196] The defendant based his appeal in part on the prosecutor's remarks during closing argument.[197] During closing argument, the prosecutor argued the defendant did not tell his version of events to the police on the night he was arrested:

> Now, when Mr. Hoggins gives his story—When you remember the story that he gave the other day, remember one thing, that the police arrived at that apartment to conduct a search. It was then that they found him hiding in the upstairs bedroom in the apartment of his girlfriend. Remember, he doesn't tell them that story at that time.
>
> Now, when they bring him downstairs and have him confronted face to face with the victim, who is so outraged, . . . saying "You tried to kill me," and that victim when confronted with him tries to

191. *Id.* at 1201.
192. *Id.*
193. *Id.* at 1202–03.
194. *Gore*, 719 So. 2d at 1203 (quoting Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th Dist. Ct. App. 1984)).
195. 718 So. 2d 761 (Fla. 1998).
196. *Id.* at 764.
197. *Id.* at 762.

> go after this man, he never mentioned his story. [Objection overruled].
>
> Mr. Hoggins did not give them that story. Ronnie Hoggins, never did at that point say anything like, "Man, I didn't try to shoot you. I didn't rob your store. I just found that money and stuff and picked it all up and ran into the apartment."[198]

During rebuttal closing argument, the prosecutor emphasized that the defendant had failed to come forward with an exculpatory explanation prior to trial:

> Not once does this Defendant give the police the count [sic] that he came up with when he took the witness stand today. He gave this statement under oath, but never anytime previous to today did he ever say this story to the police about how he came across this money and stuff.... Having been advised of his constitutional right he never mentioned one time this story he has said here today.[199]

No objection was made to the prosecutor's rebuttal closing argument.[200] On appeal, the Fourth District Court of Appeal reversed and held that the prosecutor improperly commented on the defendant's custodial, pre-Miranda silence and violated the due process guarantees of article I, section 9 of the Florida Constitution.[201] The Fourth District recognized a conflict and certified a question to the Supreme Court of Florida.[202] The Supreme Court of Florida rephrased the question:

> DOES FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, PREVENT THE IMPEACHMENT OF A TESTIFYING DEFENDANT WITH THE DEFENDANT'S SILENCE MAINTAINED AT THE TIME OF ARREST BUT PRIOR TO THE RECEIPT OF *MIRANDA* WARNINGS?[203]

The Supreme Court of Florida answered the question in the affirmative and explained how Florida courts differ from the United States Supreme Court on the right to remain silent:

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198. *Id.* at 764.
199. *Id.*
200. *Hoggins*, 718 So. 2d at 764 n.3.
201. *Id.* at 764.
202. *Id.*
203. *Id.* at 762 (emphasis in original).

> Florida courts reach a different conclusion than does the United States Supreme Court on the issue of postarrest, pre-Miranda silence for two reasons. First, unlike the United States Supreme Court, Florida courts have recognized that the defendant does not waive his or her right to silence at the time of arrest by taking the stand in his or her own defense. Regardless of whether evidence of post arrest silence is introduced in the state's case-in-chief or for impeachment purposes, the same test applies. If the comment is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent, it violates the defendant's right to silence.[204]

The Supreme Court of Florida held "[t]he comments at issue . . . were fairly susceptible of being interpreted as comments on Hoggins' silence and therefore clearly violated his right to remain silent."[205]

6. Personal Attacks on Defense Counsel

Florida courts do not condone personal attacks on defense counsel because they are an improper trial tactic that can poison the minds of the jury.[206]

In *Del Rio v. State*,[207] the defendant was convicted of first degree murder with a firearm, attempted second degree murder with a firearm, attempted first degree murder with a firearm, and burglary of an occupied dwelling with an assault and with a firearm.[208] The Third District Court of Appeal affirmed the convictions and sentence but wrote an opinion specifically to address the improper comments made by the prosecutor.[209]

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204. *Id.* at 769.

205. *Hoggins*, 718 So. 2d at 769.

206. *See* Cochran v. State, 711 So. 2d 1159 (Fla. 4th Dist. Ct. App. 1998); Landry v. State, 620 So. 2d 1099, 1102 (Fla. 4th Dist. Ct. App. 1993); Ryan v. State, 457 So. 2d 1084, 1089 (Fla. 4th Dist. Ct. App. 1984); Briggs v. State, 455 So. 2d 519 (Fla. 1st Dist. Ct. App. 1984); McGee v. State, 435 So. 2d 854 (Fla. 1st Dist. Ct. App. 1983); Westley v. State, 416 So. 2d 18 (Fla. 1st Dist. Ct. App. 1982); Melton v. State, 402 So. 2d 30 (Fla. 1st Dist. Ct. App. 1981); Hufham v. State, 400 So. 2d 133 (Fla. 5th Dist. Ct. App. 1981); Simpson v. State, 352 So. 2d 125 (Fla. 1st Dist. Ct. App. 1977); Thompson v. State, 318 So. 2d 549 (Fla. 4th Dist. Ct. App. 1975); Cochran v. State, 280 So. 2d 42 (Fla. 1st Dist. Ct. App. 1973).

207. 732 So. 2d 1100 (Fla. 3d Dist. Ct. App. 1999).

208. *Id.* at 1101.

209. *Id.* (the prosecutor denigrated the city as a place where "death is cheap" and commented upon his own and the jurors' personal stake in the case when he said "the law protects all of us or the law protects none of us and how [i]n the south, we saw it when it happened to blacks. In Germany we saw it when it happened to the Jews.").

During closing argument, the prosecutor attacked the integrity of defense counsel when he referred to defense counsel and said "[s]ee this man here who claims to be a lawyer in good standing in Miami, Florida and that is the same guy who is going to get up when I sit down and try to tell you what the evidence showed."[210] The Third District Court of Appeal stated that it "will not condone inflammatory and prejudicial remarks attacking the integrity of opposing counsel."[211] The Third District cautioned the prosecution about improper comments and sent a copy of its opinion to The Florida Bar for investigation.[212]

In *Barnes v. State*,[213] defense counsel argued there was a lack of objective evidence linking the defendant to the crime.[214] Defense counsel told the jury a guilty verdict would have to rest on eyewitness identification and the testimony of the defendant's former defense counsel had compromised the identification.[215] In response, the prosecutor characterized the former defense counsel's testimony as "the mercenary actions of . . . a hired gun, hired by the—."[216] Defense counsel objected and requested the prosecutor's remark be stricken.[217] The trial judge instructed the jury to ignore that last comment.[218] Ignoring the judge, the prosecutor immediately continued his argument and said "—who was hired to go over there and defend this guy."[219] The Fourth District Court of Appeal reversed and held that the prosecutor's argument was highly improper and affected the jury's deliberations "in spite of a sustained objection and the curative instruction."[220]

The Fourth District was troubled by the way the trial judge granted the motion to strike and was concerned about the insufficiency of the curative instruction.[221] The court said the trial judge's statement, "[i]gnore the last

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210. *Id.* at 1102.

211. *Id. See also* Owens Corning Fiberglass Corp. v. Morse, 653 So. 2d 409, 410 (Fla. 3d Dist. Ct. App. 1995) (referring to opposing counsel as "a master of trickery"); Sun Supermarkets, Inc. v. Fields, 568 So. 2d 480 (Fla. 3d Dist. Ct. App. 1990) (commenting that opposing counsel lied and committed a fraud upon the court and jury); Jackson v. State, 421 So. 2d 15, 16 n.1 (Fla. 3d Dist. Ct. App. 1982) (referring to opposing counsel as a "cheap shot artist").

212. *Del Rio*, 732 So. 2d at 1102 n.1.

213. 743 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1999).

214. *Id.* at 1106.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Barnes*, 743 So. 2d at 1106.

219. *Id.*

220. *Id.*

221. *Id.*

comment" was ambiguous and vaporous.[222] The court stated "[w]hen a judge grants a motion to strike . . . it is important that the fact of granting the motion be made unmistakably clear to the jury."[223] The court continued by adding that it is "very important that the precise comment to be stricken be identified in a way that will leave no room for doubt about what the jury must ignore."[224] The court explained the proper method for handling this type of objection:

> When it is made to appear that a prosecuting officer has overstepped the bounds of that propriety and fairness which should characterize the conduct of a state's counsel in the prosecution of a criminal case, or where a prosecuting attorney's argument to the jury is undignified and intemperate, and contains aspersions, improper insinuations, and assertions of matters not in evidence, or consists of an appeal to prejudice or sympathy calculated to unduly influence a trial jury, *the trial judge* should not only sustain an objection at the time to such improper conduct when objection is offered, *but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments.*[225]

The Fourth District Court of Appeal then directed its attention to attorney professionalism.[226] The court observed that the prosecutor's prior misconduct required a new trial in four other cases.[227] Because the prosecutor had persisted in improper conduct, the court called for sanctions when it referred the matter to The Florida Bar and stated: "[w]ith the fourth rebuke of prosecutor Milian by this court, we hope that the disciplinary organs of The Florida Bar will finally bring their compelling powers to bear on this lawyer who either refuses or is unable to limit his trial tactics to that which are ethical and proper."[228]

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222. *Id.* at 1107.

223. *Barnes*, 743 So. 2d at 1107.

224. *Id.*

225. *Id.* (quoting Deas v. State, 161 So. 729, 731 (Fla. 1935)) (emphasis in original).

226. *Id.* at 1108.

227. *Id.*; *See* Cochran v. State, 711 So. 2d 1159 (Fla. 4th Dist. Ct. App. 1998); Knight v. State, 672 So. 2d 590 (Fla. 4th Dist. Ct. App. 1996); Klepak v. State, 622 So. 2d 19 (Fla. 4th Dist. Ct. App. 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th Dist. Ct. App. 1993).

228. *Barnes*, 743 So. 2d at 1109.

7. Disclosing the Length of the Sentence

Florida Rule of Criminal Procedure 3.390(a) provides that "[t]he presiding judge shall charge the jury only on the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial."[229] The Supreme Court of Florida has construed this rule literally: "[T]he jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment. As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties."[230] Thus, neither the defense nor the prosecutor is permitted to disclose the length of the sentence for the crime charged or for any lesser included offenses.

In *Legette v. State*,[231] the defendant was charged with second degree murder, and the jury found him guilty of manslaughter.[232] The trial court informed counsel it would instruct the jury on the lesser included offenses of manslaughter, battery, and improper exhibition of a weapon.[233] During closing argument, the prosecutor told the jury that battery was a misdemeanor.[234] The defense objected and moved for a mistrial, which was overruled by the trial court.[235]

The court stated that allowing a prosecutor to "inject the length of sentence into closing argument [was] contrary to the policy behind the 1984 amendment to rule 3.390(a), that the jury should decide a case in accordance with the law and the evidence and disregard the consequences of its verdict."[236] However, the court found that the reference to the misdemeanor was not prejudicial pursuant to section 924.051(1)(a) of the *Florida Statutes*.[237]

The Fourth District Court of Appeal affirmed the conviction but wrote an opinion discussing the prosecutor's closing argument.[238] The Fourth District said "[t]he reference to a misdemeanor suggested to the jury that the sentence for battery was relatively minor when compared to second degree murder and

229. FLA. R. CRIM. P. 3.390(a).
230. Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1990).
231. 718 So. 2d 878 (Fla. 4th Dist. Ct. App. 1998).
232. *Id.* at 878.
233. *Id.* at 880.
234. *Id.*
235. *Id.*
236. *Legette*, 718 So. 2d at 881.
237. *Id.*
238. *Id.* at 878–79.

manslaughter."[239] The court discussed the reasons for the 1985 amendment to *Florida Rule of Criminal Procedure* 3.390(a).[240] Before 1985, the jury was allowed to consider the issue of sentence length.[241] The Fourth District found two reasons for the amendment: "to 'minimize the potential for jury sympathy based on the defendant's possible sentence' [and] to harness the jury's exercise of its pardon power."[242]

8. Bolstering the Credibility of Police Officers

In *Freeman v. State*,[243] the defendant was convicted of carrying a concealed firearm and sentenced to two years of probation.[244] At trial, the testimony of the State's witnesses was in direct conflict with the defense witnesses' testimony concerning whether the firearm discovered in the defendant's automobile was concealed from the police officers.[245] During closing argument, the prosecutor stated:

> . . . So that's the question. Who do you want to believe here? Do you want to believe the officers or do you want to believe Mr. Freeman?
> Ladies and gentlemen, I'm here to tell you that you should believe the officers. Why should you believe the officers? Simply because they're police officers, because they're sworn to uphold the law, because they're trained observers, because they have no reason to lie.[246]

The court reasoned that because the credibility of the State's witnesses was crucial in determining the factual dispute about concealment of the weapon, the prosecutor's argument was clearly improper and was not harmless error.[247] The prosecutor later referred to facts not in evidence and the defense objected.[248] Although the defense had made no objection to the

239. *Id.* at 880.
240. *Id.*
241. *Legette*, 718 So. 2d at 880.
242. *Id.* (quoting Limose v. State, 656 So. 2d 947, 949 (Fla. 5th Dist. Ct. App. 1995)).
243. 717 So. 2d 105 (Fla. 5th Dist. Ct. App. 1998).
244. *Id.* at 105.
245. *Id.* at 106.
246. *Id.* at 105.
247. *Id.* at 105–06.
248. *Freeman*, 717 So. 2d at 106.

first offending argument,[249] the court found the prosecutor's collective comments were "so prejudicial as to vitiate the entire trial."[250]

In *Sinclair v. State*,[251] the defendant was convicted of attempted first-degree murder, robbery, and armed burglary.[252] Although the Fourth District Court of Appeal affirmed the defendant's conviction and sentence, it wrote an opinion to admonish the prosecutor's improper comment on the veracity of a detective who testified.[253] The prosecutor stated, "Detective Shotwell, you have to determine if he is the kind of detective you want to believe or not. Do you [sic] want to put his career on the line and for whatever motivations as lead—."[254] The defense objected and the trial court gave a curative instruction.[255] The Fourth District stated that it has "repeatedly condemned comments that the jury should believe a police officer because the officer would not put his or her career on the line by committing perjury."[256] The court then explained why this type of argument is patently improper:

> First, although such comments may not in some instances constitute an affirmative statement of the prosecutor's personal belief in the veracity of the police officer, they do constitute an inappropriate attempt to persuade the jury that the police officer's testimony should be believed simply because the witness is a police officer. Second, such comments make reference to matters outside the record and constituted [sic] impermissible bolstering of the police officer's testimony.[257]

The Fourth District concluded that because the trial court sustained the objection and gave a curative instruction, the trial court did not abuse its discretion when it denied the motion for mistrial based upon the improper comment.[258]

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249. *Id.* at 105.
250. *Id.* at 106.
251. 717 So. 2d 99 (Fla. 4th Dist. Ct. App. 1998).
252. *Id.* at 100.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Sinclair*, 77 So. 2d at 100.
257. *Id.* (quoting Cisneros v. State, 678 So. 2d 888, 890 (Fla. 4th Dist. Ct. App. 1996)).
258. *Id.* at 101.

9. Bolstering the Credibility of the Victim

In *Lewis v. State*,[259] the defendant was found guilty of armed robbery with a weapon and armed car jacking with a weapon and was sentenced to fifteen years in state prison.[260] He appealed his conviction and sentence and argued "that the trial judge erred in denying his motion for mistrial based on improper arguments made by the prosecutor during closing argument."[261] Although the Third District Court of Appeal affirmed the conviction and sentence, it noted that the prosecutor's closing argument was extremely disturbing.[262] During closing argument, the prosecutor improperly and repeatedly vouched for and bolstered the testimony of the victim:

> **And, he was honest. He didn't exaggerate. He didn't lie.** He didn't go in and say, "[y]eah, that's the guy," because, you know he's a nice kid. **That's just the type of person he is.** As a matter of fact, even when he was describing the gun, he said, "look, it was used in a manner that I believed it was a gun." But he's not going to come out and say, yeah, man, a hundred percent it's a gun, because **that's the type of person he is.**
> Don't let that confuse you. Don't release him into society. **Don't let him walk simply because [the victim] is super honest or super accurate.**
> . . . .
> **Don't reward him because Peter [the victim] is a super honest guy and would not come in here and exaggerate and would not come in here and lie.**[263]

The court said vouching for the credibility of the victim was improper, but the error was harmless considering the overwhelming evidence of guilt.[264]

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259. 711 So. 2d 205 (Fla. 3d Dist. Ct. App. 1998), *review denied*, 725 So. 2d 1109 (Fla. 1998).

260. *Lewis*, 711 So. 2d at 206–07. *See also* Deluca v. State, 736 So. 2d 1222 (Fla. 4th Dist. Ct. App. 1999).

261. *Id.* at 207.

262. *Id.*

263. *Id.* (emphasis in original).

264. *Id.* at 208.

10. Ridiculing the Defense Theory

In *Miller v. State*,[265] the defendant was convicted of burglary of a dwelling, petit theft, and attempted burglary.[266] He appealed and claimed *inter alia* that the trial court erred when it denied his motion for a new trial based on improper arguments the prosecutor made during closing argument.[267] During trial, the defendant asserted the defense of voluntary intoxication.[268] The State and the defense presented witness testimony that supported the voluntary intoxication defense.[269] During closing argument, the prosecutor stated:

> PROSECUTOR: Voluntary intoxication. Let's talk about this. Their defense is the defense of lack of responsibility. That's simply what it is. He has the nerve to tell you he drank twenty-one beers. No one tied him down, no one forced him to do it—
> DEFENSE COUNSEL: Your Honor, I object, this is an instruction on the law.
> THE COURT: Overruled. This is argument.
> PROSECUTOR: No one forced him to drink those twenty-one beers he claims to have drunk that night, but still is able to at least walk. But yet, because he chose to drink in a reckless manner he's not guilty. Where's the responsibility for your actions?
> This is not a case about lack of intent, it's a question of lack of responsibility. For when he tells you that he was voluntarily intoxicated, "I'm so drunk I don't know what I'm doing, I don't know what is right from wrong," who did the drinking? And who forced him to drink?[270]

The Fourth District said the prosecutor's comments improperly expressed personal opinion of the defense theory.[271] The court stated a defendant has a "fundamental right to present a defense . . . and to have the jury properly instructed on any legal defense supported by the evidence."[272] The court went on to say "[t]hese rights stand for naught if the prosecutor

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265. 712 So. 2d 451 (Fla. 2d Dist. Ct. App. 1998).
266. *Id.* at 452.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Miller*, 712 So. 2d at 452–53.
271. *Id.* at 453.
272. *Id.* (internal citations omitted).

can ridicule a defense so presented, denigrate the accused for his temerity in raising the issue, and misstate the law in contradiction of the judge's instructions, as the prosecutor in this case did."[273] The court concluded that the prosecutor's misconduct was a "foul blow" and deprived the defendant of his fundamental right to a fair trial.[274]

11. Improper Penalty-Phase Arguments

"[P]rosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding."[275] In *Urbin v. State*,[276] the defendant was found guilty of first-degree murder and robbery and was sentenced to death.[277] The Supreme Court of Florida affirmed the conviction but reversed the death sentence based on proportionality.[278] Although the defense had failed to object to the prosecutor's penalty-phase argument and the issue was moot because of the proportionality reversal, the Supreme Court of Florida said it was obligated to acknowledge and disapprove of improprieties in the prosecutor's closing penalty-phase argument.[279]

The Supreme Court of Florida was particularly concerned that the prosecutor had invited the jury to disregard the law.[280] The prosecutor improperly asserted that if the defendant received a life sentence, they might still release him some day.[281] The prosecutor argued:

> I anticipate that the defense lawyer is going to argue for you—argue to you to recommend the life sentence. They're going to argue that life without parole is what you ought to recommend. And I submit to you today now that is the state of the law, life without parole. We all know in the past laws have changed. And *we all know that in the future laws can change.* The law now is life without parole.[282]

273. *Id.*
274. *Id.*
275. Garron v. State, 528 So. 2d 353, 359 (Fla. 1988).
276. 714 So. 2d 411 (Fla. 1998).
277. *Id.* at 413.
278. *Id.* at 418.
279. *Id.* at 418–19.
280. *Id.* at 420.
281. *Urbin*, 714 So. 2d at 420.
282. *Id.* at 420 n.10 (emphasis added).

The court said the prosecutor was "encourag[ing] the jury to reject the only lawful alternative to the death penalty, even if they believed that to be the right recommendation, based on a reflexive fear that, regardless of the law, [the defendant] might someday be eligible for parole."[283] The court found the prosecutor's "ignore the law" argument had absolutely no place in a trial.[284] The prosecutor aggravated the matter more when he argued:

> [M]y concern is that some of you may be tempted to take the easy way out, to not weigh the aggravating circumstances and the mitigating circumstances and not want to fully carry out your responsibility and just vote for life. . . . I'm going to ask you not be swayed by pity or sympathy. I'm going to ask you what pity, what sympathy, what mercy did the defendant show [the victim]. . . . I'm going to ask you to follow the law. I'm going to ask you to do your duty.[285]

The Supreme Court of Florida noted that the prosecutor's argument was similar to a case in which the First District Court of Appeal had condemned the argument as "an impermissible attempt by the prosecution to instruct the jury as to its duties and functions."[286] The prosecutor went beyond the evidence when he stated the "victim was shot while 'pleading for his life.'"[287] The court found that this type of argument was an impermissible emotional appeal and constituted a "subtle 'golden rule' argument."[288] The prosecutor put his own words in the victim's mouth by saying "[d]on't hurt me. Take my money, take my jewelry. Don't hurt me."[289] The court found these imaginary words were an attempt by the prosecutor to "'unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused.'"[290]

The court then addressed the prosecutor's verbal attack on the defendant's mother.[291] The prosecutor called the defendant's mother a "mistress of excuses" three times and criticized her because she never expressed any concern, remorse, or sorrow to the victim's family.[292] The

283. *Id.* at 420.
284. *Id.*
285. *Id.* at 421.
286. *Urbin*, 714 So. 2d at 421 (citing Redish v. State, 525 So. 2d 928, 930 (Fla. 1st Dist. Ct. App. 1988)).
287. *Id.* at 421.
288. *Id.*
289. *Id.*
290. *Id.* (quoting Barnes v. State, 58 So. 2d 157, 159 (Fla. 1951)).
291. *Urbin*, 714 So. 2d at 421.
292. *Id.* at 421.

court explained that "[t]hese attacks could only serve to prejudice [the defendant] for any animosity that may have been aroused in the jury for [defendant's] mother, hence essentially turning the substantial mitigation of parental neglect against [defendant]."[293] The court also found the prosecutor improperly concluded his argument by stating:

> If you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed [the victim] on September 1, 1995, and that was none.[294]

Mercy arguments are impermissible because they are "'an unnecessary appeal to the sympathies of the juror calculated to influence their sentence recommendation.'"[295]

VIII. CONCLUSION

Unfortunately, despite warnings, admonitions, and appellate court reversals, misconduct continues, showing that some trial attorneys ignore the requirement for professional and ethical conduct in the courtroom.[296] To halt unethical conduct, appellate courts appear more willing to take serious action against the attorney and forward instances of misconduct to The Florida Bar for disciplinary proceedings.[297]

Judge Altenbernd recently proposed a solution to misconduct during closing argument:[298]

> [T]he state attorneys, the public defenders, and the circuit court judges, at a statewide level, need to create a continuing legal education videotape for prosecutors and a separate video tape for defense attorneys, demonstrating improper closing arguments that are against the rules and should never be made. Each new attorney who practices in criminal court should be required to view these tapes before the attorney is allowed to try a case. When an attorney

293. *Id.*

294. *Id.*

295. *Id.* (quoting Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989)).

296. *See Urbin*, 714 So. 2d at 422.

297. *See* Barnes v. State, 743 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1999); Del Rio v. State, 732 So. 2d 1100, 1102 n.1 (Fla. 3d Dist. Ct. App. 1999); Izquierdo v. State, 724 So. 2d 124, 125 n.1 (Fla. 3d Dist. Ct. App. 1998).

298. Bell v. State, 723 So. 2d 896, 897 (Fla. 2d Dist. Ct. App. 1998) (Altenbernd, A.C.J., specially concurring).

> violates the rules for the first time in closing argument, the trial judge should be encouraged to require the attorney to view the tape again. After two or three viewings, if an attorney still cannot argue within the rules, other more serious sanctions should be imposed either by a supervising attorney or by the trial court. Given the seriousness of these trials and the ramifications of appellate court reversals, the public, the victims of crime, and the defendants deserve no less.[299]

"'If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in its use, they should not be members of The Florida Bar.'"[300] "[*Y*]*ou can win your cases, you can win the tough ones, but you have to do it with dignity and with honor . . . . We are a noble and honorable profession.*"[301]

299. *Id.* at 897.

300. *Id.* (quoting Luce v. State, 642 So. 2d 4 (Fla. 2d Dist. Ct. App. 1994) (Leblue, J., specially concurring)).

301. Honorable Gerald Kogan, Keynote Address at the *Nova Law Review* Annual Banquet (Mar. 29, 1996), (emphasis added), *reprinted in* Honorable Gerald Kogan, *Keynote Address at the Annual Nova Law Review Banquet Mar. 29, 1996,* 24 NOVA L. REV. 1, 4 (1996).