

**THE PROSECUTOR’S DUTY TO SEEK AND DO JUSTICE  
DURING TRIAL BY AVOIDING COMMON ERRORS**

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INTRODUCTION.....	613
I. JURY SELECTION .....	616
A. Voir Dire .....	616
B. Peremptory Challenges .....	618
II. OPENING STATEMENT .....	620
A. Opening Statements That Are Argumentative.....	621
B. Comments Unsupported by the Evidence.....	621
C. Comments Unrelated to the Evidence.....	622
D. Comments About the Exercise of Constitutional Rights.....	623
E. Comments About the Truthfulness of Witnesses.....	624
F. Bolstering Witnesses .....	625
G. Making Legal or Factual Conclusions .....	627
H. Appeal to Emotion .....	627
IV. CLOSING ARGUMENT .....	629
A. Declarations of Personal Opinion.....	629
B. Attacks Against Opposing Counsel’s Character or Credibility .....	630
C. Calling the Defendant Disparaging Names.....	632
D. Vouching.....	633
E. Arguing Outside the Record.....	635
F. Golden Rule Arguments .....	636
G. Appealing to the Jury’s Passions or Prejudices .....	638
H. Referring to the Exercise of Constitutional Rights by the Defendant .....	639
I. Sending a Message to the Community .....	640
J. Religious References.....	642
CONCLUSION .....	643

INTRODUCTION

All new prosecutors are told that they have a duty to “seek justice” or “do justice.”<sup>1</sup> This is not surprising, as this is the common standard reflected

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1. See *infra* notes 4, 6 (providing an example of standards to which a prosecutor is held).

in the caselaw.<sup>2</sup> For instance, the United States Supreme Court observed in 1935:

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.<sup>3</sup>

This is also the standard of the Model Code of Professional Responsibility<sup>4</sup> and the ABA Criminal Justice Standards for the Prosecution Function.<sup>5</sup>

No reasonable person would argue that this lofty standard is undesirable. However, this standard may well be too “vague and impractical” to be of much use.<sup>6</sup> Indeed, what does it mean? How does one go about “doing” or “seeking” justice? Unfortunately, there are no intuitive answers to these questions that magically appear in the minds of new prosecutors. Therein lies the problem.

New prosecutors need specific training and guidance to understand what it means to seek and do justice when confronted with real-life situations.<sup>7</sup> It is unreasonable to expect new prosecutors to learn this on their own:

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2. See *infra* note 3 and accompanying text (highlighting that prosecutors must obtain justice through the proper means and ultimately avoid wrongful convictions).

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

4. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (AM. BAR. ASS'N 1980) (footnote omitted) (“The responsibility of public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”).

5. AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-1.2(b) (2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”).

6. See Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335, 338 (2007) (“Although this lofty goal of ‘doing justice’ is very noble, it is also very vague and impractical.”).

7. Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 402 (2009) (footnotes omitted).

[N]ewly hired prosecutors have a tremendous amount to learn. On the legal side, junior prosecutors must become familiar with the ins and outs of the criminal code (something rarely taught in law schools) as well as numerous federal and state constitutional rules of criminal procedure, which are always changing. On the trial advocacy front, prosecutors must learn techniques for direct and cross-examination, opening statements, closing arguments, and favorable jury selection. Then prosecutors must learn which plea bargain offers are appropriate for dozens of different types of crimes. They also must learn the informal office protocol for dealing with defense lawyers and judges. On top of this, many district attorneys' offices are terribly overburdened, forcing prosecutors to handle excessive caseloads. In short, junior prosecutors have an overwhelming amount to do and learn in a limited amount of time.<sup>8</sup>

Thus, it is imperative that new prosecutors not be left on their own to figure out what it means to seek and do justice. Most prosecution error "happens inadvertently because there is too much for prosecutors to know and insufficient ethics training to avoid misconduct."<sup>9</sup> However, their inexperience will not save them because "[t]he law cannot reward ignorance; there must be a point at which lawyers are conclusively presumed to know what is proper and what is not."<sup>10</sup>

This Article seeks to remedy this situation by providing a clear understanding of what it means for a prosecutor to seek and do justice during trial. The best way to seek and do justice at trial is to avoid common errors that lead to injustice. Because no article could address every possible aspect of this ethical duty, this Article identifies and focuses on the most common trial errors that are considered to be a violation of the duty to seek and do justice in every jurisdiction in the country.<sup>11</sup> These errors are most common during jury selection,<sup>12</sup> the opening statement,<sup>13</sup> and the closing argument.<sup>14</sup>

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8. *Id.*

9. *Id.* at 404 (footnote omitted).

10. *Pool v. Superior Court*, 677 P.2d 261, 270 (Ariz. 1984); *see also State v. Breit*, 930 P.2d 792, 803 (N.M. 1996) (citation omitted) ("Rare are the instances of misconduct that are not violations of rules that every legal professional, no matter how inexperienced, is charged with knowing.").

11. *See infra* Part I (discussing the importance of voir dire and peremptory challenges in the jury-selection process in administering justice as a prosecutor); Part II (explaining the power of using the opening statement for obtaining justice); Part III (acknowledging that the prosecutor's closing statement helps fulfil the prosecutor's duty to seek justice).

12. *See infra* Part I (providing examples of prosecutorial error in the jury-selection process).

13. *See infra* Part II (exemplifying common errors in a prosecutor's opening arguments).

14. *See infra* Part III (demonstrating cases of prosecutorial errors made during closing arguments that run afoul of a prosecutor's duty to seek justice).

## I. JURY SELECTION

The first opportunity to seek and do justice in trial occurs during jury selection.<sup>15</sup> Fulfilling this duty requires a prosecutor to be vigilant to avoid prejudicial statements and discriminatory selection.<sup>16</sup>

*A. Voir Dire*

In jurisdictions that allow attorneys to conduct voir dire, prosecutors do justice by avoiding improper questions and improper statements.<sup>17</sup> First, “a prosecutor commits misconduct when he or she misstates the law” during voir dire.<sup>18</sup> For example, the Louisiana Supreme Court held in *State v. Hart* that a prosecutor committed misconduct by stating during voir dire that “under the law, a person, all of us are presumed to intend the natural and probable consequences of our act or failure to act . . . . If you do something . . . you must have intended for whatever happens . . . to happen.”<sup>19</sup> The Court held that this was improper because it clearly misstated the law of specific intent.<sup>20</sup>

Prosecutors must be careful not to misrepresent the burden of proof when participating in voir dire.<sup>21</sup> Indeed, the Kansas Court of Appeals held in *State v. Crawford* that a prosecutor committed misconduct in voir dire by questioning a juror about jigsaw puzzles by asking, “even though there’s some pieces missing, you’re able to say that looks like a lighthouse and an ocean?”<sup>22</sup> The Court held that this statement was improper because it implied that the jury could find the defendant guilty “even if some evidence was missing if it ‘looked like’ he committed the crimes.”<sup>23</sup> In essence, it was

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15. *Justice 101*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/usao/justice-101/trial> (last visited Apr. 20, 2020).

16. *See* *Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986) (indicating that, in the jury-selection process, an accused person must be safeguarded against the arbitrary and discriminatory exercise of prosecutorial power).

17. *See* AM. BAR ASS’N, *supra* note 5, at 3-6.3(c) (“In cases in which the prosecutor conducts a pretrial investigation of the background of potential jurors, the investigative methods used should not harass, intimidate, or unduly embarrass or invade the privacy of potential jurors.”).

18. *People v. Carter*, 402 P.3d 480, 494 (Colo. App. 2015) (citation omitted).

19. *State v. Hart*, 691 So.2d 651, 659 (La. 1997) (first and second alterations in original) (citation omitted).

20. *Id.*

21. U.S. DEP’T OF JUSTICE, *supra* note 15.

22. *State v. Crawford*, 262 P.3d 1070, 1079 (Kan. Ct. App. 2011), *aff’d*, 334 P.3d 311 (Kan. 2014).

23. *Id.* at 1080.

improper because it misstated the law by suggesting the jury could convict the defendant on something less than reasonable doubt.<sup>24</sup>

A prosecutor's questions and statements in voir dire must relate to the expected evidence in the case.<sup>25</sup> For instance, the prosecutor in *People v. Carter* stated in voir dire:

I've worked with . . . the defense counsel on this case. They're going to be zealously defending their client and advocate for their side. But I don't want you all to lose focus. I don't want you all—and think of it like a magic trick. When a magician does a trick, usually by sleight of hand, they say, look over here, look over here. Don't look over here, look over here, look over here, because I don't want you to see what I'm trying to do.<sup>26</sup>

The prosecutor stated, “while working with one of Carter’s counsel, he had seen her ‘become very emotional to the point where she’s in tears,’ and asked several prospective jurors if ‘that emotion’ would affect them.”<sup>27</sup> The Colorado Court of Appeals held that these comments were improper because they “did not appear to be tied, in any way, to the evidence.”<sup>28</sup>

A prosecutor may not use voir dire to commit jurors to a particular position.<sup>29</sup> In *Wingo v. State*, the court convicted a police officer of tampering with a government record by putting false information in a police report.<sup>30</sup> During voir dire, the prosecutor asked: “And on a police report, if they put something false in there, which would be tampering with a government record, would you have a problem finding someone guilty if the State proves a case beyond a reasonable doubt?”<sup>31</sup> The Texas Court of Appeals stated:

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24. *Id.* In agreeing that the statement was improper, the Kansas Supreme Court noted that because “the prosecutor did not attempt to distinguish between having no doubt and having a reasonable doubt . . . neither the jury nor an appellate court can determine how much of the puzzle is left unfinished and how much guessing a juror is being asked to perform.” *State v. Crawford*, 334 P.3d 311, 322 (Kan. 2014).

25. See AM. BAR ASS'N, *supra* note 5, at 3-6.6(d) (“The prosecutor should not bring to the attention of the trier of fact matters that the prosecutor knows to be inadmissible, whether by offering or displaying inadmissible evidence, asking legally objectionable questions, or making impermissible comments or arguments.”).

26. *People v. Carter*, 402 P.3d 480, 493 (Colo. App. 2015) (omission in original).

27. *Id.*

28. *Id.* at 494.

29. See Merle L. Silverstein, *The Limitations on Voir Dire Examination of Jurors in Criminal Prosecutions*, 1950 WASH. U. L.Q. 381, 389 (1950) (noting that hypothetical questions are disfavored by the courts when used to gauge how a juror might react should a certain situation arise at trial).

30. *Wingo v. State*, 143 S.W.3d 178, 183 (Tex. App. 2004), *aff'd*, 189 S.W.3d 270 (Tex. Crim. App. 2006).

31. *Id.* at 185.

The general rule is that an attorney cannot attempt to bind or commit a venire member to a verdict based on a hypothetical set of facts. Questions that commit prospective jurors to a position, using a hypothetical or otherwise, are improper and serve no purpose other than to commit the jury to a specific set of facts before the presentation of any evidence at trial.<sup>32</sup>

The court deemed the prosecutor's question was improper because it sought a juror's commitment to convict if a certain fact was proven.<sup>33</sup>

A prosecutor should not use voir dire to suggest that a defendant has committed a greater offense than they have actually been charged.<sup>34</sup> For instance, the defendant in *Perryman v. State* was charged with possession of cocaine and marijuana.<sup>35</sup> During voir dire, the prosecutor asked questions about packaging of drugs to create the impression that the defendant was a drug dealer rather than a mere drug user.<sup>36</sup> The Indiana Court of Appeals found that suggesting the defendant was a drug dealer, even though he faced no charge, was improper because the prosecutor "suggest[ed] prejudicial evidence not adduced at trial."<sup>37</sup>

### B. Peremptory Challenges

Traditionally, the exercise of a peremptory challenge allowed an attorney to strike a juror without having to give a reason for doing so.<sup>38</sup> However, this was changed when the United States Supreme Court addressed the issue of discriminatory strikes in *Batson v. Kentucky*.<sup>39</sup> In that case, the African-American defendant was charged with burglary and receiving stolen property.<sup>40</sup> After voir dire, the prosecutor used his peremptory challenges to

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32. *Id.* at 184–85 (citations omitted).

33. *Id.* at 186.

34. See AM. BAR ASS'N, *supra* note 5, at 3-6.3(d) (noting that a prosecutor should not present arguments or facts during voir dire which they should know to be inadmissible at trial); see also *infra* notes 35–37 and accompanying text.

35. *Perryman v. State*, 830 N.E.2d 1005, 1007 (Ind. Ct. App. 2005).

36. *Id.* at 1009.

37. *Id.* at 1010 (citation omitted).

38. Kendra J. Golden, *Peremptory Challenges in Transition*, 5 PACE L. REV. 185, 185 (1984) (quoting *Swain v. Alabama*, 380 U.S. 202, 220 (1965)) (noting the traditional use of peremptory challenges to eliminate potential jurors "without a reason stated, without inquiry and without being subject to the court's control."); *People v. Prator*, 856 P.2d 837, 840 (Colo. 1993) (citation omitted) (internal quotation marks omitted) ("[P]eremptory challenges serve to eliminate extremes of partiality on both sides and to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.").

39. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

40. *Id.*

strike all four African-Americans on the venire, which resulted in an all-white jury.<sup>41</sup> The Court held that this was a violation of the Equal Protection Clause.<sup>42</sup> The Court explained that:

Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.<sup>43</sup>

The Court then set forth a three-part test to determine whether a peremptory strike was discriminatory.<sup>44</sup> First, the defendant has the burden of showing “that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.”<sup>45</sup> Second, the burden shifts to the prosecutor to “articulate a neutral explanation related to the case to be tried.”<sup>46</sup> Finally, “[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination.”<sup>47</sup>

The Supreme Court addressed discriminatory peremptory strikes again in *J.E.B. v. Alabama*, where the State used nine of its ten peremptory strikes to remove male jurors in a paternity action.<sup>48</sup> The petitioner objected to the State's peremptory challenges on the ground that striking jurors solely on the basis of gender violated the Equal Protection Clause.<sup>49</sup> The Supreme Court agreed, holding:

[T]he Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. As with race, the core guarantee of equal protection, ensuring citizens that their State will not discriminate . . . would

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41. *Id.* at 83.

42. *Id.* at 89.

43. *Id.* (citations omitted) (internal quotation marks omitted).

44. *Id.* at 96.

45. *Id.* (citation omitted).

46. *Id.* at 98.

47. *Id.* The Supreme Court subsequently held that *Batson* applies, regardless of the litigant's race. *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

48. *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994).

49. *Id.*

be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender].<sup>50</sup>

In *Hernandez v. New York*, the Supreme Court applied the *Batson* analysis to a claim of discriminatory strikes against Hispanic jurors.<sup>51</sup> Federal circuit courts have likewise applied the *Batson* analysis to claims of discriminatory strikes against Asian-Americans,<sup>52</sup> Italian-Americans,<sup>53</sup> and Native Americans.<sup>54</sup> Additional courts have applied the *Batson* analysis to peremptory strikes based on skin color,<sup>55</sup> sexual orientation,<sup>56</sup> and religious affiliation.<sup>57</sup>

A prosecutor's duty to seek and do justice in jury selection means that a prosecutor should avoid errors that results in injustice. Thus, a prosecutor should never use a peremptory challenge to strike a juror based solely on membership in a group.<sup>58</sup>

## II. OPENING STATEMENT

The purpose of the opening statement is "to inform the court and the jury in a general way of the nature of the case, the outline of the anticipated proof and the significance of the evidence as it is presented."<sup>59</sup> Indeed, the opening statement has been analogized "to a movie preview, the cover of a jigsaw puzzle box, a bird's-eye view of the evidence, or, the all-time favorite, a roadmap."<sup>60</sup> A prosecutor must give a strong opening statement<sup>61</sup> and must follow the rules in order to do justice.

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50. *Id.* at 146 (omission in original) (citation omitted) (internal quotation marks omitted).

51. *Hernandez v. New York*, 500 U.S. 352, 355–66 (1991); *see also* *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) (citing *Hernandez*, 500 U.S. at 352) (stating that a peremptory strike may not be used to remove a potential juror based solely on the juror's ethnic origin).

52. *United States v. Sneed*, 34 F.3d 1570, 1578–79 (10th Cir. 1994).

53. *United States v. Biaggi*, 853 F.2d 89, 95 (2d Cir. 1988).

54. *United States v. Chalan*, 812 F.2d 1302, 1312 (10th Cir. 1987).

55. *People v. Bridgeforth*, 69 N.E.3d 611, 613 (N.Y. 2016).

56. *SmithKline Beecham Corp. v. Abbott Lab.*, 740 F.3d 471, 474 (9th Cir. 2014).

57. *State v. Fuller*, 862 A.2d 1130, 1146–47 (N.J. 2004).

58. *See supra* notes 41–57 and accompanying text.

59. *State v. Fleming*, 523 S.W.2d 849, 852 (Mo. Ct. App. 1975).

60. L. Timothy Perrin, *From O.J. to McVeigh: The Use of Argument in the Opening Statement*, 48 EMORY L.J. 107, 110 (1999) (footnotes omitted).

61. Donald E. Vinson, *Jury Psychology and Antitrust Trial Strategy*, 55 ANTITRUST L.J. 591, 591–92 (1986). A study based on interviews of 14,000 actual or surrogate jurors found that "80 to 90 percent of all jurors come to a decision [about a case] during or immediately after the opening statements." *Id.*



*A. Opening Statements That Are Argumentative*

The primary rule of the opening statement is that it cannot contain argument.<sup>62</sup> Because the line between a permissible preview of the evidence and improper argument is not always intuitively obvious,<sup>63</sup> it is necessary to turn to the caselaw for guidance.

In *Dolphy v. State*, the prosecutor showed the jury a PowerPoint presentation.<sup>64</sup> During the presentation, the prosecutor showed the jury slides that read, “Defendant’s Story Is a Lie,” and “People Lie When They Are Guilty.”<sup>65</sup> After the prosecution’s slideshow, the defense objected, and the trial court ruled that the slide was argumentative and instructed the prosecutor to take it down.<sup>66</sup> On appeal, the Georgia Supreme Court stated that “the trial court did not abuse its discretion in concluding that the slides were inappropriately argumentative for opening statement.”<sup>67</sup>

A similar improper comment occurred in *State v. Reynolds*.<sup>68</sup> During the opening statement of that case, the prosecutor stated that the day after the incident, the defendant “called [a witness] and gave him this cock-and-bull story . . . .”<sup>69</sup> The New Mexico Supreme Court stated that “[t]he purpose of the opening statement is *not* to serve as the final argument nor as a preface thereto.”<sup>70</sup> The Court then stated that the trial “court properly could have found that the prosecutor’s comment was too argumentative for opening statement.”<sup>71</sup>

*B. Comments Unsupported by the Evidence*

In order to do justice, a prosecutor must avoid making comments in the opening statement that are unsupported by the evidence.<sup>72</sup> For example, the prosecutor in the murder case of *State v. Thurber* commented that when the victim was being strangled:

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62. See Perrin, *supra* note 60, at 111 (noting that the primary objection in opening statements is the presence of an argument).

63. See Kenneth J. Melilli, *Succeeding in the Opening Statement*, 29 AM. J. TRIAL ADVOC. 525, 549–50 (2006).

64. *Dolphy v. State*, 707 S.E.2d 56, 57 (Ga. 2011).

65. *Id.*

66. *Id.*

67. *Id.*

68. *State v. Reynolds*, 804 P.2d 1082, 1085 (N.M. Ct. App. 1990).

69. *Id.* (alteration in original)

70. *Id.* (emphasis in original) (citation omitted).

71. *Id.*

72. James R. Lucas, *Opening Statement*, 13 U. HAW. L. REV. 349, 352–54 (1991) (noting that a prosecutor “is afforded some license for figurative language” in an opening statement, so long as their comments are based on the evidence).

[S]he would struggle and can get a little bit, she is gasping for air, gasping. And every time she did that, more oxygen went to her brain, allowed her to live longer. The strangulation, five to 12 minutes. Five to 12 minutes. . . . She's dying. Her heart is still beating. She's looking up at the gray sky. She's in an area that she does not know.<sup>73</sup>

The Kansas Supreme Court began its analysis of this issue by stating that, “[p]rosecutors step outside the wide latitude [they have in the opening statement] when employing an ‘imaginary script’ to convey a victim’s last moments because such a comment is unsupported by the evidence.”<sup>74</sup> The Court then held that the prosecutor’s comments were improper because the coroner’s testimony did not support the statement that the strangulation could have lasted for twelve minutes, and there was no evidence at all that the victim was unfamiliar with the area where the murder occurred.<sup>75</sup>

The prosecutor in the murder and robbery case of *Bailey v. United States* made a similar error.<sup>76</sup> During the opening statement, the prosecutor stated that one of the witnesses was “now in a nursing home” and had “never recovered” from the incident.<sup>77</sup> The District of Columbia Court of Appeals agreed with the defendant that this comment was improper because the witness never testified, and no evidence was introduced about the whereabouts or state of health of the witness.<sup>78</sup>

### C. Comments Unrelated to the Evidence

In order to do justice, prosecutors should not make comments in the opening statement that bear no relation to the evidence or the issues of the case.<sup>79</sup> For instance, the prosecutor in *United States v. Conrad* made the following comment during the opening statement:

[Y]ou’ll also hear from Special Agent David Nygren. He’ll talk to you about the firearm that was seized in the execution of the

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73. *State v. Thurber*, 420 P.3d 389, 410 (Kan. 2018).

74. *Id.* at 412 (citation omitted).

75. *Id.* at 413.

76. *Bailey v. United States*, 831 A.2d 973, 982 (D.C. 2003).

77. *Id.*

78. *Id.*

79. See MODEL RULES OF PROF’L CONDUCT r. 3.4(e) (AM. BAR ASS’N 2019), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_4\\_fairness\\_to\\_opposing\\_party\\_counsel/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel/) (“A lawyer shall not . . . allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.”).

warrant. He'll tell you that it was working, that it fired without a problem, and he'll talk to you a little bit about sawed-off shotguns versus shotguns, why they're illegal . . . .<sup>80</sup>

The defense objected, and the trial court sustained the objection.<sup>81</sup> The Eighth Circuit Court of Appeals held that this comment was improper because it “had little or no probative value on any issue at trial” and “did not relate to an element of the offense nor did the comments aid the fact finder.”<sup>82</sup> The court explained that “[w]hy Congress has chosen to prohibit the possession of a sawed off shotgun is simply not relevant to issues of whether the defendant possessed such a weapon.”<sup>83</sup>

A similar error occurred in the case of *State v. Loya* in which the defendant was charged with driving while intoxicated.<sup>84</sup> The prosecutor began the opening statement by saying:

Ladies and gentlemen, [thirteen] is seen by some people as an unlucky number. However, on April 13, 2008, it was a very good day for the citizens of Doña Ana County, because [D]efendant in this case was seen driving without his headlights and was pulled over before he could cause any significant harm.<sup>85</sup>

The New Mexico Court of Appeals agreed with the trial court that this comment was improper.<sup>86</sup> Essentially, the comment was improper because whether the defendant would have caused significant harm if not pulled over was speculation that bore no relation to the actual evidence.<sup>87</sup>

#### *D. Comments About the Exercise of Constitutional Rights*

Doing justice means that a prosecutor cannot comment on the defendant's exercise of constitutional rights during the opening statement.<sup>88</sup> For instance, the prosecutor in *Fratcher v. State* made the following comment during opening statement: “The police get there. Fratcher opens the door and they place him under arrest. He immediately—the officer, you hear Detective

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80. United States v. Conrad, 320 F.3d 851, 854 (8th Cir. 2003).

81. *Id.* at 855.

82. *Id.*

83. *Id.*

84. State v. Loya, 258 P.3d 1165, 1166 (N.M. Ct. App. 2011).

85. *Id.* (alterations in original).

86. See *id.* at 1168–69 (stating the comment made was “ill-advised” for opening statements).

87. *Id.* at 1169.

88. See AM. BAR ASS'N, *supra* note 5, at 3-6.5(c) (“The prosecutor should scrupulously avoid any comment on a defendant's right to remain silent.”).

McNally . . . say, can I search your truck. No, you can't search my truck."<sup>89</sup> The defendant objected, but the trial court overruled the objection.<sup>90</sup> The Florida District Court of Appeal held that this was error because the prosecutor's comment "ran afoul of the strong prohibition against comment on a defendant's exercise of his Fourth Amendment rights."<sup>91</sup>

A similar error occurred in *United States v. Mooney*.<sup>92</sup> During the opening statement in that case, the prosecutor said:

Finally, as you assess the codefendants' credibility, consider how their testimony fits with the defendant's own words. You see, after the defendant was arrested on these charges, he chose not to speak to the police, and that was certainly his right. He did give a false name.<sup>93</sup>

The First Circuit Court of Appeals had no hesitation in finding that commenting on the defendant's exercise of his right to remain silent was improper.<sup>94</sup>

#### *E. Comments About the Truthfulness of Witnesses*

It is improper for a prosecutor to comment on the veracity of a witness during the opening statement.<sup>95</sup> For example, the prosecutor in the domestic violence case of *State v. Clay* referred to the victim's prior written statement during the opening statement, and "stated that the victim's testimony most likely would not be consistent with her signed written statement, but repeatedly urged the jury to believe the statement, not the testimony."<sup>96</sup> The Ohio Court of Appeals began its analysis by stating that "[c]ommenting on the truthfulness of a witness [during an opening statement] is not proper."<sup>97</sup> The court then held that the prosecutor's opening statement was improper because "commenting on the veracity of the victim's yet-to-be-heard testimony was improper."<sup>98</sup>

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89. Fratcher v. State, 37 So.3d 365, 367 (Fla. Dist. Ct. App. 2010) (alteration in original).

90. *Id.*

91. *Id.* at 369.

92. *United States v. Mooney*, 315 F.3d 54, 58 (1st Cir. 2002).

93. *Id.* at 58–59.

94. *See id.* at 61.

95. *See infra* notes 96–103 and accompanying text.

96. *State v. Clay*, 910 N.E.2d 14, 22 (Ohio Ct. App. 2009).

97. *Id.*

98. *Id.*

A related improper opening statement was given in *United States v. Certified Environmental Services*.<sup>99</sup> In that case, the prosecutor stated that he would call witnesses who “engaged in absolutely deplorable behavior,” but “[t]heir obligation is to tell the truth.”<sup>100</sup> The prosecutor then stated, “[w]e will introduce their plea agreements, and you will see through their plea agreements what their obligations are, what benefits they get, and what happens if they don’t tell the truth.”<sup>101</sup> The Second Circuit Court of Appeals began its analysis by stating that, “it is well established that prosecutors may not [personally] vouch for their witnesses’ truthfulness.”<sup>102</sup> The court held that these comments during the opening statement violated this principle.<sup>103</sup>

#### F. Bolstering Witnesses

Just as it is improper to directly comment on a witness’s veracity, it is also improper for a prosecutor to indirectly bolster a witness’s credibility during an opening statement.<sup>104</sup> For instance, the prosecutor in *State v. Perez* referred to a witness’s help in a prior forgery case, where the witness helped the police catch a “guy . . . who was wanted in three different states” by providing the police with information which “all . . . turn[ed] out to be good information.”<sup>105</sup> The Utah Court of Appeals stated that:

“The purpose of an opening statement is to apprise the jury of what counsel intends to prove in his own case in chief by way of providing the jury an overview of, and general familiarity with, the facts the party intends to prove.” This does not mean that the State can refer to evidence it *may* introduce on rebuttal based on its expectation that the defense will introduce certain impeaching evidence. . . . “[A]n opening statement should not be argumentative. It is not proper to engage in anticipatory rebuttal or to argue credibility by referring to impeachment evidence the other side may adduce.”<sup>106</sup>

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99. *United States v. Certified Envntl. Serv.*, 753 F.3d 72, 86–87 (2d Cir. 2014).

100. *Id.* at 86–87.

101. *Id.* at 87.

102. *Id.* at 86 (alteration in original) (internal quotation marks omitted).

103. *Id.*

104. *State v. Perez*, 946 P.2d 724, 731 (Utah Ct. App. 1997).

105. *Id.* (first and second alterations in original).

106. *Id.* (emphasis in original) (citation omitted).

The court then held that because the prosecutor's comments amounted to bolstering the witness's credibility, the opening statement was improper.<sup>107</sup>

Similar improper vouching occurred in the death-penalty case of *State v. Bible*.<sup>108</sup> The prosecutor made the following comment in the opening statement:

I promise you that I'm gonna be honest with you, that the witnesses that I call, there is a reason for them to be here. They have something important to tell you. I'm not gonna waste your time. If there is [sic] two or three people that did the same thing in this case, you will probably only hear from one of them. It's gonna be a straightforward, no nonsense case. . . . But as you know, we wouldn't be here unless what I'm about to tell you really happened.<sup>109</sup>

The Arizona Supreme Court began its analysis by stating that “[i]t is black letter law that it is improper for a prosecutor to vouch for a witness.”<sup>110</sup> The Court then explained that: “Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony.”<sup>111</sup> The Court then held that the prosecutor's comments were improper because they constituted both forms of vouching.<sup>112</sup>

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107. *Id.* at 731–32. The State argued that the anticipatory bolstering was proper because it turned out that the defense attacked the witness's credibility during the trial. *Id.* at 731. The court stated that, in addition to there being no authority for this proposition,

the State's argument is circular because if the State engages in anticipatory rebuttal in its opening statement, the defendant will likely be forced to counter the State's comments by introducing impeaching evidence, which the State could then point to as justifying its anticipatory rebuttal. This circularity also defeats the State's argument that the bolstering testimony elicited by the prosecutor in this case on direct examination was appropriate as the defense first attacked [the witness's] credibility in opening statement. Because the State engaged in “anticipatory rebuttal” in its own opening statement, it is impossible for this court to determine whether, in the absence of such anticipatory rebuttal, the defense would have attacked [the witness's] credibility in opening statement. Thus, we cannot agree that the State was entitled to bolster [the witness's] credibility based on the defense's attack on [the witness's] credibility in opening statement.

*Id.* at 731–32 (citation omitted).

108. *State v. Bible*, 858 P.2d 1152, 1204 (Ariz. 1993).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

### G. Making Legal or Factual Conclusions

In order to do justice, a prosecutor must not make a comment during the opening statement that amounts to a legal or factual conclusion.<sup>113</sup> For example, the prosecutor in the murder case of *Commonwealth v. Griffin* “referred several times to the victim’s death as a ‘murder’ and to the defendant as having ‘murdered’ the victim.”<sup>114</sup> The Massachusetts Supreme Judicial Court held that “it was improper for the prosecutor to refer to the killing as a ‘murder’ in his opening statement where the question whether the killing was, in fact, a murder was the ultimate question before the jury.”<sup>115</sup>

The prosecutor made a related error in *Bailey v. United States*.<sup>116</sup> In that case, two men had been arrested and then released for the crimes for which the defendant was ultimately charged.<sup>117</sup> During the opening statement, the prosecutor described the alibis of the two men as being “airtight.”<sup>118</sup> The District of Columbia Court of Appeals held that this comment was improper because “[w]hile it is true that both men had alibis, the strength of those alibis—their ‘airtightness’—was a matter for the jury to decide and should not have been the subject of comment by the prosecutor in his opening statement.”<sup>119</sup>

### H. Appeal to Emotion

Doing justice means that a prosecutor cannot make comments in an opening statement that encourage the jury to decide the case on emotion.<sup>120</sup> For instance, the prosecutor in *State v. Bible* made the following comment:

[Y]our goal is not necessarily just to give Ricky Bible a fair trial.  
Your goal in this case is going to be justice.

And justice doesn’t mean just giving Ricky Bible a fair trial.  
It means looking at the rights of other people, too, like [the victim],  
and those rights include those that are enumerated in the

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113. See AM. BAR ASS’N, *supra* note, 5 at 3-6.5(b) (emphasis added) (“The prosecutor’s opening statement at trial should be *confined* to a fair statement of the case . . . and discussion of evidence that the prosecutor reasonably believes will be available, offered and admitted.”).

114. *Commonwealth v. Griffin*, 62 N.E.3d 490, 499 (Mass. 2016).

115. *Id.* (footnote omitted).

116. *Bailey v. United States*, 831 A.2d 973, 983 (D.C. 2003).

117. *Id.*

118. *Id.*

119. *Id.*

120. See AM. BAR ASS’N, *supra* note 5, at 3-6.5(c) (“The prosecutor’s opening statement should be made without . . . appeals to emotion . . .”).

Declaration of Independence, life, liberty and the pursuit of happiness. And there won't be any of that for [the victim].<sup>121</sup>

The Arizona Supreme Court began its analysis by stating that “[i]t cannot be doubted that victims of crime, and their families, have certain rights,” but “[i]t is equally clear . . . that these rights do not, and cannot, conflict with a defendant's right to a fair trial.”<sup>122</sup> The Court then found that the prosecutor's comments were improper:

Appeals to the jury's innate sense of fairness between a defendant and the victim may have surface appeal but cannot prevail. A jury in a criminal trial is not expected to strike some sort of balance between the victim's and the defendant's rights. The judge, not the jury, balances conflicting rights; the jury must find the facts and apply the judge's instructions. Accordingly, the clear weight of authority shows the impropriety of the prosecutor's statements.<sup>123</sup>

The prosecutor in *United States v. Mooney* made a similarly improper remark in the opening statement.<sup>124</sup> The prosecutor stated:

We are fortunate in the state of Maine, particularly in the part of Maine that most of us come from, to live lives that are relatively free from random acts of violence. We don't have bars on our windows. We don't fear walking at night. And as a rule, our homes and our workplaces are safe havens from random crime.

This case involves a painful exception to that rule, a random act of violence that has forever changed the way that one person looks at the world, and in some respects has rocked the sense of security of an entire Maine community.<sup>125</sup>

The First Circuit Court of Appeals held that “the prosecutor's remarks contrasting the jurors' sense of community safety with the armed robbery of the hotel crossed the bounds of permissible argument.”<sup>126</sup> The court stated that the comments were improper because they “interjected issues having no

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121. *State v. Bible*, 858 P.2d 1152, 1205 (Ariz. 1993) (second and third alterations in original).

122. *Id.* (citations omitted).

123. *Id.* at 1206 (citations omitted).

124. *United States v. Mooney*, 315 F.3d at 54, 58 (1st Cir. 2002).

125. *Id.*

126. *Id.* at 59.



bearing on the defendant's guilt or innocence and improperly appealed to the jury to act in ways other than as dispassionate arbiters of the facts."<sup>127</sup>

#### IV. CLOSING ARGUMENT

Regarding closing arguments, the Supreme Court of Nevada has said, "the purpose of closing arguments is to enlighten the jury, and to assist . . . in analyzing, evaluating, and applying the evidence, so that the jury may reach a just and reasonable conclusion."<sup>128</sup> This conclusion must be "based on the evidence alone, and not on any fact not admitted in evidence."<sup>129</sup> Prosecutors who deviate from this rule and base closing arguments on anything other than the evidence are not fulfilling their duty to seek and do justice.<sup>130</sup>

##### *A. Declarations of Personal Opinion*

Prosecutors have strong beliefs about the evidence they present in trial. However, a prosecutor who expresses personal opinion in a closing argument is not doing justice.<sup>131</sup>

In *United States v. Young*, the defendant was convicted of numerous fraud-related crimes for the sale of oil to Apco.<sup>132</sup> During the closing argument, the defense attorney "pointed directly at the prosecutor's table and stated: 'I submit to you that there's not a person in this courtroom including those sitting at this table who think that Billy Young intended to defraud Apco.'"<sup>133</sup> In the closing rebuttal, the prosecutor stated:

I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he

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127. *Id.*

128. Taylor v. State, 371 P.3d 1036, 1045 (Nev. 2016) (alteration in original) (internal quotation marks omitted).

129. Milton v. State, 546 S.W.3d 330, 334 (Tex. Ct. App. 2018) (citation omitted) (internal quotation marks omitted).

130. See AM. BAR ASS'N, *supra* note 5, at 3-1.2(b) ("The primary duty of the prosecutor is to seek justice . . .")

131. See *id.* at 3-6.8(b) ("The prosecutor should not argue in terms of counsel's personal opinion.")

132. United States v. Young, 470 U.S. 1, 4 (1985).

133. *Id.* at 4-5.

did. If we are allowed to give our personal impressions *since it was asked of me*.<sup>134</sup>

The prosecutor then reviewed that portion of the evidence and stated, “I don’t know what you call that, I call it fraud.”<sup>135</sup> The United States Supreme Court began its analysis by quoting the ABA Standards of Criminal Justice: “[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.”<sup>136</sup> The Court held that the prosecutor’s closing argument was improper because it contained an expression of personal opinion.<sup>137</sup>

A related error occurred in *Fennell v. State*.<sup>138</sup> In that drug distribution case, the prosecutor stated during closing argument: “What we do know is from Jeffrey Wheeler’s testimony, he gave [Mr. Fennell] the \$400, and he got the cocaine. We know because the agents did their job incredibly well . . . . Again, fortunately, these officers and agents are incredibly good at their job. Why? They controlled the situation.”<sup>139</sup> The Wyoming Supreme Court stated that one question was whether “the prosecutor’s remarks constituted an impermissible opinion about the witnesses’ credibility.”<sup>140</sup> The Court held that it was improper because “the prosecutor’s comments involved his own opinion or experience of the incredible job the agents did, something the jury had not experienced and one of the very questions the jury had to resolve for itself.”<sup>141</sup>

### *B. Attacks Against Opposing Counsel’s Character or Credibility*

Doing justice means that a prosecutor cannot make a personal attack against opposing counsel during closing argument, especially against

134. *Id.* at 5. (alterations in original) (emphasis in original).

135. *Id.*

136. *Id.* at 8 (citation omitted).

137. *Id.* at 7–9. The Court also held that because the prosecutor’s improper closing argument was invited by the defense’s own improper closing argument, reversal of the conviction was not warranted. *Id.* at 17–18. The Court stated,

[i]n order to make an appropriate assessment, the 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.

*Id.* at 12–13 (footnote omitted).

138. *Fennell v. State*, 350 P.3d 710, 722 (Wyo. 2015).

139. *Id.* at 722 (alteration in original).

140. *Id.*

141. *Id.* at 725.

counsel's character and credibility.<sup>142</sup> For instance, the prosecutor in the capital-murder trial of *State v. Hulsey* “invoked the story of Don Quixote and compared the defense’s theory to tilting at windmills.”<sup>143</sup> The prosecutor also “repeatedly analogized the defense’s evidence in the case to the imaginary monsters in that story. He stated that the defense wanted the jury to ‘[go] to Neverland’ and enter the ‘Land of Oz.’”<sup>144</sup> The Arizona Supreme Court began its analysis by stating that “[w]hile commentary about the defense’s theory is common, an argument the impugns the integrity or honesty of opposing counsel is [] improper.”<sup>145</sup> The Court then held that the prosecutor’s statements were improper because: “The prosecutor’s comments equating defense counsel to Don Quixote were different from those discussing defense theories. The prosecution impugned defense counsel’s integrity by suggesting he was purposely leading the jury on a make-believe expedition.”<sup>146</sup>

A similar error occurred during the closing argument in *Black v. State*.<sup>147</sup> In that case, “[t]he prosecutor alternately and repeatedly stated that defense counsel’s arguments and questioning were ‘offensive,’ ‘nuts,’ ‘laughable,’ and ‘bizarre,’ and that they took his breath away.”<sup>148</sup> The Wyoming Supreme Court began by stating the general rule that “[a] personal attack by the prosecutor on defense counsel is improper.”<sup>149</sup> The Court then held that:

Many of the comments challenged by Appellant in this case could be viewed as merely close to the line, “ill-advised” comments reflecting the prosecutor’s view of the defense’s case. However, the prosecutor also asserted that aspects of defense counsel’s argument were “offensive.” Such a comment, we believe, crosses the line. It is an improper, personal attack on defense counsel. It is the type of remark that elevates the impact of the other comments—that defense counsel’s statements were “nuts,” “laughable,” “bizarre,” and that they took his breath away. Viewed in their totality, we cannot conclude that the prosecutor’s comments were merely “ill-advised.” They were an improper

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142. *State v. Walters*, 588 S.E.2d 344, 363 (N.C. 2003) (holding that a prosecutor’s closing argument was improper when they called the defendant names.)

143. *State v. Hulsey*, 408 P.3d 408, 431 (Ariz. 2018).

144. *Id.*

145. *Id.* (internal quotation marks omitted).

146. *Id.*

147. *Black v. State*, 405 P.3d 1045, 1057 (Wyo. 2017).

148. *Id.* at 1057.

149. *Id.*

attack on defense counsel and violated a clear and unequivocal rule of law.<sup>150</sup>

### C. Calling the Defendant Disparaging Names

In order to do justice, a prosecutor must avoid calling the defendant names that are unrelated to the evidence during the closing argument.<sup>151</sup> For example, the prosecutor in *State v. Walters* engaged in the following incidents of name-calling during the closing argument:

Ladies and gentlemen, you mean to tell me three people get shot in cold blood by a bunch of no working, no school going, heathen, murdering, low-lifes and nobody's supposed to get emotional?

....

... The whole low-life, no working, unemployed group, every one of them is just as guilty.

....

... Ladies and gentlemen of the jury, you got to learn how to recognize evil when you see it . . . . You got to learn how to stand up to evil, ladies and gentlemen of the jury. You have to learn how to stand up to evil.

And that girl and that whole gang of them over there, just like this man said, evil, wicked and mean.

....

You say she's not evil? You say she's not evil? You don't think so. Well, ladies and gentlemen of the jury, if you can't recognize evil, you will never recognize it.<sup>152</sup>

The prosecutor also told a story about Adolph Hitler, Neville Chamberlain, and Winston Churchill, and then tied the references about Hitler to the

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150. *Id.*

151. *Orellana v. State*, 489 S.W.3d 537, 548 (Tex. Ct. App. 2016) (quoting *Gilcrease v. State*, 32 S.W.3d 277, 279 (Tex. App. 2000)) (alteration in original) (“Name calling and curse words . . . have no place in the administration of justice.”).

152. *State v. Walters*, 588 S.E.2d 344, 363 (N.C. 2003) (alterations in original).

defendant.<sup>153</sup> The North Carolina Supreme Court had no hesitation in holding that the closing argument was improper, stating:

This is a compelling case based upon the evidence presented at trial, and it is inconceivable why the [closing argument] was ever made. Little, if any, argument was made about the evidence, law, or issues. Instead, the argument consisted of a rambling, disjointed personal attack on defendant, filled with irrelevant historical references and name-calling.<sup>154</sup>

Additional incidents of name-calling that have been deemed improper include referring to the defendant as a “vicious dictator,” a “two-headed hydra,” a “tower of terror,” a “monster of mayhem,” a “king of killers,”<sup>155</sup> a “bastard,”<sup>156</sup> a “monster,”<sup>157</sup> a “rabid dog,”<sup>158</sup> an “animal,” “unadulterated evil,”<sup>159</sup> a “terrorist,”<sup>160</sup> and someone who “can’t keep her knees together or her mouth shut.”<sup>161</sup> However, courts do allow an argument that appears to be name-calling if it is based on the evidence presented during trial.<sup>162</sup>

#### *D. Vouching*

It is improper for a prosecutor to vouch for a witness’s credibility during the closing argument because it induces “the jury to trust the Government’s judgment rather than its own view of the evidence.”<sup>163</sup>

An example of improper vouching occurred in *Black v. State*.<sup>164</sup> In that case, the prosecutor stated during the closing argument: “I have been stunned

153. *Id.* at 365.

154. *Id.* at 363.

155. *State v. Barfield*, 723 N.W.2d 303, 313 (Neb. 2006).

156. *Gilcrease v. State*, 32 S.W.3d 277, 279 (Tex. App. 2000).

157. *Ponce v. State*, 299 S.W.3d 167, 174–75 (Tex. App. 2009).

158. *Bates v. Bell*, 402 F.3d 635, 643 (6th Cir. 2005).

159. *Wilson v. Simons*, 536 F.3d 1064, 1118 (10th Cir. 2008).

160. *United States v. Moore*, 375 F.3d 259, 260 (3d Cir. 2004).

161. *State v. Madonna*, 806 S.E.2d 356, 362 (N.C. Ct. App. 2017).

162. *See Orellana v. State*, 489 S.W.3d 537, 548 (Tex. Ct. App. 2016) (holding that calling the defendant a “MS-13 thug” was not improper because it was a “reasonable deduction” from testimony that the defendant was a gang member who had threatened women and children with serious bodily harm and death); *Commonwealth v. Clancy*, 192 A.3d 44, 47, 65–68 (Pa. 2018) (holding that it was not improper to refer to the defendant as a “cold blooded killer” because the reference specifically addressed an element of the offense that had to be proven—that the defendant’s “actions were willful, deliberate, and premeditated”).

163. *United States v. Berrios*, 676 F.3d 118, 133 (3d Cir. 2012).

164. *See Black v. State*, 405 P.3d 1045, 1045 (Wyo. 2017) (holding that the prosecutor’s comments during the closing argument interfered with the jury’s ability to make determinations on the credibility of the witnesses).

by the police work here. I used to be in Cheyenne, the police work that this detective has done has been as complete as anything I've ever seen. All texts, everything."<sup>165</sup> The prosecutor also stated during rebuttal that, "there might be a few bad [law enforcement officers], but there aren't any around here."<sup>166</sup> The Wyoming Supreme Court began its analysis by stating that the law is "clear that a prosecutor cannot personally vouch for the credibility of a state's witness."<sup>167</sup> The Court held that "[t]he prosecutor's statements violated well-established rules against vouching for the skill or credibility of a witness" because the vouching "creat[ed] the risk that the jurors would view him as an authority whose knowledge and opinions carried greater weight than their own."<sup>168</sup>

A related example of improper vouching occurred in *State v. Albino*.<sup>169</sup> In that case, a jailhouse informant had testified for the State about a conversation he had with the defendant.<sup>170</sup> During the closing argument, the prosecutor said that the "state's not promising anything to [the informant], and he made that clear to you, and *we make it clear to the jury*."<sup>171</sup> The Connecticut Supreme Court held that this comment was improper in light of the general rule that a prosecutor must not "[a]ssert his personal knowledge of the facts in issue, except when testifying as a witness."<sup>172</sup> The Court stated:

By reiterating the lack of promises, the prosecutor impermissibly bolstered [the informant]'s credibility. This inference was compounded by the statement in closing argument using the collective pronoun "we," thus aligning [the informant] with the state. [A]lthough a prosecutor is permitted to comment [on] the evidence presented at trial and to argue the inferences that the jurors might draw therefrom, he is not permitted to vouch personally for the truth or veracity of the state's witnesses.<sup>173</sup>

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165. *Id.* at 1055.

166. *Id.* (internal quotation marks omitted).

167. *Id.* at 1056 (citation omitted).

168. *Id.*

169. *State v. Albino*, 97 A.3d 478, 490 (Conn. 2014).

170. *Id.* at 489–90.

171. *Id.* at 504 (emphasis in original).

172. *Id.* at 490 (alteration in original).

173. *Id.* (third and fourth alterations in original) (citations omitted) (internal quotation marks omitted).

*E. Arguing Outside the Record*

Doing justice means that a prosecutor cannot base a closing argument on facts that were not introduced into the record during trial.<sup>174</sup> For example, the prosecutor in *United States v. Fletcher* referred to the legal problems of celebrities and religious figures during the closing argument.<sup>175</sup> Specifically, the prosecutor “made specific references to sensational events not in evidence in order to support her contention that [the defendant] was guilty,” such as “ask Jesse Jackson about his two year old daughter,” and “[a]sk Jerry Falwell about the hooker that he got caught having intercourse with in a car in Palm Springs.”<sup>176</sup> The Court of Appeals for the Armed Forces noted that a prosecutor may “comment during argument on contemporary history or matters of common knowledge within the community.”<sup>177</sup> However, the court found that the closing argument was improper because the prosecutor’s

references to religious figures and entertainers improperly invited comparison to other cases, the facts of which were not admitted into evidence and which bore no similarity to [the defendant]’s case. Although references to public figures and news stories may be allowed, the specificity and detail of her comments went well beyond the generic comments we have allowed in the past. The [prosecutor] did not make generalized references to current events to give her argument some context. She made specific references to sensational events not in evidence in order to support her contention that [the defendant] was guilty.<sup>178</sup>

Indeed, the court stated that “this error was plain and obvious” because the prosecutor was “inviting the members to accept new and inflammatory information as factual based solely on her authority as the [prosecutor].”<sup>179</sup>

Likewise, the prosecutor improperly argued facts that were outside the record in *State v. Moreland*.<sup>180</sup> In that case, the victim denied during cross-examination that the defendant’s accomplice was his girlfriend, but a detective testified that the victim and the accomplice were in a relationship.<sup>181</sup>

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174. See AM. BAR ASS’N, *supra* note 5, at 3-6.8(d) (“[T]he prosecutor may respond fairly to arguments made in the defense closing argument, but should not present or raise new issues.”).

175. *United States v. Fletcher*, 62 M.J. 175, 183–84 (C.A.A.F. 2005).

176. *Id.* at 184.

177. *Id.* at 183.

178. *Id.* at 184 (citation omitted).

179. *Id.*

180. *State v. Moreland*, 73 N.E.3d 950, 960 (Ohio Ct. App. 2016).

181. *Id.*

During the closing argument, the prosecutor attempted to rehabilitate the victim's character by stating:

He had some facts different than his original version, absolutely. No doubt about it.

His version of what his relationship with [the accomplice] is [is] very different today than it was a couple months ago. His girlfriend, he also testified, was in the next room; his girlfriend that he was still dating at the same time that this was going on.<sup>182</sup>

The Ohio Court of Appeals held that this argument was improper because no evidence was introduced about the victim and the accomplice still dating at the time of the offense.<sup>183</sup> The court stated that “[n]either the defense nor the prosecution may refer to evidence that is not in the record” during a closing argument.<sup>184</sup>

#### F. Golden Rule Arguments

The Golden Rule encourages everyone to: “[D]o to others as you would have them do to you.”<sup>185</sup> While this is an admirable precept to follow in general, it is improper for a prosecutor to use the closing argument to ask the jurors to place themselves in the shoes of the victim.<sup>186</sup>

The prosecutor in *State v. Lowery* made an improper Golden Rule argument during closing.<sup>187</sup> In that case, the defendant was charged and convicted for the murder and attempted murder of two victims on their wedding night.<sup>188</sup> During the closing argument, “the prosecutor invited the jury to imagine what the incident was like for [the first victim]: ‘A glorious day . . . and in two minutes, you’re going to be, in essence, dead.’”<sup>189</sup> The prosecutor then named the second victim and stated:

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182. *Id.* at 961 (alterations in original).

183. *Id.*

184. *Id.* (citation omitted).

185. *Golden Rule*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/golden%20rule> (last visited Apr. 20, 2020); see *The Universality of the Golden Rule in World Religions*, TEACHING VALUES, <http://www.teachingvalues.com/goldenrule.html> (last visited Apr. 20, 2020) (listing the various iterations of the Golden Rule from different religious traditions).

186. See *infra* note 198 (holding that it was inappropriate to ask jurors to think of themselves in place of the victim).

187. *State v. Lowery*, 427 P.3d 865, 886 (Kan. 2018).

188. *Id.* at 873.

189. *Id.* at 886 (second alteration in original).



It's his wedding night. He's with his bride. They're going to get something to eat. And then he hears a loud noise, glass breaking. Could you imagine being in the state of mind where he was and that happening? Think for yourself. What would be your reaction in that moment as you're driving, just having been married, having a great time, your bride leaning her head on your shoulder as you're going down the street and then you hear this loud noise? How long would it take for you to figure out your world is about to become unglued?<sup>190</sup>

The Kansas Supreme Court began its analysis by stating that “[a] ‘[G]olden [R]ule’ argument is the suggestion by counsel that jurors should place themselves in the position of a party, a victim, or the victim’s family members” and “‘Golden [R]ule’ arguments are generally improper because they encourage the jury to decide the case based on personal interest or bias rather than neutrality.”<sup>191</sup> The Court then held that: “The prosecutor’s arguments fit squarely within the definition of a ‘[G]olden [R]ule’ argument. Telling the jury to ‘[t]hink for yourself. What would be your reaction,’ had no purpose but to inflame the passions and prejudices of the jury and divert its attention from its duty.”<sup>192</sup>

A similarly improper argument was given by the prosecutor in the murder case of *Holliman v. State*.<sup>193</sup> During the closing argument, the prosecutor stated:

I grew up with guns. And I’m not one to play with them. If I did not have the respect with them that I do, then perhaps it would have been a dramatic thing for me to take that shotgun over there, open the breach, and walk in front of the jury and point it at each and every one of you. What would you have felt if I had done that, Ladies and Gentlemen?<sup>194</sup>

The prosecutor then asked the jurors three more times how they would feel if a gun was pointed at them.<sup>195</sup> The Mississippi Supreme Court began by stating that “[a] [G]olden-[R]ule argument, in which an attorney asks the jurors to put themselves in the place of one of the parties, is prohibited.”<sup>196</sup> This type of argument is prohibited because:

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190. *Id.* (emphasis omitted).

191. *Id.*

192. *Id.*

193. *Holliman v. State*, 79 So.3d 496, 499 (Miss. 2011).

194. *Id.*

195. *Id.* at 499–500.

196. *Id.* at 500.

[C]ourts of this country have uniformly held that human beings are unreliable judges of their own affairs; that it is expecting too much of a man to weigh his own case fairly and impartially, since most humans want their own cases to be decided in their favor. It follows, therefore, to advise jurors to decide a case as they would want it decided if they or their loved ones were the litigants is to establish a false standard for the basis of judgments.<sup>197</sup>

The Court then held that the prosecutor had committed reversible error because he “essentially requested that each juror put himself or herself in the place of [the victim] during the fatal altercation.”<sup>198</sup>

### *G. Appealing to the Jury’s Passions or Prejudices*

In order to do justice, a prosecutor cannot use the closing argument to get the jury to base its verdict on passions or prejudices, rather than the evidence.<sup>199</sup> An example of this sort of improper argument occurred in *Larkins v. State*.<sup>200</sup> During the closing argument of that child abuse case, the prosecutor stated:

[The children] feel it is important that you know, because nobody else can change it. No one else can do anything about it. . . . It is important to tell you. And they did. Please, listen to them.

[E]very single point that’s made from the defense, the traumatic experiences that they were brave enough to share with you and open enough to talk about with you become more and more cheapened and degraded.

So I’m speaking for them.<sup>201</sup>

The Wyoming Supreme Court held that this argument was “clearly improper.”<sup>202</sup> The argument was improper because rather than encouraging the jury to follow the law to ascertain the truth, the argument implied that the only way the jury could help the child victims was to convict the two

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197. *Id.* (alteration in original) (citation omitted).

198. *Id.*

199. *Larkins v. State*, 429 P.3d 28, 51 (Wyo. 2018).

200. *Id.*

201. *Id.* (alterations in original) (internal quotation marks omitted).

202. *Id.*

defendants.<sup>203</sup> This violated “clear precedent prohibiting prosecutors from seeking a conviction by appealing to the jury’s passions and prejudices.”<sup>204</sup>

A similarly improper closing argument was given in *People v. Harris*, in which the defendant was charged with carjacking.<sup>205</sup> In that case, the prosecutor remarked in the closing argument that the victim still did not have a car because she could not afford one and had to rely on her father to drive her to school, that it is an injustice that the victim still did not have a car and had to rely on her father, and that the victim “got very emotional when talking about how she didn’t have a car anymore.”<sup>206</sup> The Illinois Court of Appeals began its analysis by stating that “[w]hile the State has wide latitude in making opening statements and closing arguments and is entitled to comment on the evidence . . . , comments intending only to arouse the prejudice and passion of the jury are improper.”<sup>207</sup> The court held that under this general rule, the comments were improper.<sup>208</sup>

#### *H. Referring to the Exercise of Constitutional Rights by the Defendant*

A prosecutor who mentions the defendant’s exercise of constitutional rights during a closing argument is not doing justice.<sup>209</sup> For instance, the prosecutor in *United States v. Murra* stated during the closing argument: “And let’s step back and let’s talk about credibility, folks, because that woman sitting there, she has an absolute [] right not to testify. You heard about that . . . .”<sup>210</sup> The defendant argued on appeal that this remark was an impermissible comment on her decision not to testify in her own defense.<sup>211</sup> The Fifth Circuit Court of Appeals began its analysis by stating that “[t]he Fifth Amendment forbids comment by the prosecution, either direct or indirect, on the accused’s silence.”<sup>212</sup> The court then stated that “[w]hatever the prosecutor’s subjective intent in making the remark[], the character of the remark [was] such that the jury would naturally and necessarily construe it as [a] comment on the defendant’s silence.”<sup>213</sup> Thus, the comment was

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203. *Id.*

204. *Id.*

205. *People v. Harris*, 74 N.E.3d 1, 12 (Ill. Ct. App. 2017).

206. *Id.*

207. *Id.* at 13 (citation omitted).

208. *Id.* at 14.

209. See AM. BAR ASS’N, *supra* note 5, at 3-6.8(a) (“The prosecutor should scrupulously avoid any reference to a defendant’s decision not to testify.”).

210. *United States v. Murra*, 879 F.3d 669, 677 (5th Cir. 2018) (alterations in original).

211. *Id.* at 682.

212. *Id.* (citing *Griffin v. California*, 380 U.S. 609, 615 (1965)).

213. *Id.* at 683–84 (second and third alterations in original).

improper because it impinged on the Fifth Amendment rights of the defendant.<sup>214</sup>

A related improper comment occurred in *Goldsbury v. State*.<sup>215</sup> After the defendant exercised his right not to testify during the trial, the prosecutor stated in the closing argument:

[W]e heard all this talk about what was not done in the investigation. But the fact remains, the only people who know what happened that night are [the victim] and the defendant. And [the victim] testified, came in here and faced all you people, and told you what happened in this case.<sup>216</sup>

The Alaska Supreme Court began its discussion of the issue by stating:

[P]rosecutors may not comment adversely on a criminal defendant's decision to invoke his right against self-incrimination. Even where an adverse comment only indirectly addresses a defendant's invocation of the right against self-incrimination, constitutional error occurs if "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."<sup>217</sup>

The Court held that under this rule, the statement was clearly improper because it infringed on the defendant's constitutional right against self-incrimination.<sup>218</sup>

### *I. Sending a Message to the Community*

A prosecutor who uses a closing argument to ask the jury to send a message to the community is not doing justice.<sup>219</sup> An example of this occurred in *McMahan v. Commonwealth*, in which the defendant was convicted of selling alcohol to minors.<sup>220</sup> During the penalty phase closing argument, the prosecutor told the jury:

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214. *Id.* at 684.

215. *Goldsbury v. State*, 342 P.3d 834, 835 (Alaska 2015).

216. *Id.* (alterations in original).

217. *Id.* at 837 (footnotes omitted).

218. *Id.*

219. See AM. BAR ASS'N, *supra* note 5, at 3-6.8(c) ("The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact.").

220. *McMahan v. Commonwealth*, 242 S.W.3d 348, 350 (Ky. 2007).

Whatever you do with regard to punishment sends a message not only to [objection]—not only to the Defendant who needs a message about this type of conduct, but it lets other folks within the community know what you are going to condone with regard to children of this community. It is imperative that adults act like adults, and that includes not supplying alcohol to minors. And it is an important decision that you are about to make. And on behalf of the prosecution and the Commonwealth I'm asking that you give a year in the penitentiary to send the message.<sup>221</sup>

The defendant argued on appeal that he was denied due process of law when the prosecutor asked the jury to convict him in order to send a message to the community, and the Kentucky Court of Appeals agreed.<sup>222</sup> The court stated that while a prosecutor may use the closing argument to “persuade the jurors the matter should not be dealt with lightly,” it is improper for a prosecutor to ask a jury to “send a message to the community.”<sup>223</sup>

A related improper statement occurred in the closing statement of *Brown v. State*.<sup>224</sup> During the closing argument, the prosecutor urged the jurors to:

[W]alk away from our oppression and prejudice and make the types of decisions that make us heroes and *rid crime from our streets*. You know, we always say something could have been done. I mean, have you heard that? Something could have been done. Something could have been done in the future. And the future is now. *We get to do something about the crime in this county*. It is [sic] epidemic proportion.<sup>225</sup>

The prosecutor made several similar statements, which all basically encouraged the jury to send a message and do something about the crime in the streets.<sup>226</sup> The Mississippi Supreme Court held that the prosecutor had “blatantly violat[ed] the rule against making inappropriate statements to the jury.”<sup>227</sup> In so holding, the Court quoted its prior warning to prosecutors:

The jurors are representatives of the community in one sense, but they are not to vote in a representative capacity. Each juror is to apply the law to the evidence and vote accordingly. The issue

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221. *Id.* at 350 (alteration in original). The objection of the defense was overruled. *Id.*

222. *Id.*

223. *Id.*

224. *Brown v. State*, 986 So.2d 270, 277 (Miss. 2008).

225. *Id.* at 273 (second alteration in original) (emphasis in original).

226. *Id.* at 273–74.

227. *Id.* at 275.

which each juror must resolve is not whether or not he or she wishes to “send a message” but whether or not he or she believes that the evidence showed the defendant to be guilty of the crime charged. The jury is an arm of the State but it is not an arm of the prosecution. The State includes both the prosecution and the accused. The function of the jury is to weigh the evidence and determine the facts. When the prosecution wishes to send a message they should employ Western Union. Mississippi jurors are not messenger boys.<sup>228</sup>

### *J. Religious References*

A prosecutor does not do justice by invoking religious authority during a closing argument.<sup>229</sup> For instance, in the closing argument of the penalty phase in the death penalty case of *Sandoval v. Calderon*:

The prosecutor told the jurors that God sanctioned the death penalty for people like Sandoval who were evil and have defied the authority of the State. He explained that by sentencing Sandoval to death, the jury would be “doing what God says.” The prosecutor added that imposing the death penalty and destroying Sandoval’s mortal body might be the only way to save Sandoval’s eternal soul.<sup>230</sup>

The defendant argued on appeal that this argument denied him of a fair penalty phase of trial.<sup>231</sup> The Ninth Circuit Court of Appeals agreed, finding this argument to be “both improper and highly prejudicial.”<sup>232</sup> The court stated that “any suggestion that the jury may base its decision on a ‘higher law’ than that of the court in which it sits is forbidden” because “[t]he obvious danger of such a suggestion is that the jury will give less weight to, or perhaps even disregard, the legal instructions given it by the trial judge in favor of the asserted higher law.”<sup>233</sup> The court also stated:

In a capital case like this one, the prosecution’s invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be

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228. *Id.* (quoting *Williams v. State*, 522 So.2d 201, 209 (Miss. 1988)).

229. See AM. BAR ASS’N, *supra* note 5, at 3-6.8(c) (“The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact.”); *infra* note 237.

230. *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2001).

231. *Id.*

232. *Id.*

233. *Id.*

constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict. The Biblical concepts of vengeance invoked by the prosecution here do not recognize such a refined approach . . . . Argument involving religious authority also undercuts the jury's own sense of responsibility for imposing the death penalty.<sup>234</sup>

A similarly improper closing argument occurred during the penalty phase closing argument in *Roybal v. Davis*.<sup>235</sup> After referring to the relevant statutes, the prosecutor stated:

There is another book, written long ago, that mentions the crime of murder, and mentions what is the appropriate penalty for the crime of murder, and that book says a couple of different things. It says, "Thou shalt not steal." It says, "Thou shalt not kill." It says "And if he smite with an instrument of iron so that he die, he is a murderer. The murderer shall surely be put to death." . . . It says, moreover, "Ye shall take no satisfaction for the life of a murderer which is guilty of death, but shall be surely put to death."<sup>236</sup>

The U.S. District Court for the Southern District of California stated that "[t]he prosecutor's reference to biblical authority was clear misconduct" because "[t]here could have been no purpose for this portion of the argument than to invite the jury to find support for a death verdict in the religious text."<sup>237</sup>

#### CONCLUSION

No article could possibly list every way that a prosecutor can stray from the duty to seek and do justice during trial. However, this Article has identified the most common ways that are considered to be violations of the duty in every jurisdiction in the country. The most common ways occur during jury selection, the opening statement, and the closing argument. Fortunately, these are all areas within the prosecutor's control. A prosecutor can never fully control what a witness may say during direct or cross-examination, and has almost no control over what the judge or defense attorney may say or do. However, a prosecutor is in full control of whether

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234. *Id.* at 776–77 (citations omitted).

235. *Roybal v. Davis*, 148 F. Supp. 3d 958, 1026 (S.D. Cal. 2015).

236. *Id.* at 1044.

237. *Id.* at 1044–45.

he or she uses peremptory strikes in a discriminatory manner, and is in full control of what he or she says during voir dire, the opening statement, and the closing argument. It is incumbent upon every prosecutor to learn the rules of trial and to follow them.

Prosecutors are faced with various objectives at trial, which may sometimes seem to be inconsistent to new prosecutors.<sup>238</sup> For instance, a prosecutor should pursue the conviction and punishment of lawbreakers, while avoiding the conviction of the innocent, and while ensuring that all people are treated fairly in the criminal justice system.<sup>239</sup> However, an experienced, educated prosecutor knows that these objectives are not inconsistent when viewed in terms of the overarching duty to seek and do justice by following the rules.

One objective that all prosecutors must have during trial is to prevent the reversal of convictions on appeal. Prosecutors should keep this objective in mind when tempted to gain an advantage by skirting the rules. As Ralph W. Sockman famously stated, “Be careful that victories do not carry the seed of future defeats.”<sup>240</sup> Purposefully engaging in improper conduct that results in a conviction that is reversed on appeal is really no victory at all, nor can it be considered seeking and doing justice.

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238. See generally Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 642 (1999) (“[A] prosecutor is a representative of, as well as a lawyer for, a government entity that has several different, sometimes seemingly inconsistent, objectives in the criminal context.”).

239. See *id.*

240. *Ralph W. Sockman Quotes*, QUOTES.NET, <https://www.quotes.net/quote/7729> (last visited Apr. 20, 2020).