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Prosecutorial Misconduct in Closing Argument

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Abstract

Prosecutorial misconduct in closing argument is increasing in frequency and appears to be perniciously resistant to eradication. Because of its potentially disastrous effects² upon a criminal trial, it demands the attention of prosecutors and the defense bar alike.

KEYWORDS: argument, closing, misconduct

Prosecutorial Misconduct in Closing Argument

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Introduction

Prosecutorial misconduct in closing argument¹ is increasing in frequency and appears to be perniciously resistant to eradication. Because of its potentially disastrous effects² upon a criminal trial, it demands the attention of prosecutors and the defense bar alike. As stated by Mr. Justice Drew: "Many a winning touchdown has been called back and nullified because someone on the offensive team violated a rule by which the game was to be played."³

This article will explore the parameters imposed upon a prosecutor in Florida⁴ in arguments to the jury,⁵ the effects of failure to adhere to those standards,⁶ and the procedural rules governing this area of the law.⁷

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1. The reasoning may also be applied to improper opening statements, as the rule would be the same. Of course, there should, in theory, be no arguments advanced in opening. Cf. *Juhasz v. Darton*, 146 Fla. 484, 1 So. 2d 476, 478 (1941).

2. See *infra* text accompanying notes 203-07.

3. *Grant v. State*, 194 So. 2d 612, 616 (Fla. 1967).

4. The laws of other jurisdictions will only be considered as they reflect or amplify principles of Florida law.

5. Arguments have been referred to by commentators such as Note, *Prosecutor Forensic Misconduct—"Harmless Error?"* 6 UTAH L. REV. 108, 108 (1958) [hereinafter cited as *Prosecutor Forensic Misconduct*], and have been defined as "any activity by the prosecutor which tends to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in the manner prescribed by law, . . ." Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946, 949 (1954) [hereinafter cited as Note, *The Nature and Consequences of Forensic Misconduct*].

6. See *infra* text accompanying notes 203-07.

7. See *infra* text accompanying notes 208-28.

Recent Trends

The recent case of *State v. Gomez*⁸ concluded with the prosecutor's summation:

Don't let that gentleman [the victim] with three children and a wife walk away without justice in this case, facing possible jail, an arm that's hideously changed the rest of his life and let these gentlemen [the defendant and codefendant] walk away into our community and commit further crimes of this nature. These assassins must be put away. It is your duty to do that. You told me you'll do that.⁹

The Third District Court of Appeal expressed its obvious exasperation with the prosecutor thus: "We add to the growing list of cases requiring reversal on the basis of prosecutorial misconduct, the case of José Gomez."¹⁰ The court noted dryly that in this case, the victim for whom the prosecutor pled for "justice" was an admitted perjurer, as were all of the State's witnesses, while the "assassin" had no prior criminal record.¹¹

In the subsequent case of *Jackson v. State*,¹² the exasperation of the district court reached a peak. In the face of the prosecutorial argument which it termed "utterly and grossly improper,"¹³ the court in *Jackson* chose to react to the "veritable torrent of cases which have similarly involved significant prosecutorial improprieties committed by assistant state attorneys in this district."¹⁴ Noting that the volume of such cases included multiple improprieties by individual prosecutors,¹⁵ the court stated that a pattern seemed to be emerging: "[W]e must suspect, however reluctantly, that the improprieties may be deliberately

8. 415 So. 2d 822 (Fla. 3d Dist. Ct. App. 1982).

9. *Id.* at 823 (first bracket original, second bracket supplied by 3d Dist. Ct. App.).

10. *Id.*

11. *Id.*

12. 421 So. 2d 15 (Fla. 3d Dist. Ct. App. 1982).

13. *Id.*

14. *Id.* at 16. *See infra* note 20.

15. 421 So. 2d at 16. The court stressed it was not the prosecutor in the case *sub judice*. They appear to have been directing their fire at the *Gomez* prosecutor. *Id.* *See infra* note 24.

calculated to accomplish just what representatives of the state cannot be permitted — inducing a jury to convict by unfairly prejudicing it against the defendant.”¹⁶ The *Jackson* court noted that other sanctions, such as stern judicial admonitions, reversals, discipline by superiors or self-adherence to the prosecutor’s oaths and Code of Professional Responsibility, had all failed.¹⁷ The court went to to “serve notice”¹⁸ that it was prepared to go to the extraordinary measures of analyzing each instance of misconduct, to refer instances of abuse to the Florida Bar or to seek discipline directly in circuit court.¹⁹ While the year 1982 has yielded a great number of cases²⁰ and a large amount of public comment²¹ as well as strong judicial protest concerning reversal of criminal cases for improper prosecutorial argument,²² the phenomenon is by no means a recent one. Each generation of judges seems to supplant the preceeding one in decrying the occurrence of needless behavior which too often leads to the squandering of judicial resources. Yet it continues in the face of the sternest denunciations.²³

16. *Jackson*, 421 So. 2d at 16.

17. *Id.* at 16-17.

18. *Id.* at 17.

19. *Id.*

20. The year 1982 has yielded no less than ten reversals predicated upon improper closing arguments by prosecutors: *Wheeler v. State*, 1983 Fla. L.W. 124 (Fla. 1st Dist. Ct. App. 1982); *Collins v. State*, 423 So. 2d 516 (Fla. 3d Dist. Ct. App. 1982); *Coleman v. State*, 420 So. 2d 354 (Fla. 5th Dist. Ct. App. 1982); *Simpson v. State*, 418 So. 2d 984 (Fla. 1982); *Gomez v. State*, 415 So. 2d 822 (Fla. 3d Dist. Ct. App. 1982); *Harris v. State*, 414 So. 2d 557 (Fla. 3d Dist. Ct. App. 1982); *Ramos v. State*, 413 So. 2d 1302 (Fla. 3d Dist. Ct. App. 1982); *Cooper v. State*, 413 So. 2d 1244 (Fla. 1st Dist. Ct. App. 1982); *Harper v. State*, 411 So. 2d 325 (Fla. 3d Dist. Ct. App. 1982); *McMillan v. State*, 409 So. 2d 197 (Fla. 3d Dist. Ct. App. 1982) (a case reversed for improper questioning by the prosecutor); *Chapman v. State*, 417 So. 2d 1028 (Fla. 3d Dist. Ct. App. 1982); as well as several close calls, *Williams v. State*, 1983 Fla. L.W. 224 (Fla. 3d Dist. Ct. App. 1982) *Thomas v. State*, 419 So. 2d 634 (Fla. 1982); *Kindell v. State*, 413 So. 2d 1283 (Fla. 3d Dist. Ct. App. 1982); *Westley v. State*, 416 So. 2d 18 (Fla. 1st Dist. Ct. App. 1982); *Nelson v. State*, 416 So. 2d 899 (Fla. 2d Dist. Ct. App. 1982); *Breedlove v. State*, 413 So. 2d 1 (Fla. 1982). This trend has continued in 1983. See, e.g., *Edwards v. State*, ___ So. 2d ___, 8 Fla. L.W. 868 (Fla. 3d Dist. Ct. App. 1983).

21. *Fiery Talk Causes Reversal of Conviction*, Miami Herald, July 4, 1982, at 1B, col. 1 [hereinafter cited as *Fiery Talk*].

22. See *Jackson*, 421 So. 2d at 16.

23. “It imposes an added burden on the taxpayers for court expenses and clutters

In reality, such abuses may be regrettable, but they inevitably lurk at the threshold of every criminal trial.²⁴ This type of conduct arises

the docket of this court with unnecessary appeals." *Stewart v. State*, 51 So. 2d 494, 495 (Fla. 1951). *Compare* *Gomez v. State*, 415 So. 2d 822 with *Grant v. State*, 194 So. 2d 612, 615 (Fla. 1967) ("as an increasing number of cases reaching us in recent years, we must undo all of that which has been done and send this case back for a new trial") with *Stewart v. State*, 51 So. 2d 494, 494 (Fla. 1951) ("so many times condemned . . . that the law against it would seem to be so commonplace that any layman would be familiar with and observe it") with *Clinton v. State*, 53 Fla. 98, 114, 43 So. 312, 317 (Fla. 1907) ("No extended comment upon these utterances of counsel for the prosecution in their arguments to the jury is necessary."). *See also* Cain, *Sensational Prosecutions and Reversals*, 7 NOTRE DAME L. REV. 1 (1931).

24. "[I]solated examples of understandable, if inexcusable, overzealousness in the heat of trial," *Jackson*, 421 So. 2d at 16. In analyzing a number of such reversals which had occurred in her office recently, Eleventh Circuit State Attorney Janet Reno was quoted as citing a number of reasons which together she saw as producing the comments. *Fiery Talk*, *supra* note 21.

These factors were "greenness" of staff, lack of proper training, pressure of community concern over crime, the precariousness of the prosecutor's balancing act between advocate and seeker of justice, frustration over defense tactics, and the difference between appellate review of a cold record and the heat of trial with its split second decisions. *Id.*

Most of the factors cited are the inevitable by-product of the conflicting roles and duties of public prosecutors, discussed *infra* notes 28-42.

Ms. Reno may have hit the nail on the head in the discussion of the "greenness" of staff. This is a factor common to virtually every prosecutor's office, due to rapid turnover. The average tenure of a prosecutor nationwide is less than two years. *See* C. SILBERMAN, *CRIMINAL JUSTICE, CRIMINAL VIOLENCE* 375 (1978).

This inexperience leads to a failure to fully understand and reconcile the conflicting duties of advocate and seeker of justice. In *Gomez* the prosecutor, a Reno employee, was receiving his second reversal for such comments. Unchastened, he was quoted as strongly disagreeing with the appellate court decision (calling it a "travesty of justice," *Fiery Talk*, *supra* note 21), stating further that in his experience the less evidence against a defendant, the more likely he would be to resort to inflammatory argument. *Contra*, *State v. Cyty*, 50 Nev. 256, 256 P. 793 (1927) and *State v. Kirk*, 227 So. 2d 40 (Fla. 4th Dist. Ct. App. 1969).

The prosecutor was ultimately quoted as claiming "victory" based upon the two years incarceration which the defendant served during the pendency of the appeal — "When you get to the bottom line, I won." *Fiery Talk*, *supra* note 21. In discussing the apparently deliberate pattern of prosecutorial abuse which it saw emerging, the court in *Jackson* observed: "This may be — although we are loathe to consider the possibility — because some prosecutors believe that keeping a convicted defendant in prison during the sometimes lengthy appellate process is enough to chalk up a 'win' even if the

primarily as a by-product of the heat of combat²⁵ and the conflicting duties assumed by the public prosecutor.²⁶ As stated by Judge Mann with predictable eloquence, “[i]f oratory comes can reversal be far behind?”²⁷

The Public Prosecutor's Duty

While there are rules governing the conduct of all counsel in argument,²⁸ the prosecutor is uniquely placed in a position of conflicting professional obligations. Unlike the defense attorney whose duty, subject to certain obligations to the court, is to his client,²⁹ the prosecutor has duties to the State, to the defendant, as well as special obligations to the court and judicial system.³⁰

On one hand he is an advocate of his cause, expected to prevail for his client, the sovereign.³¹ At the same time, because of the nature of

conviction is later reversed.” 421 So. 2d. at 16 n.4.

Another commentator has asserted that such abuses may be traced to four basic causes: “a) Sincere, but excessive, zeal of prosecuting attorneys; b) Headline seeking prosecutors; c) Sheer ignorance of the proper function of a prosecuting attorney and of criminal law; d) Timidity and indifference of trial court judges.” Cain, *supra* note 23, at 2.

25. “[L]apsus linguae in the heat of argument,” *Trafficante v. State*, 92 So. 2d 811, 814 (Fla. 1957). See also *Fiery Talk*, *supra* note 21; *Jackson*, *supra* note 24.

26. See *supra* note 24 and text accompanying notes 28-42.

27. *Chavez v. State*, 215 So. 2d 750, 750 (Fla. 2d Dist. Ct. App. 1968).

28. See, e.g., FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (1981).

29. For an excellent discussion of defense counsel and closing argument, see Martin, *Closing Argument to the Jury for the Defense in Criminal Cases*, 10 CRIM. L.Q. 34 (1967).

30. “The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice not merely to convict.” FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981). ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function*, § 1.1 (Approved Draft 1971); *Kirk v. State*, 227 So. 2d 40, 43 (Fla. 4th Dist. Ct. App. 1969).

31. “[T]he prosecutor represents the sovereign. . .” FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13(1), *cf. id.* at 7-13(2); *Washington v. State*, 86 Fla. 533, 543, 98 So. 605, 609 (1923) “not to consider himself *merely* as attorney of record for the state, struggling for a verdict (emphasis supplied). “[H]e represents the great authority of the State of Florida.” *Kirk*, 227 So. 2d at 43.

that power, he is expected to exercise it with great discretion.³² At odds with his duty as advocate, he has a specific duty to the defendant which requires him to negate or mitigate the defendant's guilt.³³ Beyond those duties, he has a special obligation to the court which has been termed "semi-judicial."³⁴ In the early case of *Washington v. State*,³⁵ the Florida Supreme Court summed up these often conflicting duties:

The prosecuting attorney occupies a semijudicial position. He is a sworn officer of the government, with no greater duty imposed on him than to preserve intact all the great sanctions and traditions of the law. It matters not how guilty a defendant in his opinion may be, it is his duty under oath to see that no conviction takes place except in strict conformity to law. His primary considerations should be to develop the facts and the evidence for the guidance of the court and jury, and not to consider himself merely as attorney of record for the state, struggling for a verdict.³⁶

In short his obligation is to see that "justice is done."³⁷

In argument before the jury these duties restrain the prosecutor from language which directs the jury to anything but the facts of the case and the law.³⁸ It has been asserted that the accused has a funda-

32. FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13(2); *Kirk*, 227 So. 2d at 43.

33. In our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.

FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13(3).

34. See, e.g., *Oglesby v. State*, 156 Fla. 481, 23 So. 2d 558 (Fla. 1945); *Akin v. State*, 86 Fla. 564, 572, 98 So. 609, 612 (1923); *Washington v. State*, 86 Fla. 533, 542, 98 So. 605, 609 (1923).

35. 86 Fla. 533, 98 So. 605 (1923).

36. *Id.* at 573-74, 98 So. at 609.

37. See FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13.

38. See FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106; ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* §§ 5.8, 5.9 (Approved Draft 1971).

mental right to a fair trial free of improper argument.³⁹ However, due to the nature of lawyers and the adversary system the line will often be difficult to draw.⁴⁰

The United States Supreme Court summed it up by stating: “[W]hile he may strike hard blows, he is not at liberty to strike foul ones.”⁴¹ Yet another court said of improper prosecutorial argument, “[i]f the state has a strong case, it is not necessary, and if it has a close case, such misconduct is gross injustice to the defendant.”⁴²

Comment upon the Defendant's Silence

The ultimate and unpardonable⁴³ sin in a prosecutor's argument is directing any comment towards the defendant's exercise of his right to remain silent.⁴⁴ Because of the special significance of the rules in this area, it will be considered first and separately. Rule 3.250 of the Florida Rules of Criminal Procedure forbids the prosecutor from commenting upon the failure of a criminal defendant to take the stand.⁴⁵ The

39. *Chavez v. State*, 215 So. 2d 50 (Fla. 2d Dist. Ct. App. 1968).

40. *Tyson v. State*, 87 Fla. 392, 394, 100 So. 254, 255 (1924). *See* ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* § 5.8 commentary at 122 (Approved Draft 1971). “To attempt to spell out in detail what can and cannot be said in argument is impossible, since it will depend on the facts of the particular case.” *See also infra* note 123.

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

42. *State v. Cyty*, 50 Nev. 256, —, 256 P. 793, 794 (1927). *Accord* *Kirk v. State*, 227 So. 2d 40, 43 (Fla. 4th Dist. Ct. App. 1959): “If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client.”

43. *See infra* text accompanying notes 44-61.

44. *Doyle v. Ohio*, 426 U.S. 610 (1976); *Brown v. State*, 367 So. 2d 616 (Fla. 1979).

45. The text of the rule reads as follows:

Accused as Witness

In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the

rule arises from several constitutional roots.

The prohibition against compelling a defendant to testify against himself has a long history in Florida⁴⁶ and United States Constitutional law.⁴⁷ In the later part of the eighteenth century, there was a nationwide erosion of the common-law rule which held a defendant incompetent to testify in his own behalf. While this story has been covered in more depth elsewhere,⁴⁸ suffice it to say that by 1895, an act of the legislature of Florida had fully abrogated the common-law rule, and a criminal defendant had the privilege to become a sworn witness in his own behalf, subject to the same status as any other witness.⁴⁹ This

jury.

Rule 3.250 FLA. R. CRIM. P. (1972 Rev.).

46. "No person shall be . . . compelled in any criminal matter to be a witness against himself." FLA. CONST. of 1968, art. 1, § 9. Similar provisions have been a part of Florida's Constitution since its original constitution in 1838. FLA. CONST. OF 1885, DECLARATION OF RIGHTS, § 12; FLA. CONST. OF 1868, DECLARATION OF RIGHTS § 8; FLA. CONST. OF 1865, art. 1, § 10; FLA. CONST. OF 1861, art 1, § 10; FLA. CONST. of 1838, art. 1, § 10.

47. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. This has been a part of the Constitution since 1791, though its parameters have been subject to expansion and contraction in recent years.

48. See J. WIGMORE, EVIDENCE § 579 (Chadbourn Rev. 1979); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

The sequence of this progression in Florida, and the nature of what Florida progressed from, has never been perfectly clear. See De Foor & Mitchell, *Hybrid Representation: The Right of Criminal Defendant to Participate in His Trial as Co-Counsel*, 10 STETSON L. REV. 191 (1981); De Foor, Lewis & Mitchell, *The Right to Dual Representation*, 18 HOUS. L. REV. 519 (1981). It is clear that Florida adhered to the common law rule. See cases cited in this note.

It is equally clear that by the latter part of the 19th century, the legislature had created the right for a criminal defendant to make a sworn statement to the jury, but without examination by counsel or the court. This innovation occurred in 1870. See Act Concerning Testimony, 1870 Fla. Laws, ch. 1816, § 1 (amended 1898); *Hancock v. State*, 79 Fla. 701, 706, 85 So. 142, 143-44 (1920) (Brown, J., dissenting); *Millar v. State*, 15 Fla. 577, 584 (1876). This right was broadened by the legislature in 1895 to make the defendant in a criminal case subject to all of the rules applicable to witnesses. See text of the Act contained infra at note 49. See also *Hart v. State*, 38 Fla. 39, 20 So. 805 (1896).

49. Act to Amend Section 2908, 1895 Fla. Laws 4420, § 1 (repealed 1970) provided:

Accused may Make Himself a Witness. In all criminal prosecutions the

same act also stated “nor shall any prosecuting attorney be permitted before the court or jury to comment on the failure of the defendant to testify in his own behalf.”⁵⁰ This provision is still seen as an essential protection of the right against self-incrimination which became necessary once a defendant had the opportunity to testify in his own behalf.⁵¹

While the United States Supreme Court has fairly recently made it clear that any such comment is strictly prohibited by the fifth amendment,⁵² the Florida courts took a similar position early-on. By 1924 the Florida Supreme Court had taken the then-minority⁵³ view that such comment was improper and incurable.⁵⁴ Further, the impro-

accused may at his option be sworn as a witness in his own behalf and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the court or jury to comment on the failure of the accused to testify in his own behalf.

This remained the law, essentially unchanged until its repeal in 1970. *See Ratiner, Adverse Comments by a Florida Prosecutor upon a Defendant's Failure to Testify*, 15 U. MIAMI L. REV. 293, 295 n.12 (1961) and history of FLA. STAT. 918. 091 (1959). The provisions of Florida Statutes section 918.09 were adopted into Rule 3.250 of the Florida Rules of Criminal Procedure in 1967 and were unchanged in the 1972 revision, *see* Committee Notes Rule 3.250, FLA. R. CRIM. P., and remain the law in Florida.

50. Act to Amend Section 2908, 1895 Fla. Laws 4420, § 1. Florida prosecutors began to test the limits with the basic “unexplained and uncontradicted” evidence argument, almost immediately. *Gray v. State*, 42 Fla. 174, 28 So. 53 (1900). *See infra* notes 66-93 and accompanying text.

51. *Gordon v. State*, 104 So. 2d 524, 540 (Fla. 1958); *Burse v. State*, 175 So. 2d 586, 587 (Fla. 3d Dist. Ct. App. 1968). *See generally* Ratiner, *supra* note 49.

52. *Calloway v. Wainwright*, 409 U.S. 59 (1968); *Griffin v. California*, 380 U.S. 609 (1965).

53. *See* Ratiner, *supra* note 49 and Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 960 n.68.

54. *Rowe v. State*, 87 Fla. 17, 31-32, 98 So. 613, 618 (1924). As early as 1903 the supreme court had indicated in dicta that there “might” be cases where such comment would not be reversible error while not finding it to be likely. *Jackson v. State*, 45 Fla. 38, 34 So. 243 (1903).

The rule had an interesting evolution in Florida. *Simmons v. State*, 139 Fla. 645, 190 So. 756 (1939) became the principal case for the proposition that this sort of error was not subject to the harmless error rule. *Simmons* was directly repudiated in *State v. Hines*, 195 So. 2d 550 (1967), which was itself repudiated and the rule of *Simmons* was re-established in *Willinsky v. State*, 360 So. 2d 760, 762-63 (Fla. 1978).

The recent decision of *Clark v. State*, 363 So. 2d 331, 335-36 (Fla. 1978) dis-

priety of the comment is not affected by how inadvertant or indirect⁵⁵ the comment might be, or by the prosecutor's denial of any intent to comment on the defendant's right.⁵⁶ In terms of construction, if the comment is subject to an interpretation that brings it within the rule, it is so construed, regardless of susceptibility to a differing construction.⁵⁷ Indeed, the cases reversing for prosecutorial comment on this point have ranged from the egregious⁵⁸ to the subtle.⁵⁹ The rule applies equally to comment by a prosecutor about the failure of a co-defendant to testify.⁶⁰ It does not extend, however, to such comment by a co-defendant's counsel.⁶¹

A failure to contemporaneously object to the comment will be seen

cussed *infra* at note 207, which places strict technical requirements upon the receipt of the benefits of this rule, has been seen as another retreat. (Adkins, J., dissenting).

55. Flaherty v. State, 183 So. 2d 607, 609 (Fla. 4th Dist. Ct. App. 1966)(and cases cited therein). But see Helton v. State, 424 So. 2d 137 (Fla. 1st Dist. Ct. App. 1982).

56. Trafficante v. State, 92 So. 2d 811 (Fla. 1957); Milton v. State, 127 So. 2d 460 (Fla. 2d Dist. Ct. App. 1961).

57. Rowe v. State, 87 Fla. 17, 31, 98 So. 613, 618 (1924); Jackson v. State, 45 Fla. 38, 34 So. 243 (1903).

The rule may well be such as to be stated thus: if the prosecutor's comment is "fairly susceptible of being interpreted by the jury as a statement to the effect that an innocent man would attempt to explain the circumstances but the defendant offered no such explanation. . . ." then the comment thus interpreted or construed violated the prohibition of the rule. David v. State, 369 So. 2d 943, 944 (Fla. 4th Dist. Ct. App. 1977) (quoting David v. State, 348 So. 2d 420, 421 (Fla. 4th Dist. Ct. App. 1973) (Mager, J., dissenting), which quashed the lower court's decision.

58. As an example of the egregious see David v. State, 369 So. 2d 943 (Fla. 1979). The defense attorney apparently had hypothesized a defense predicated upon a business failure. The prosecutor argued the permissible line of "Where is the evidence," see *infra* notes 66-77, only to succumb to "If he had a business failure, . . . why didn't he say anything. . . ." David, 369 So. 2d at 944 (emphasis omitted). The conviction was reversed.

59. As an example of the subtle, see Hall v. State, 364 So. 2d 866 (Fla. 1st Dist. Ct. App. 1978) where the prosecutor referred to the defense counsel's attempt to shift the focus of the case from the defendant whom he characterized as sitting there "quietly." *Id.* at 867.

60. Clouser v. State, 152 So. 2d 200, 201 (Fla. 2d Dist. Ct. App. 1963); Harper v. State, 151 So. 2d 881, 883 (Fla. 2d Dist. Ct. App. 1963).

61. Jenkins v. State, 317 So. 2d 114, 115 (Fla. 3d Dist. Ct. App. 1975); Smith v. State, 238 So. 2d 120, 121 (Fla. 3d Dist. Ct. App. 1970). But see Cruz v. State, 328 So. 2d 24 (Fla. 3d Dist. Ct. App. 1976). See generally, Annot., 1 A.L.R.3d 989 (1965).

as waiver of the benefits of this rule.⁶² A defendant may also waive the benefits of the rule by taking the stand⁶³ or by comment of defense counsel.⁶⁴ Further, by taking the stand he becomes subject to the full range of cross-examination based on what he did and did not say.⁶⁵

However, not all comments which seem to brush against this subject are cause for reversal. Much confusion has resulted from a prosecutor's characterization of his case as "uncontroverted" or "unexplained" in cases where the defendant did not testify. Prosecutors were using this *double entendre* almost as soon as they were prohibited from commenting upon a defendant's silence.⁶⁶ For a long while such comments were allowed on the theory that they were comments on the evidence, not the defendant's silence.⁶⁷ The trend then began to run the other way, to the point that one court held "when the defendant elects not to testify, it is error to refer to the State's evidence as unexplained or uncontradicted, or undenied."⁶⁸

The supreme court later allowed such a comment in two cases

62. Clark v. State, 363 So. 2d 331, 335 (Fla. 1978).

63. Hufham v. State, 400 So. 2d 133 (Fla. 5th Dist. Ct. App. 1982); Blackwell v. State, 271 So. 2d 187 (Fla. 1st Dist. Ct. App. 1972); Clinton v. State, 53 Fla. 98, 43 So. 312 (1903).

64. See Doctrine of Invited Comment or Fair Reply, *infra*, text accompanying notes 152-70.

65. [T]he failure of the defendant to testify cannot be taken or considered as any admission against his interest; but, if a defendant voluntarily takes the stand and testifies as a witness in his own behalf, then he becomes subject to cross-examination as any other witness, and the prosecuting officer has the right to comment on his testimony, his manner and demeanor on the stand, the reasonableness or unreasonableness of his statements, and on the discrepancies which may appear in his testimony to the same extent as would be proper with reference to testimony of any other witness.

Dabney v. State, 119 Fla. 341, 343, 161 So. 380, 381 (1935). Accord Jordan v. State, 334 So. 2d 589 (Fla. 1976); Odom v. State, 109 So. 2d 163 (Fla. 1959); Craft v. State, 300 So. 2d 307, 308 (Fla. 2d Dist. Ct. App. 1974); Coney v. State, 258 So. 2d 497 (Fla. 3d Dist. Ct. App. 1972); Peel v. State, 154 So. 2d 910 (Fla. 2d Dist. Ct. App. 1963).

66. Gray v. State, 42 Fla. 174, 28 So. 53 (1900).

67. *Id.* See also Clinton v. State, 56 Fla. 57, 47 So. 389 (1908).

68. Singleton v. State, 183 So. 2d 245 (Fla. 2d Dist. Ct. App. 1966) (citing Way v. State, 67 So. 2d 321 (Fla. 1953)). Accord Trafficante v. State, 92 So. 2d 811 (Fla. 1957).

where the defense counsel advanced theories of coerced confession⁶⁹ and insanity without the defendant's testimony.⁷⁰ Then, in the case of *White v. State*,⁷¹ the Third District Court held that such a comment was permitted as a comment on the evidence where the testimony of several witnesses was heard.⁷² This was approved by the supreme court, which cited the earlier line of cases allowing such comment.⁷³ Subsequently in *Smith v. State*,⁷⁴ the Fifth District Court of Appeals relying on *White* stated: "Indeed, if a prosecutor could not make fair comment on the fact that the state's evidence of guilt was uncontroverted, what would be left for him to argue in a case where the defendant declined to testify?"⁷⁵ The district court has since reaffirmed its position in the case of *Elam v. State*.⁷⁶ The Third District has taken a similar view in the case of *Budman v. State*.⁷⁷

Some of the confusion in this area has resulted from the jury instruction based on the common-law presumption that a person in unexplained possession of recently stolen property is presumed to know it was stolen.⁷⁸ The question was whether the instruction was an infringe-

69. "Now did you hear one thing about him getting beaten up, or somebody was pounding on his head, forcing him into this?" *State v. Mathis*, 278 So. 2d 280, 281 (Fla. 1973).

70. "Now where is the evidence that he says he didn't know what he was doing?" *State v. Jones*, 204 So. 2d 515, 516 (Fla. 1967).

71. 348 So. 2d 368 (Fla. 3d Dist. Ct. App. 1977).

72. "You haven't heard one word of testimony to contradict what she [State's witness] said, other than the lawyer's argument." *Id.* at 369.

73. "It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue. It is thus firmly embedded in the jurisprudence of this state that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury." *White v. State*, 377 So. 2d 1149, 1150 (Fla. 1979) (citations omitted). Firmly embedded indeed! See cases at note 68.

74. 378 So. 2d 313 (Fla. 5th Dist. Ct. App. 1980), *aff'd*, *Smith v. State*, 394 So. 2d 407 (Fla. 1980).

75. *Id.* at 314.

76. 389 So. 2d 221 (Fla. 5th Dist. Ct. App. 1980).

77. 362 So. 2d 1022 (Fla. 3d Dist. Ct. App. 1978).

78. *Florida Standard Jury Instruction in Criminal Cases, Theft* 148 provides:

Proof of possession of recently stolen property, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen.

ment of the defendant's right to remain silent.⁷⁹ Early cases held that a prosecutor may not use the instruction in argument, but the instruction itself was approved.⁸⁰

In light of the positions taken by the courts in *White*,⁸¹ *Budman*,⁸² and *Smith*,⁸³ this confusion may not be relevant. The exact parameters placed upon the prosecutor's argument that the evidence is uncontroverted, remain unclear from these opinions. May it be advanced at all times, or only where it may be seen as a comment on the evidence, rather than on the defendant's silence? The language of the Fifth District in *Smith*⁸⁴ and *Elam*⁸⁵ suggest the former, while the language of the Third District in *White*⁸⁶ suggests the latter.⁸⁷

There are several directions which the Florida courts might head on this point.⁸⁸ Some jurisdictions allow such comments if they appear to refer to a witness other than the defendant.⁸⁹ The Florida courts already allow comment that the defendant did not provide a witness that he could reasonably be expected to provide.⁹⁰ Still others would seem to allow this line of argument⁹¹ even when the defendant would

79. See generally *State v. Young*, 217 So. 2d 567 (Fla. 1968), *cert. denied*, 396 U.S. 853 (1969) and *Smith v. State*, 394 So. 2d 407 (Fla. 1980).

80. The instruction has been held to be constitutional. See cases cited *supra* note 79. *Ard v. State*, 108 So. 2d 38 (Fla. 1959). The case ignores the fact that such an explanation need not necessarily come from the defendant himself.

81. 348 So. 2d 368.

82. 362 So. 2d 1022.

83. 378 So. 2d 313.

84. *Id.*

85. 309 So. 2d 221.

86. See *supra* text accompanying notes 75-76.

87. "If the evidence presented a situation where the only person who could have contradicted the witness' testimony was the defendant himself, then this comment might have been interpreted as the defendant suggests." 348 So. 2d at 369.

88. See generally *Annot.*, 14 A.L.R.3d 723 (1967).

89. See, e.g., *Desmond v. United States*, 345 F.2d 225 (5th Cir. 1965).

90. The witness must be competent and available. *Buckrem v. State*, 355 So. 2d 111 (Fla. 1978). This is especially true if a witness is a spouse. *Jenkins v. State*, 317 So. 2d 90 (Fla. 1st Dist. Ct. App. 1975).

91. It can take other forms: see, e.g., "undenied," *State v. Hampton*, 430 S.W.2d 160 (Mo. 1968); "unrefuted," *United States v. Guiliano*, 383 F.2d 30 (3d Cir. 1967); "uncontroverted," *Ruiz v. United States*, 365 F.2d 103 (10th Cir. 1966).

be the only witness who could reasonably be expected to refute it.⁹² Clarification will be needed on this point in the future. In a related matter, Florida courts have allowed prosecutors to argue that guilt could be inferred from the defendant's flight.⁹³

Permissible Scope of Argument

Other than the special rules concerning comment upon the defendant's failure to testify, the rules concerning a prosecutor's argument are fairly broad. As long as his arguments are predicated upon the evidence in the case,⁹⁴ "wide latitude is permitted in argument to the jury."⁹⁵ The prosecutor is allowed to advance all legitimate arguments,⁹⁶ and is free to make logical inferences based upon the evidence to support his theory of the case.⁹⁷ The Supreme Court of Florida has stated that these inferences may include "the fanciful play of imaginations,"⁹⁸ and inferences are not objectionable merely because they overcharacterize,⁹⁹ or soundness of logic, or relevancy¹⁰⁰ may be lack-

92. See, e.g., *People v. Stanbeary*, 126 Ill. App. 2d 244, 261 N.E.2d 765 (1970).

93. Cf. *Palmer v. State*, 323 So. 2d 612 (Fla. 1st Dist. Ct. App. 1975) and cases cited therein at 615 n.2.

94. *Powell v. State*, 93 Fla. 756, 112 So. 608 (1927); *Johnson v. State*, 88 Fla. 461, 464, 102 So. 549, 550 (1924); *Washington v. State*, 86 Fla. 533, 98 So. 605 (1923); *Akin v. State*, 86 Fla. 564, —, 98 So. 609, 618 (1922).

95. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982); *Thomas v. State*, 326 So. 2d 413 (Fla. 1975); *Spencer v. State*, 133 So. 2d 729 (Fla. 1961), *cert. denied*, 369 U.S. 880 (1962), *cert. denied* 372 U.S. 904 (1963); *Smith v. State*, 365 So. 2d 405 (Fla. 3d Dist. Ct. App. 1979); *Johnson v. State*, 348 So. 2d 747 (Fla. 3d Dist. Ct. App. 1977); *Pitts v. State*, 307 So. 2d 473 (Fla. 1st Dist. Ct. App. 1975), *cert. dismissed*, 423 U.S. 918 (1975); *Wilson v. State*, 305 So. 2d 5 (Fla. 3d Dist. Ct. App. 1974); *Frazer v. State*, 294 So. 2d 291 (Fla. 1st Dist. Ct. App. 1974).

96. *Spencer*, 133 So. 2d at 731.

97. *Breedlove*, 413 So. 2d at 8; *Spencer*, 133 So. 2d at 731.

98. *Gaston v. Stater*, 134 Fla. 538-542, 184 So. 150, 151-52 (1938); *Johnson v. State*, 86 Fla. 461, —, 102 So. 549, 550 (1924). "His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit or wing to his imagination." *Washington v. State*, 82 Fla. 533, —, 98 So. 605, 609 (1923) (citing *Mitchum v. State*, 11 Ga. 615, 631 (1852)).

99. See, e.g., *Schneider v. State*, 152 So. 2d 731 (Fla. 1963). In *Schneider* the prosecutor's argument dwelt upon the deceased's head having been "blown-off," while, in fact, he had been shot in the head and neck. *Id.* at 735.

ing. Generally speaking, much discretion is vested in the trial court in keeping counsel's arguments within the scope of the issues and evidence.¹⁰¹ There have been cases where prosecutors made statements so far from the facts as to constitute deliberate misrepresentation.¹⁰² Such cases are, fortunately, rare, and are so obviously reprehensible and reversible as to be undeserving of further comment.¹⁰³

Prosecutor's Statement of Opinion or Personal Belief

The prosecutor in a case is an advocate, and not a sworn witness capable of rendering testimony, much less any sort of expert testimony such as an opinion.¹⁰⁴ By rendering an opinion in a factual or ultimate matter concerning a case, a prosecutor, in effect, renders unsworn testimony not subject to cross-examination.¹⁰⁵ The advocacy of a prosecutor's opinion has been prohibited by Florida law at least since 1907,¹⁰⁶ and is also in violation of the Code of Professional Responsibility,¹⁰⁷ yet

100. *Brown v. State*, 80 Fla. 741, 744, 86 So. 574, 575 (1920); *Wilson v. State*, 47 Fla. 118, 36 So. 580 (1904); *Mitchell v. State*, 43 Fla. 584, 31 So. 242 (1901). *Cf. Gines v. State*, 97 Fla. 908, —, 112 So. 525, 527 (1929); *Goshea v. State*, 97 Fla. 621, 121 So. 797 (1929).

101. *See cases cited supra* note 94.

102. *See, e.g., Berger v. United States*, 295 U.S. 78, 85 (1935); *Flicker v. State*, 296 So. 2d 109, 113 (Fla. 1st Dist. Ct. App. 1977).

103. *Cf. Berger*, 295 U.S. 78. ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* § 5.8 (Approved Draft 1971). *See also* ABA STANDARDS, *The Defense Function* § 7.8 (Approved Draft 1971), as to a similar obligation upon the defense. *Cf. Akin v. State*, 86 Fla. 564, 574, 98 So. 609, 613 (1924).

104. "It is generally understood that the expression by counsel in argument before the jury or personal opinion of guilt is not only bad form but highly improper, as counsel is not a witness, nor under oath to speak the truth, nor called as an expert to give his opinion." *Tyson v. State*, 87 Fla. 392, 394, 100 So. 254, 255 (1924).

105. Comment (a) to ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* § 5.8, 127 (Approved Draft 1971). Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 955 (1954).

106. *Adams v. State*, 54 Fla. 1, 45 So. 494 (1907).

107. Disciplinary Rule DR 7-106(c)(4) (1981) of the Code of Professional Responsibility states:

"(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(4) Assert his personal opinion as to the justness of the cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the

it remains a common source of error.¹⁰⁸

The statement by the prosecutor of his belief as to the defendant's guilt is also impermissible. Prosecutors are human beings who often believe very strongly in the justness of their cause.¹⁰⁹ As stated truthfully though improperly by one prosecutor: "The State doesn't prosecute someone because of their religion or race or their nationality. We prosecute them because we believe they are guilty of crimes."¹¹⁰ Such comments are prohibited though they do not always constitute reversible error.¹¹¹ Especially to be avoided are opinions which imply superior knowledge or investigation beyond the facts in evidence, as the foundation for the opinion.¹¹² There is a great danger that because of the pres-

guilt or innocence of an accused; but he may argue, on his analysis of the evidence for any position or conclusion with respect to the matters stated herein."

108. See cases cited *infra* notes 110-15.

109. See, e.g., the remarks of the reversed prosecutor contained in *Fiery Talk*, *supra* note 14. See also Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 948. "He may consider himself engaged in a war against crime in which no holds are barred in the struggle to overcome powerful, unscrupulous opposition." The same commentator went on to note more dryly: "Besides, a record of many convictions is important to the prosecutor who wishes to further his political ambitions. Even convictions subsequently reversed for misconduct have political utility, especially where the trial is accompanied by sensational publicity, for the reversal may receive less attention than the trial and the reputation of the fighting district attorney will be preserved." *Id.*

110. *Reed v. State*, 333 So. 2d 524, 525-26 (Fla. 1st Dist. Ct. App. 1976). For virtually identical statements see *McGuire v. State*, 411 So. 2d 439 (Fla. 4th Dist. Ct. App. 1982); *Price v. State*, 267 So. 2d 39 (Fla. 4th Dist. Ct. App. 1982). Another prosecutor stated the same thoughts, perhaps more mundanely by stating that the state believed in the defendant's guilt "or we would not be here," *Buckhann v. State*, 356 So. 2d 1327, 1328 (Fla. 4th Dist. Ct. App. 1978). Yet another prosecutor went for the homerun equivalent in expressing his belief in the defendant's guilt "with all my heart, mind and soul." *Wilson v. State*, 371 So. 2d 126, 127 (Fla. 1st Dist. Ct. App. 1978).

111. *Grant v. State*, 171 So. 2d 361, 365 (Fla. 1965), *cert. denied*, 384 U.S. 1014 (1966); *Tyson v. State*, 87 Fla. 392, 100 So. 54 (1927); *Arline v. State*, 303 So. 2d 37 (Fla. 1st Dist. Ct. App. 1974); *Roundtree v. State*, 229 So. 2d 281 (Fla. 1st Dist. Ct. App. 1969).

112. In the case of *Thompson v. State*, 318 So. 2d 549 (Fla. 4th Dist. Ct. App. 1975) the reversed prosecutor flatly asserted that he had numerous other witnesses he could have called, and this was termed "highly improper." *Id.* at 552. *Cf.* *Richardson v. State*, 335 So. 2d 835 (Fla. 4th Dist. Ct. App. 1976). Similar results have been obtained where the opinion offered was a collective one, such as is obtained at a prose-

tige of the office, and the presumably greater fact-finding abilities of the office, the jury will be led to rely on the prosecutors opinion.¹¹³ This substitutes the prosecutor for the trier of fact, and is most likely to be deemed reversible error.¹¹⁴ Expressions of personal belief as to the credibility of witnesses are equally prohibited.¹¹⁵

Not every comment which begins with "I think" is seen as an improper expression of the prosecutor's opinion regarding the merits of the case. There is a difference between the prosecutor's statement of his belief in the defendant's guilt and his belief that the evidence proved the defendant's guilt, with the latter allowed.¹¹⁶

The use of the words "I think" have been held, in context, to be a deduction based upon the evidence,¹¹⁷ or a prefatory statement,¹¹⁸ rather than an expression of opinion. Curiously, a prosecutor has been allowed to state that he felt he was justified in filing an information,¹¹⁹ and expressions of shock over a crime¹²⁰ have also been allowed. However, it clearly is the more ethical, professional and prudent practice for

cutor's office conference; *Pait v. State*, 112 So. 2d 380, 384 (Fla. 1959); or in the form of office policy, *Cummings v. State*, 412 So. 2d 436, 439 (Fla. 4th Dist. Ct. App. 1982); or even the entire State of Florida, *Buckhann v. State* 356 So. 2d 1327, 1328 (Fla. 4th Dist. Ct. App. 1978); or of the police, *Cumbe v. State*, 378 So. 2d 1 (Fla. 3d Dist. Ct. App. 1978), *quashed*, 330 So. 2d 1031 (Fla. 1980). *See also* *Oglesby v. State*, 23 So. 2d 558 (Fla. 1945) (police could tack other offenses on defendant); *Berger v. United States*, 295 U.S. 78, 88 (1935).

113. Commentary, ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* § 5.8 (Approved Draft 1971).

114. *Thomson v. State*, 318 So. 2d 549, 552 (Fla. 4th Dist. Ct. App. 1975).

115. *Cummings v. State*, 412 So. 2d 436 (Fla. 4th Dist. Ct. App. 1982); *Buckhann v. State*, 356 So. 2d 1327 (Fla. 4th Dist. Ct. App. 1978); *Hancock v. State*, 90 Fla. 178, 195 So. 401 (1925).

116. *See* *Adams v. State*, 54 Fla. 1, 5, 45 So. 494, 495 (1907); *Washington v. State*, 86 Fla. 533, 536, 98 So. 605, 608 (1925). *Cf.* *Coleman v. State*, 215 So. 2d 96, 98 (Fla. 4th Dist. Ct. App. 1968). *See generally*, DR 7-106(c)(4) (1981), *Budman v. State*, 362 So. 2d 1022 (Fla. 3d Dist. Ct. App. 1978).

117. *Coleman*, 215 So. 2d at 98 ("If you believe as I do.").

118. *Edwards v. State*, 288 So. 2d 540, 540 (Fla. 2d Dist. Ct. App. 1974) "the prosecutor had an unfortunate habit of using these words to introduce each new topic of discussion."

119. *Hancock v. State*, 90 Fla. 178, 185, 105 So. 401, 403 (1925). The theory advanced by the court seemed to be the redundancy and obviousness of the statement.

120. *Girtman v. State*, 270 So. 2d 380, 381-82 (Fla. 3d Dist. Ct. App. 1972).

a prosecutor to strike the words "I think" from his trial vocabulary.

Inflammatory Argument

Under the guiding principle that argument should be restricted to the record and to reasonable inferences therefrom, argument which is inflammatory is objectionable.¹²¹ As stated by Mr. Justice Terrell, "[t]he trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament."¹²² Obviously, given the nature of a criminal trial, and of lawyers, this will be another difficult line to draw.¹²³ Much discretion is vested in the trial court,¹²⁴ but here are some general guidelines.

Arguments which ask the jurors to place themselves in the shoes of the victim, so-called golden-rule arguments, are held to be improper.¹²⁵ Perhaps the clearest example of such an argument may be found in the case of *Lucas v. State*,¹²⁶ where the prosecutor in a rape case asked of the female jurors, "[t]hink how you ladies would feel it that happened to you."¹²⁷ It was held that this comment required reversal because it tended to deprive the defendant of his right to trial by an impartial jury.¹²⁸

121. "[T]rials should be conducted coolly and fairly, without the indulgence in abusive or inflammatory statements made in the presence of the jury by the prosecuting officer." *Goddard v. State*, 93 Fla. 504, 515, 112 So. 83, — (1927); *Landrum v. State*, 79 Fla. 189, 84 So. 535 (1920); *Clinton v. State*, 53 Fla. 98, 43 So. 312 (1907).

122. *Stewart v. State*, 51 So. 2d 494, 495 (Fla. 1951).

123. "The history of the legal profession is clear also in its love of florid arguments and dramatic perorations. The line between the inflammatory and the dramatic is not clear." *Collins v. State*, 180 So. 2d 340, 342 (Fla. 1965).

124. *Sanchez v. State*, 133 Fla. 160, 182 So. 2d 645 (1938).

125. See, e.g., *Adams v. State*, 192 So. 2d 762, 763 (Fla. 1966) ("your wife . . . your sister . . . your daughter" in a prosecution for murder); *Coley v. State*, 185 So. 2d 472, 473 (Fla. 1966) ("their little daughter" in a rape prosecution in which the prosecutrix was 17 years old); *Barnes v. State*, 88 So. 2d 157, 158 (Fla. 1952) ("what if it was your wife or your sister or your daughter that this beast was after?").

126. 335 So. 2d 566 (Fla. 1st Dist. Ct. App. 1976).

127. *Id.* at 567.

128. *Id.* Accord *Lester v. State*, 37 Fla. 382, 387, 20 So. 232, 234 (1896). The rule and rationale are the same in civil cases. See, e.g., *Bullock v. Branch*, 130 So. 2d 74, 76 (Fla. 1st Dist. Ct. App. 1961).

Character

Under the Florida Statutes and case law, the character of the defendant may not be the subject of proof or prosecutorial comment except in very limited circumstance. If the defendant offers proof of his character, the State may offer evidence of other crimes, charges, or acts as rebuttal¹²⁹ if they are relevant and the state complies with notice requirements.¹³⁰ Despite the clear nature of this rule, prosecutors

129. FLA. STAT. § 90-404(1) (1981) provides:

90.404 Character evidence; when admissible. —

(1) CHARACTER EVIDENCE GENERALLY —

Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except:

(a) *Character of accused* — Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the trait.

(b) *Character of victim* —

(1) Except as provided in s. 794.022, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait; or

(2) Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor.

(c) *Character of witness* — Evidence of the character of a witness, as provided in ss. 90.608-90.610.

See *Young v. State*, 142 Fla. 361, 195 So. 569 (1939); *Clinton v. State*, 53 Fla. 98, 43 So. 312 (1907).

130. FLA. STAT. § 90.404 (2) (1981) provides:

90.404 Character evidence; when admissible. —

(2) OTHER CRIMES, WRONGS, OR ACTS —

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(b)1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an

have been stumbling frequently on it for years. The cases generally divide themselves into two categories,¹³¹ past bad acts and future bad acts.¹³²

The fundamental rule as to past acts was stated in the early case of *Simmons v. State*.¹³³ "It is well settled that statements or intimations by the prosecuting attorney that the accused has committed other crimes besides that for which he is now on trial constitutes error."¹³⁴

The argument disallowed in *Simmons*, a rape case, was a classic example of the type of argument sought to be prevented by the rule: "And we don't know how many other girls this old Simmons has carried off that way who have never complained. . . ." ¹³⁵ This argument is improper precisely because we *don't* know.¹³⁶

This rule may be violated in more subtle ways. Cases have found

indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

(3) Nothing in this section affects the admissibility of evidence under § 90.610.

This statute embodies the so-called "Williams Rule," allowing the prosecutor to use similar acts as evidence against a criminal defendant in certain circumstances. *See Williams v. State*, 110 So. 2d 654, 663 (Fla. 1959), *cert. denied*, 361 U.S. 847 (1959). *See generally Green v. State*, 190 So. 2d 42, 46 (Fla. 2d Dist. Ct. App. 1966). For an excellent discussion in the context of prosecutorial questioning in this area, see *Chapman v. State*, 417 So. 2d 1028 (Fla. 3d Dist. Ct. App. 1982).

131. *See infra* text accompanying notes 133-41.

132. *See infra* text accompanying notes 142-45.

133. 139 Fla. 645, 190 So. 756 (1939), *overruled on other grounds*, 195 So. 2d 550 (1957); *State v. Hines*, 195 So. 2d 551 (Fla. 1967).

134. *Id.* at 758. *Accord*, *Ailer v. State*, 114 So. 2d 348 (Fla. 2d Dist. Ct. App. 1959); *Carlile v. State*, 129 Fla. 860, 176 So. 862 (1937).

135. *Simmons*, 190 So. at 758. *Cf. Young v. State*, 142 Fla. 351, 195 So. 569 (1939).

136. In *Oglesby v. State*, 156 Fla. 481, 482, 23 So. 2d 558, 558 (1945), the prosecutor stated at trial that the only reason the police had arrested the defendant was because they could pin similar crimes on him.

the characterization of the defendant in a DUI case as a “drunkard” improper.¹³⁷ Any intimation of prior criminal charges is objectionable whether the reference is made directly¹³⁸ or indirectly.¹³⁹ Indeed one of the most common errors found in the cases comes from the inference raised by reference to the defendant’s photo in a “mug book” or “mug shots,”¹⁴⁰ though it is not necessarily fatal error.¹⁴¹

The prohibition against implying future criminal acts may well be the most commonly violated rule by prosecutors.¹⁴² Case after case reveals the prosecutor improperly raising before the jury the spectre of the defendant walking out the door, ready to commit more crimes. None stated it quite so well as did the prosecutor in *Davis v. State*,¹⁴³ who summed up in this fashion: “Gentlemen, if this man is sent out on the street to do the very same thing, the only question that can never be resolved, if you will, or put in the same position to ask, ‘Am I to be next?’ ”¹⁴⁴ Such comments routinely produce reversals.¹⁴⁵

137. *Young*, 195 So. at 569.

138. *See, e.g.*, *Gluck v. State*, 62 So. 2d 71 (Fla. 1952); *Noeling v. State*, 40 So. 2d 120 (Fla. 1949).

139. In *Sherman v. State*, 255 So. 2d 263, 265 (Fla. 1971), the prosecutor, referring to the defendant, stated: “He’s seen me lots of times. It’s not been under social circumstances. . . .”

140. *See, e.g.*, *State v. Rucker*, 330 So. 2d 470 (Fla. 1976); *Loftin v. State*, 273 So. 2d 70 (Fla. 1973); *Jones v. State*, 194 So. 2d 24 (Fla. 3d Dist. Ct. App. 1967).

141. *See State v. Rucker*, 330 So. 2d 470 (Fla. 1976).

142. *See infra* note 145.

143. 214 So. 2d 41 (Fla. 3d Dist. Ct. App. 1968).

144. *Id.* at 42.

145. *See, E.g.*, *Grant v. State*, 194 So. 2d 612, 613 (Fla. 1967) (“Do you want to give this man less than first degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?”); *Williams v. State*, 68 So. 2d 583 (Fla. 1953) (acquittal of defendant by reason of insanity would lead to his ultimate release from asylum to commit another homicide); *Young v. State*, 195 So. 569, 569 (Fla. 1940) (“the good honest people of the country should not sit down in solitude, in inaction, and let these whores and drunkards get out here and slay our women and children”); *Gomez v. State*, 415 So. 2d 822, 823 (Fla. 3d Dist. Ct. App. 1982) (“let these gentlemen . . . walk away into our community and commit further crimes of this nature”); *McMillan v. State*, 409 So. 2d 197, 198 (Fla. 3d Dist. Ct. App. 1982) (“if you want to let [defendant] walk out of here, if you want to let this kind of horrible crime go on in Dade County”); *Sims v. State*, 371 So. 2d 211, 212 (Fla. 3d Dist. Ct. App. 1977) (“to [g]o get another one” in a case involving firearms); *Porter v. State*, 347 So. 2d 449, 449-50 (Fla. 3d Dist. Ct. App. 1977) (“to turn this pusher on the

The prosecutor must also be careful of the characterizations which he draws from the facts and circumstances of the case, as well as characterizations of the defendant. The easiest to deal with are the most objectionable. Arguments directed at the defendant's race¹⁴⁶ or religion,¹⁴⁷ when not in issue, are clearly prohibited, as are arguments directed at geographical prejudices.¹⁴⁸ Courts have allowed references to a defendant as a "murderer"¹⁴⁹ in a murder case, or a "thief"¹⁵⁰ in a larceny case, but "assassin"¹⁵¹ has been disapproved, as has the statement that the prosecutor "wouldn't want to meet the defendant in a dark alley."¹⁵²

From the cases, it would seem that the dividing line is based first upon relevancy, and second upon whether there is fair factual basis for the characterization in the record. Strong characterizations such as "beast," "cruel human vulture," and "vile creature"¹⁵³ have been al-

streets again" and "to put this man on the street to sell more heroin"); *Russell v. State*, 233 So. 2d 154, 155 (Fla. 4th Dist. Ct. App. 1970) (if the defendant were acquitted, there would be "people getting stabbed all over Orange County"). *Accord*, *Johnson v. State*, 408 So. 2d 813 (Fla. 3d Dist. Ct. App. 1982); *Chavez v. State*, 215 So. 2d 750, 750 (Fla. 2d Dist. Ct. App. 1968) ("let him go back out in your community and handle more morphine"). In the case of *Singer v. State*, 109 So. 2d 7, 28-30 (Fla. 1959), the court held that argument directed at what the defendant would do to the prosecutor's family if defendant was not executed was reversible error.

146. *Cooper v. State*, 136 Fla. 23, 186 So. 230 (Fla. 1939); *Huggins v. State*, 129 Fla. 329, 176 So. 154 (Fla. 1937).

147. *Gluck v. State*, 62 So. 2d 71 (Fla. 1952).

148. *Knight v. State*, 316 So. 2d 576, 578 (Fla. 1st Dist. Ct. App. 1975).

149. *Washington v. State*, 86 Fla. 533, 98 So. 605, 609 (1923). "It is not reversible error for the prosecuting attorney to refer to the defendant as a murderer where the indictment is for murder and the evidence supports the charge."

150. *Sanchez v. State*, 133 Fla. 160, 165, 182 So. 645, 648 (1938), termed a "border line question."

151. *Landrum v. State*, 79 Fla. 189, 84 So. 535 (1920); *Gomez v. State*, 415 So. 2d 822, 822 n.1 (Fla. 3d Dist. Ct. App. 1979).

152. *Zamot v. State*, 375 So. 2d 881 (Fla. 3d Dist. Ct. App. 1979).

153. *Collins v. State*, 180 So. 2d 340, 342 (Fla. 1965); *See also Breedlove v. State*, 413 So. 2d 1, 8 n.10 (Fla. 1982) ("animalistic attack"); *Darden v. State*, 329 So. 2d 287, 289 (Fla. 1976), *cert. granted*, 429 U.S. 917 (1976), *cert. dismissed*, 430 U.S. 704 (1977) and *cert. granted*, 429 U.S. 1036 (1976) (defendant called an "animal"); *Goddard v. State*, 143 Fla. 28, 31, 196 So. 596, 598 (1940) ("skunks," "low-down scoundrel"); *Gaston v. State*, 124 Fla. 538, 539, 184 So. 150, 151 (1938) ("malignant growth").

lowed where there is support for them in the record.¹⁵⁴ The courts seem to take the position that some cases are factually so extreme that there is little a prosecutor might say to make it worse.¹⁵⁵ As stated in *Spencer v. State*:¹⁵⁶ "In actuality, there is probably very little that the prosecutors themselves could have advanced which would have been any more damning of the conduct of this appellant than the gruesome evidence which was presented from the witness stand."

As a general rule, inflammatory arguments are distasteful and are considered a sign of incompetence.¹⁵⁷ A competent prosecutor will sustain his burden under the law with the facts, not by resort to innuendo in order to give his case a false appearance of strength.¹⁵⁸

Attacks on Opposing Counsel

It appears that from time to time prosecutors seem unable to restrain themselves in their zeal, as they go beyond verbal assaults on the defendant to attacks on defense counsel.¹⁵⁹ They have said some shocking things about their adversaries.¹⁶⁰ The case of *Douglass v. State*¹⁶¹

154. See, e.g., *Roundtree v. State*, 229 So. 2d 281, 283 (Fla. 1st Dist. Ct. App. 1970).

155. See *infra* note 156.

156. 133 So. 2d 729, 731-32 (Fla. 1961), *cert. denied*, 369 U.S. 905 (1963). *Accord* *Holmes v. State*, 228 So. 2d 417, 419 (Fla. 3d Dist. Ct. App. 1969) ("it would have been difficult for a prosecutor in this case to overcharacterize the reprehensible acts shown in the evidence, or to present the facts in a worse light than the bare disclosure of them at the trial revealed"). See generally Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 969, n.112.

157. *Daugherty v. State*, 154 Fla. 308, 310, 17 So. 2d 290, 291 (1944).

158. *Peterson v. State*, 376 So. 2d 1230, 1235 (Fla. 4th Dist. Ct. App. 1979); *Kirk v. State*, 227 So. 2d 40, 42-43 (Fla. 4th Dist. Ct. App. 1968).

159. *Jackson v. State*, 421 So. 2d 15 (Fla. 3d Dist. Ct. App. 1982); *Johnson v. State*, 351 So. 2d 10 (Fla. 1977); *Adams v. State*, 192 So. 2d 762 (Fla. 1966); *Irvin v. State*, 66 So. 2d 288 (Fla. 1953), *cert. denied*, 346 U.S. 927 (1954); *Carter v. State*, 356 So. 2d 67 (Fla. 1st Dist. Ct. App. 1978); *Simpson v. State*, 352 So. 2d 125 (Fla. 1st Dist. Ct. App. 1977); *Cochran v. State*, 280 So. 2d 42 (Fla. 1st Dist. Ct. App. 1973); *Evans v. State*, 178 So. 2d 892 (Fla. 3d Dist. Ct. App. 1965), and notes 160-164.

160. E.g., "Would you buy a used car from this guy" and "cheap shot artist." *Jackson v. State*, 421 So. 2d at 16 n.1.

Let me show you what perverted and distorted things a lawyer can do

represents the worst example. In *Douglass*, the defendant was on trial for incest, and the prosecutor gratuitously suggested that defense counsel was also guilty of incest.¹⁶² The courts have sternly disapproved of such arguments, terming them both highly improper and unethical.¹⁶³ Such conduct, though, seems to be subject to the harmless error rule¹⁶⁴ and the doctrine of fair reply.¹⁶⁵

when he wants to do it. How wrong it is, and when they try to do such as this it is disgusting.

If he thought Mrs. Mayer had one word of testimony, he, himself, violated his oath as a lawyer and violated his representation of this man and as a human being. . . . He has no business being a lawyer if he hadn't talked with her and found out that she knew nothing about it.

Adams, 192 So. 2d at 764. "How defense lawyers operate. . .," *Cochran*, 280 So. 2d at 43. "One of the favorite tricks of a defense lawyer," *Simpson*, 352 So. 2d at 126. *But see* *Westley v. State*, 416 So. 2d 18, 19-20 (Fla. 1st Dist. Ct. App. 1982) in which "smokescreen" was approved.

161. 135 Fla. 199, 184 So. 756 (1929).

162. *Id.* at 757. It was such a comment which prompted the Third District Court in *Jackson* to threaten to take disciplinary action against the Assistant State Attorney. *See* note 160 *supra*.

163. The court in *Simpson* termed the prosecutor's statement "a gratuitous insult to the adversary system which he serves." 352 So. 2d at 126. *See* FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-37 (1981):

In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

164. *E.g.*, In *Irvin*, 66 So. 2d 288, and *Simpson*, 352 So. 2d 125, the error was found harmless. In *Adams*, 192 So. 2d 762, *Cochran*, 280 So. 2d 42, and *Carter*, 356 So. 2d 67, it was held fatal. In *Irvin*, the comment was merely that the defense attorney "stopped me from proving it," 66 So. 2d at 295, referring to a defense objection which had been sustained. *See also* *Johnson*, 351 So. 2d 10.

165. *See, e.g.*, *Evans v. State*, 178 So. 2d 892 (Fla. 3d Dist. Ct. App. 1965). In *Evans* defense counsel sought to discredit law enforcement efforts in the case, asking why they hadn't been able to find an alibi witness which she had found and produced at trial. The prosecutor's reply was "[w]e were wondering about that too," implying a fabricated defense. *Id.* at 893.

Duty

At the bottom of every prosecutor's bag of rhetorical tricks is that personal favorite — the appeal to the jurors to “perform their public duty,” and bring in a verdict of guilty.¹⁶⁶ Generally, so long as the prosecutor stays otherwise within bounds, this line of argument is permissible.¹⁶⁷ The sterner or more coercive the language used, the more likely to be disapproved. For instance, the appeal “We are going to continue to have life treated as a scrap of paper in the State of Florida, until juries with backbones rise up and say we are going to stop it,” was disallowed.¹⁶⁸

The prosecutor must not, however, seek to shift or lighten the burden upon the jurors by references to the existence of appellate courts to correct any mistake they might make, and such references are reversible error.¹⁶⁹ Nor may a prosecutor appeal to the jury to convict because of economic loss caused to them as taxpayers by the defendant.¹⁷⁰ However, in a drug case alleging possession of marijuana, the statement “[t]hat is the reason so many high school students over the

166. *Spencer v. State*, 133 So. 2d 729 (Fla. 1961), *cert. denied*, 369 U.S. 880 (1961), *cert. denied*, 372 U.S. 904 (1963).

167. “We realize that the situation in some cases justifies very strong appeals by the prosecution to arouse the patriotism and public duty of the jurors to perform the duty which the law and the evidence in a case plainly justifies and calls for.” *Henderson v. State*, 94 Fla. 318, 345, 113 So. 689, 698 (1927). *Accord* *Thomas v. State*, 326 So. 2d 413, 415 (Fla. 1976); *Betsy v. State*, 368 So. 2d 436 (Fla. 3d Dist. Ct. App. 1979).

168. *Johnson v. State*, 140 Fla. 443, 445, 191 So. 847, 848 (1939). The Johnson court however found the error harmless. *Id.* *Cf.* *Reed v. State*, 333 So. 2d 524, 525 (Fla. 1st Dist. Ct. App. 1976). It is noteworthy how contemporary the argument in *Johnson* sounds.

169. *Pait v. State*, 112 So. 2d 380, 384 (Fla. 1959); *Blackwell v. State*, 76 Fla. 124, 137, 79 So. 731, 735 (1918). *See generally*, Annot., 3 A.L.R.3d 1449 (1965). *Cf.* *Johnson v. State*, 408 So. 2d 813, 816 (Fla. 3d Dist. Ct. App. 1982) (unheard of for a person to spend more than two years in a hospital if declared insane).

170. *Taylor v. State*, 123 Fla. 358, 359, 166 So. 825, 826 (1936) (references to the jurors supporting defendant's children in a criminal non-support case held reversible error). *Cf.* *Cooper v. State*, 136 Fla. 23, 186 So. 230 (1939) (reference to taxpayers' dollars spent investigating and prosecuting “Negro” cases, coupled with appeals to social prejudice held reversible error). A mere casual reference to the amount of time and money expended by the jurors and the state, while not commended, does not necessarily require reversal. *Ellison v. State*, 91 Fla. 502, 107 So. 639 (1926).

country are using narcotics"¹⁷¹ was held to be not per se prejudicial.

There are a few areas of argument that are more a matter of style than substance, yet they have cropped up in trials and case law from time to time. First of these is a reading of law by counsel in closing argument. Fundamentally, it is the function of the court, not counsel, to give to the jury the applicable law in the case.¹⁷² Counsel submit their requested charges at the charge conference, and the court selects the theories of law applicable to the case.¹⁷³ Once selected, counsel are clearly permitted to relate the applicable law to the facts of the case in closing argument, explaining and emphasizing those portions of the charges relevant to their theory of the case.¹⁷⁴

It has been said that it is "difficult for an attorney in the trial of a case to refrain from expressing his view or opinion as to the law controlling the case"¹⁷⁵ but the jury is not bound by counsel's opinion as to the controlling law.¹⁷⁶ There have been cases in which the court, in its discretion, permitted counsel to read other authorities to the jury. In *Tindall v. State*,¹⁷⁷ the judge's allowance of a prosecutor's reading of law to the jury was upheld, absent a showing of prejudice.¹⁷⁸ The court stated, however, "correct practice does not permit counsel to read authorities to the jury."¹⁷⁹ In the case of *Wright v. State*¹⁸⁰ the prosecu-

171. *Sims v. State*, 64 So. 2d 561 (Fla. 1953).

172. In *Brownlee v. State*, 95 Fla. 755, 116 So. 618 (1928), the defendant appealed the trial court's refusal to allow defense counsel to read certain statutes to the jury. The court held: "The rule that the law and statutes applicable to any case are to be given by the court and not counsel is too elementary and universally recognized to require any discussion here." *Id.* at 628. See also FLA. R. CRIM. P. 3.390; FLA. STAT. § 918.10 (1981).

173. *Simmons v. State*, 160 Fla. 326, —, 36 So. 2d 207, 208 (1948); *Tindall v. State*, 99 Fla. 1132, —, 128 So. 494, 498 (1930); *Taylor v. State*, 330 So. 2d 91, 93 (Fla. 1st Dist. Ct. App. 1976).

174. *Taylor*, 330 So. 2d at 93.

175. *Overstreet v. State*, 143 Fla. 794, 796, 197 So. 516, 518 (1940).

176. *Id.*

177. 99 Fla. 1132, 128 So. 494 (1930).

178. The *Tindall* court made it clear that even when allowed by the trial court, the practice could cause reversal if the law read were inapplicable and prejudicial. Such a showing, however, was not made in *Tindall*. *Id.* at —, 128 So. 498.

179. *Id.*

180. 79 Fla. 831, 84 So. 919 (1920).

tor's repeated misstatements of law constituted reversible error.¹⁸¹ Tangentially related is the question of whether counsel may read scripture¹⁸² to the jury. This is held to be a matter of discretion left to the trial court and is generally not cause for reversal.¹⁸³

The Doctrine of Invited Response or Fair Reply

The normal parameters of a prosecutor's remarks in closing argument can be significantly broadened by the nature of the defense's argument. The rule was stated in *Pitts v. State*:¹⁸⁴ "Defense counsel may not make statements during summation which reasonably invite response and then complain when his opponent's response is such as would be reasonably expected to be elicited by defense counsel's own prior remarks."¹⁸⁵

In the earlier case of *Henderson v. State*,¹⁸⁶ the Court laid down the rule:

[W]e cannot afford to lay down a rule here which would make it hereafter possible for an attorney for the defendant in any hard fought criminal case to deliberately goad the state's attorney, by unfounded or improper charges and insinuations, into heated, indiscreet, and improper reply, and to then use such reply to secure a reversal of the case, regardless of the sufficiency of the evidence, thus enabling him to take advantage of his own wrong. This would, indeed, be a dangerous precedent.¹⁸⁷

When the door is opened by defense counsel's argument, it swings wide, and a number of areas barred to prosecutorial comment will sud-

181. *Id.* at 919.

182. *Paramore v. State*, 229 So. 2d 855, 861 (Fla. 1969) (Prosecutor's references to "divine law" and the Bible).

183. *Id.* at 860-61.

184. 307 So. 2d 473 (Fla. 1st Dist. Ct. App. 1975), *cert. dismissed*, 423 U.S. 918 (1975).

185. *Pitts*, 307 So. 2d at 482 (citing *Frazier v. State*, 294 So. 2d 691 (Fla. 1st Dist. Ct. App. 1974)). *Accord* *Howell v. State*, 136 Fla. 582, 589, 187 So. 163, 166 (1939); *Reyes v. State*, 49 Fla. 17, 24, 38 So. 257, 258 (1905); *Ricko v. State*, 242 So. 2d 763 (Fla. 3d Dist. Ct. App. 1971).

186. 94 Fla. 318, 113 So. 689 (1927).

187. *Id.* at 697.

denly be subject to reply. What otherwise would have been improper comment by the prosecutor will be seen as harmless. Defense counsel who promises to prove an alibi or other facts in his opening argument may find those promises thrown back in his face by the prosecutor in summation.¹⁸⁸ In the case of *Simpson v. State*¹⁸⁹ the Court found no error in the prosecutor's reiteration of the law stating that the defendant's silence could not be held against him after defense counsel had covered the point earlier.¹⁹⁰ The court properly termed the comments "perilous practice."¹⁹¹ But in one interesting case the defendant attorney's comment that the fact the defendant didn't take the stand didn't make him guilty was held to invite the response that it didn't make him innocent either.¹⁹²

Normally, argument directed at the potential penalty the defendant faces is improper.¹⁹³ Arguments as to the penalty which a defendant would receive upon conviction are fair reply where defense counsel crosses this line first.¹⁹⁴ In *Smith v. State*¹⁹⁵ defense counsel's comment

188. See, e.g., *Mitchell v. State*, 304 So. 2d 466, 468 (Fla. 3d Dist. Ct. App. 1974).

189. 352 So. 2d 125 (Fla. 1st Dist. Ct. App. 1977).

190. *Id.* at 126. The court found the prosecutor's remarks had no "sinister influence." *Id.* (citing *Gordon v. State*, 104 So. 2d 524, 540 (Fla. 1958)).

191. *Id.*

192. *Testasecca v. State*, 115 So. 2d 584 (Fla. 2d Dist. Ct. App. 1959).

193. *Cf. Waid v. State*, 58 So. 2d 146 (Fla. 1952).

It is a curious state of the law in Florida that the judge must instruct the jury on the penalties in the case, FLA. R. CRIM. P. 3.390(a), *Tascano v. State*, 393 So. 2d 540 (Fla. 1981), and yet the jury is not to consider penalties in any way in reaching its decision, Florida Standard Jury Instruction 2.15, *adopted In re Standard Jury Instructions in Criminal Cases*, 327 So. 2d 6 (Fla. 1976). Therefore argument by counsel concerning penalties would be improper.

These antagonistic themes have been termed "a Lewis Carroll fantasy flight back and forth through the legal looking glass." *Murray v. State*, 378 So. 2d 111, 112 (Fla. 5th Dist. Ct. App. 1980).

194. But appellant's position is insecure for the simple reason that his counsel, while addressing the jury, introduced the subject by remarking upon the lack of testimony by the appellant, and the reason for it. What followed was nothing more than a report by the attorney for the state.

A defendant may not reap the benefits of failure to testify, such as the escape of cross-examination, and then claim the protection the statutes afford, if he plays upon that very failure. When he brings to the attention of the jury the want of testimony by him, and the reason for the course he

that a verdict of not guilty by reason of insanity would not put the defendant back on the street, was held to justify the prosecutor's comments that the defendant could be there in 30-60 days. Where the defendant strained the facts of the case so that they approached a hypothetical circumstance, the court did not view the prosecutor's question, "where is the proof?"¹⁹⁸ as a comment upon the defendant's silence. Even sympathetic characterizations of the defendant by defense counsel must be approached with caution. In *Whitney v. State*¹⁹⁷ the defense portrayed the defendant as a mere boy, an irresponsible youth, whose crime had its roots in his domestic background.¹⁹⁸ The court held this to be an invitation to rebuttal and allowed the prosecution to portray the defendant as a "professional killer" who "lived by the gun," based upon the evidence of the defendant's methodical manner in killing and robbing.¹⁹⁹ The invited response doctrine has been used to excuse verbal sparring²⁰⁰ in the presence of the jury and other highly improper statements²⁰¹ which resulted from the heat of the exchange and the responsive nature of the prosecutor's argument. Even the expression of a prosecutor's belief in the justness of his cause has been excused by the defense portrayal of the prosecution as offering "bold lies," "false testimony," and "buying" evidence.²⁰²

chose, he invites a rebuttal from his adversary, and of that he cannot complain.

Waid, 58 So. 2d 146, 146.

195. 273 So. 2d 414 (Fla. 2d Dist. Ct. App. 1973). The prosecutor went that fatal one step too far by saying "because there is no possibility of keeping him there longer." *Id.* at 415.

196. *Sadler v. State*, 222 So. 2d 797, 800 (Fla. 2d Dist. Ct. App. 1969). In *Sadler*, defense counsel had conjured up a possible affair and love triangle, seemingly out of the air. Similarly, in *State v. Mathis*, a defense argument to consider the voluntariness of the confession, unsupported by any evidence of coercion, was held to invite the rhetorical question if the jury had heard "one thing about [the defendant] getting beaten up. . .," 278 So. 2d 280, 281 (Fla. 1973).

197. 132 So. 2d 599 (Fla. 1961).

198. *Id.* at 602.

199. *Id.*

200. *See, e.g., Parrish v. State*, 97 So. 2d 356 (Fla. 3d Dist. Ct. App. 1957).

201. *Evans v. State*, 178 So. 2d 892 (Fla. 3d Dist. Ct. App. 1965) (prosecutor suggested a contrived alibi defense).

202. *See, e.g., Broge v. State*, 288 So. 2d 280, 281 (Fla. 4th Dist. Ct. App. 1974).

Effects of Misconduct

When a prosecutor advances an improper argument, the abdication of his duty imposes certain obligations upon defense counsel and the court. Even absent any objection, it is the duty of the trial court to check the improper remarks of counsel, and to apply the appropriate remedy in order to erase its effect from the mind of the jury.²⁰³

Where the defense doesn't object to a remark, it is more likely to be viewed as nonprejudicial or the objection seen as waived.²⁰⁴ Accordingly, it is the duty of defense counsel to call to the attention of the court the prosecutor's improper argument by objecting to it.²⁰⁵ Further, the objection must be contemporaneous with the improper conduct.²⁰⁶ It is incumbent upon defense counsel to seek the remedy which he feels is appropriate in light of the comment.²⁰⁷

Remedies and Technical Requirements

The court may remedy the improper argument by stopping it, striking it, applying a curative instruction, rebuking the prosecutor before the jury, or declaring a mistrial. The nature of the prosecutor's remark, the seriousness of the charge, and the motion made by defense counsel are the key factors in consideration of the appropriate remedy for prosecutorial misconduct in argument.

In some cases, upon objection, the prosecutor has withdrawn the argument and apologized for it, and this has been seen as sufficient cure.²⁰⁸ In other cases merely halting the line of argument by sustaining the objection was sufficient.²⁰⁹ Many comments may be cured

203. *Oglesby v. State*, 23 So. 2d 558 (Fla. 1945); *Akin v. State*, 86 Fla. 564, 572, 98 So. 609, 612 (1923).

204. *E.g.*, *Smith v. State*, 3 So. 2d 516, 517 (Fla. 1941).

205. *E.g.*, *Pait v. State*, 112 So. 2d 380, 385 (Fla. 1959).

206. *Castor v. State*, 365 So.2d 701, 703 (Fla. 1978).

207. "The important thing is that the defendant retain primary control over the course to be followed in the event of such an error." *Clark v. State*, 363 So. 2d 331, 335 (Fla. 1978)(citing *United States v. Dinitz*, 724 U.S. 600 (1976)).

208. *North v. State*, 65 So. 2d 77, 86-87 (Fla. 1953), *aff'd*, 346 U.S. 932 (1954).

209. *See, e.g.*, *Collins v. State*, 180 So. 2d 340 (Fla. 1965); *Dean v. State*, 83 So. 2d 777 (Fla. 1955). *Accord*, *Cumbie v. State*, 378 So. 2d 1 (Fla. 1st Dist. Ct. App. 1978), *quashed*, 380 So. 2d 1031 (Fla. 1980).

by the court's rebuking the prosecutor before the jury in a manner sufficient to impress the members of the jury that they should not consider the argument, and further instructing the jury to disregard the comment, and adding any other necessary curative instructions.²¹⁰

The final option is declaration of a mistrial.²¹¹ Generally speaking, defense counsel should contemporaneously object, seek curative instructions, and then affirmatively move for a mistrial,²¹² in order to preserve his rights on appeal.²¹³ Failure to comply with these procedural requirements may be seen as a bar to raising the issues on appeal.²¹⁴ Further, as noted earlier, the doctrine of fair reply or invited comment may preclude relief for an otherwise objectionable statement.²¹⁵ However, where the prosecutor's comments are "of such character that neither rebuke nor retraction may entirely destroy their sinister influence . . . a new trial should be granted regardless the lack of objection or exception."²¹⁶ In such cases the error is seen as going to the heart of the case, depriving the defendant of the essential fairness of his criminal trial.²¹⁷

Certain trends emerge from the cases. On one hand, some arguments almost inevitably cause reversal when objected to by counsel. These include the previously mentioned categories of comment upon the defendant's silence,²¹⁸ appeals to racial prejudice,²¹⁹ or predictions

210. *Harper v. State*, 411 So. 2d 235, 237 (Fla. 3d Dist. Ct. App. 1982) (citing *Deas v. State*, 119 Fla. 893, 161 So. 2d 729 (1939)).

211. *Cf. Cumbe v. State*, 380 So. 2d 1031 (Fla. 1980); *Mabery v. State*, 303 So. 2d 369, 370 (Fla. 3d Dist. Ct. App. 1974).

212. *Clark v. State*, 363 So. 2d 331, 335 (Fla. 1978).

213. *Ferguson v. State*, 417 So. 2d 639 (Fla. 1982). "Contemporaneously" means during the offending closing argument, or at the very least at its conclusion. *Cumbe*, 380 So. 2d at 1033.

214. *Ferguson*, 417 So. 2d at 641-42.

215. *See supra* text accompanying notes 184-201.

216. *Ailer v. State*, 114 So. 2d 348, 351 (Fla. 2d Dist. Ct. App. 1959). *Accord*, *Peterson v. State*, 376 So. 2d 1230, 1234 (Fla. 4th Dist. Ct. App. 1979).

217. *Peterson*, 376 So. 2d at 1230. Defense counsel should not rely on this resort, however, since it is limited to the narrow category where the error is fundamental. *Cf. Clark*, 363 So. 2d at 333. Since the *Clark* case found unobjected-to prosecutorial comment upon the defendant's silence not to be such error, it should be clear that this will be true only in rare cases.

218. *See supra* text accompanying notes 43-92.

219. *See supra* note 146. *Cf. Thomas v. State*, 419 So. 2d 634 (Fla. 1982).

of future criminal activity.²²⁰ On the other hand, there is no presumption that juries are led astray by the improper arguments of counsel.²²¹ The appellate court must review each case in its own context²²² with the standard being whether the court can see from the record that the remarks or conduct of the prosecutor did not prejudice the accused.²²³ Unless that conclusion is reached, the case must be reversed. The nature²²⁴ and frequency²²⁵ of the prosecutor's comments are weighed on one hand, and the overall strength of the state's case²²⁶ on the other. Also involved in this balancing process is the nature of the charge; courts will be less hesitant to find the argument prejudicial in a capital case.²²⁷ It remains the duty of defense counsel, however, to show prejudice. It should be remembered that the defendant is entitled to a fair trial, not a perfect one.²²⁸

Future Directions

Of course, reversal is not the only solution to the problem. Indeed

220. See *supra* text accompanying notes 142-45.

221. *Paramore v. State*, 229 So. 2d 855, 860 (Fla. 1969). *Accord*, *Tyson v. State*, 87 Fla. 392, 393, 100 So. 254, 255 (1924); *Johnson v. State*, 348 So. 2d 646 (Fla. 3d Dist. Ct. App. 1977).

222. *State v. Jones*, 204 So. 2d 515, 519 (Fla. 1967).

"Statements that might appear improper when considered in a vacuum, may be found permissible when examined in context." *Nelson v. State*, 416 So. 2d 899, 900 (Fla. 2d Dist. Ct. App. 1982)(quoting *United States v. Forrest*, 620 F. 2d 446, 455-56 (5th Cir. 1980)). *Accord*, *McMillan v. State*, 409 So. 2d 197 (Fla. 3d Dist. Ct. App. 1982).

223. *Pait v. State*, 112 So. 2d 380 (Fla. 1959); *McCall v. State*, 120 Fla. 707, 163 So. 38 (1938). *Accord* *Coleman v. State*, 420 So. 2d 354, 356 (Fla. 5th Dist. Ct. App. 1982).

224. *Berger v. United States*, 295 U.S. 78, 89 (1935); *Mabery v. State*, 303 So. 2d 369, 370 (Fla. 3d Dist. Ct. App. 1974).

225. *Berger*, 295 U.S. at 78.

226. *Cummings v. State*, 412 So. 2d 436, 439 (Fla. 4th Dist. Ct. App. 1982); *McMillan v. State*, 409 So. 2d 197 (Fla. 3d Dist. Ct. App. 1982). *Cf.* *Coleman v. State*, 420 So. 2d 354 (Fla. 2d Dist. Ct. App. 1982).

227. See *Grant v. State*, 194 So. 2d 612 (Fla. 1967); *Pait v. State*, 112 So. 2d 380, 385 (Fla. 1959); *Jones v. State*, 194 So. 2d 24 (Fla. 3d Dist. Ct. App. 1967).

228. *Zide v. State*, 212 So. 2d 788, 790 (Fla. 3d Dist. Ct. App. 1968) (citing *Lutwak v. United States*, 344 U.S. 604 (1953)).

the reversal of a case for this cause may prejudice society more than the prosecutor. Witnesses disappear, memories fade and it becomes more difficult to prosecute the defendant several years later at the conclusion of the appellate process. It has also been suggested that some prosecutors, however unethically, may be anticipating ultimate reversal, but view the time served by a defendant in the interim as sufficient punishment²²⁹ — so-called “state attorney time.” Some prosecutors may feel it expedient to “win” today and deal with the reversal later.²³⁰

The virtue of the sanction threatened by the court in *Jackson v. State*,²³¹ disciplinary action against the offending prosecutor, is that it places the deterrent effect directly where it will do the most good. Disciplinary action could be applied in the local courts in the form of contempt of court²³² or disciplinary proceedings,²³³ and a punishment molded to the offense. The Florida Bar could impose penalties ranging from reprimand to disbarment.²³⁴ Other commentators have explored yet other remedies, including civil liability,²³⁵ and removal from office,²³⁶ each with its own drawbacks.²³⁷ The reluctance of trial courts to act in such a fashion, and the fact that no appellate case in Florida save *Jackson* has ever proposed a remedy other than reversal, may be traced to the same point of origin — the courts are reluctant to be so at odds with the quasi-judicial officers who are viewed as an arm of the

229. See comments of the court in *Jackson v. State*, 421 So. 2d 15 (1982).

230. Cain, *supra* note 23, at 41.

231. *Jackson v. State*, 421 So. 2d 15; Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 25, at 981. Cf. *Kleinfeld v. State*, 270 So. 2d 22 (Fla. 3d Dist. Ct. App. 1972) and case cited therein.

232. *Shelley v. District Court of Appeal*, 350 So. 2d 471 (Fla. 1977); see also Rule 3.840, Fla. R. Crim. P.

233. Fla. Bar Integr. Rule art. XI Rule 11.14; see generally *Burns v. Huffstetler*, ___ So. 2d ___ (Fla. 1983), 13 Fla. L.W. at 164 (May 12, 1983).

234. Fla. Bar Integr. Rule art. XI, Rules 11.01-11.13, see also *Jackson*, 421 So. 2d 15; Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5.

235. Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 979. Prosecutors at common law were absolutely immune from liability for acts in the scope of their duties. This immunity was not changed by 42 U.S.C. 1983. See *Imbler v. Pachtman*, 424 U.S. 409 (1976). This, of course, could be altered by statute.

236. Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 980.

237. *Id.*

court.²³⁸ It is natural to expect of prosecutors proper motives and conduct. The recriminations inherent in allegations to the contrary are doubtless not relished by anyone on either side.

It is not the purpose of this article to explore the nontraditional alternatives available to the courts in deterring prosecutors from such comments. The court's opinion in *Jackson*, while not an empty threat, is intended as a warning shot across the bow, designed to turn prosecutors away from such actions. If the warning is not heeded, the courts and commentators will be revisiting the subject within a year.

238. *Smith v. State*, 194 So. 2d 310 (Fla. 1957).