

Presented By:  
The Florida Bar Criminal Law Section

# **Closing Arguments in Criminal Cases** Updated Case Law Manual



By:  
Douglas Duncan, Esquire  
Honorable Ted Booras  
Richard Polin, Assistant Attorney General

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## I. INTRODUCTION

Approximately ten years ago The Criminal Law Section published “Closing Argument in Criminal Cases Manual and Caselaw.” Additionally, a training video was prepared which presented mock closing arguments and accompanying legal analysis. Since then these materials have been used throughout the State to help train lawyers in making proper, ethical closing arguments in criminal cases.

The Criminal Law Section is now pleased to publish this Updated Case Law Manual. While the overwhelming caselaw contained herein concerns improper conduct of prosecutors, this is not to suggest that criminal defense attorneys are not also making improper closing arguments. It is incumbent that both prosecutors and defense counsels “[must avoid improper argument if the system is to work properly.]” Luce v. State, 642 So.2d 4 (Fla. 2d DCA 1994) (J. Blue, concurring opinion). All parties are reminded that:

The proper exercise of closing arguments is to review the evidence...it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. Bertolotti v. State, 476 So.2d 130, 131 (Fla. 1985).

The Criminal Law Section is comprised of judges, prosecutors, defense attorneys (public and private), and law professors. We continue to take our role in ethical trial litigation very seriously.

Douglas Duncan, Esquire  
Honorable County Court Judge Ted Booras  
Richard Polin, Esquire, Assistant Attorney  
General

## **II. CLOSING ARGUMENT CASE LAW**

### A. PERSONAL ATTACKS ON DEFENDANT:

1. Improper to refer to a defendant in a manslaughter case as “a young Mr. Hitler.” *Copertino v. State*, 726 So.2d 330, 334 (Fla. 4<sup>th</sup> DCA), *rev. denied*, 735 So.2d 1284 (Fla. 1999).
2. Improper to comment that a defendant is “repulsive,” “has a face of a liar,” “treats his wife like a dog”/“is an actor”/“is nothing more than a used car salesman like Robin Williams in the movie Cadillac man.” *Walker v. State*, 710 So.2d 1029 (Fla. 3d DCA 1998).
3. Improper to attribute criminal conduct to a defendant based on racial or ethnic background. *Wallace v. State*, 768 So.2d 1247 (Fla. 1<sup>st</sup> DCA 2000); *Terrazas v. State*, 696 So.2d 1309 (Fla. 2d DCA 1997), *see also*, *Reynolds v. State*, 580 So.2d 254 (Fla. 1<sup>st</sup> DCA 1991).
4. Improper to call a witness a racist and then argue that the defendant thought like one, too. *Perez v. State*, 689 So.2d 306 (Fla. 3d DCA 1997).
5. Improper to apply offensive epithets to a defendant or to engage in vituperative characterizations of the defendant. *Biondo v. State*, 533 So.2d 910 (Fla. 2d DCA 1988)(“slime”); *Hippensteel v. State*, 525 So.2d 1027 (Fla. 5<sup>th</sup> DCA 1988)(“punk”); *Duque v. State*, 498 So.2d 1334 (Fla. 2d DCA 1986)(“scum bag”); *Green v. State*, 427 So.2d 1036 (Fla. 3d DCA), *rev. denied*, 438 So.2d 834 (Fla. 1983)(“dragon lady”).
6. Improper to make repeated references to the defendant as a criminal and convicted felon where, although technically correct, the comments became a feature of the trial. *Pacifico v. State*, 642 So.2d 1178 (Fla. 1<sup>st</sup> DCA 1994).
7. Improper, without record proof, to argue that the defendant’s testimony was rehearsed or that the defendant improperly suggested to another witness how to testify. *Cooper v. State*, 712 So.2d 1216 (Fla. 3d DCA), *rev. denied*, 720 So.2d 518 (Fla. 1998); *Tran v. State*, 655 So.2d 141 (Fla. 4<sup>th</sup> DCA 1995); *Henry v. State*, 651 So.2d 1267 (Fla. 4<sup>th</sup> DCA 1995); *Villavicencio v. State*, 449 So.2d 966 (Fla. 5<sup>th</sup> DCA), *rev. denied*, 456 So.2d 1182 (Fla. 1984).
8. Improper to compare the defendant to “Pinocchio.” *Ruiz v. State*, 743 So.2d 1, 5 (Fla. 1999).

9. Improper to argue that a defendant “would not know the truth if it hit him up side the head.” *Henderson v. State*, 727 So.2d 284, 285 (Fla. 2d DCA 1999).
10. Improper for a prosecutor to argue: “there’s a lot of rules and procedures that I have to follow in court and there is a lot of things I can say or can’t say, but there is one thing the judge can’t ever make me say and that is he can never make me say that [the defendant] is a human being.” *Gore v. State*, 719 So.2d 1197, 1201 (Fla. 1998).
11. Improper, without evidentiary support, to refer to a murder defendant as “a killer out to establish his reputation with his biker club,” or as a “cold blooded killer.” *Henry v. State*, 743 So.2d 52, 53 (Fla. 5<sup>th</sup> DCA 1999).
12. Improper for a prosecutor to ask the jurors whether they would buy an umbrella from the defendant if the defendant told them that it was raining inside the courthouse. *Izquierdo v. State*, 724 So.2d 124, 126 n.2 (Fla. 3d DCA 1998), *rev. denied*, 767 So.2d 457 (Fla. 2000).
13. Improper for the prosecution to comment on a defendant’s demeanor off the witness stand. *Rodriguez v. State*, 609 So.2d 493, 500 (Fla. 1992), *cert. denied*, 510 U.S. 830 (1993)(improper to argue that the person who committed crime was “[t]his man [indicating the defendant] with his eyes closed sleeping over here”); *see also*, *Baldez v. State*, 679 So.2d 825 (Fla. 4<sup>th</sup> DCA 1996)(improper to argue that defendant was glaring at child witness from defense table).

However, it is permissible for the prosecution to comment on the defendant’s demeanor when the defendant takes the stand and testifies. *Parker v. State*, 641 So.2d 483 (Fla. 5<sup>th</sup> DCA 1994).

14. Improper in drug prosecution to argue that defendant was arrested in a high-crime area or known drug location. *Johnson v. State*, 670 So.2d 1121 (Fla. 5<sup>th</sup> DCA 1996).
15. Improper to refer to defendant as a pervert. *Pendarvis v. State*, 752 So. 2d (Fla. 2d DCA 2000)(“To underhandedly characterize him [defendant] to the jury as a pervert was not only improper in that it obviously intended to inflame the jury, but also was a clear violation of a prosecutor’s duty to fairly present the evidence and permit the jury to come to a fair and impartial verdict.”)
16. Reference to defendant as the devil while ill advised may not constitute reversible error. *Hannon v. State*, 941 So. 2d 1108 (Fla. 2006). (Sometimes you need to make a deal with a sinner in order to get the devil. That’s what we did in this case. We dealt with him to get the devil).

*Moore v. State*, 820 So. 2d 199 (Fla.2002)(“Crime conceived in hell will not have any angels as witnesses. And, ladies and gentlemen, as true as that statement is, Grand Park is hell. And that man right there is the devil...But, ladies and gentlemen, sometimes you have to deal with sinners to get the devil. And I would submit to you what the State did was we dealt with the sinner and we dealt with this sinner to get this devil.” The two isolated references to Moore as “the devil” in this instance were ill advised, but not reversible error.)

## B. ATTACKS ON DEFENSE COUNSEL AND WITNESSES

1. Improper to accuse defense counsel of doing anything at all costs to get an acquittal rather than searching for the truth. *Jenkins v. State*, 563 So.2d 791 (Fla. 1<sup>st</sup> DCA 1990).
2. Improper to argue that defense attorneys operate in a sinister manner, and criticize them. *Cochran v. State*, 280 So.2d 42 (Fla. 1<sup>st</sup> DCA 1973). Improper to refer to criminal defense attorneys as “hired guns.” *Walker v. State*, 707 So.2d 300, 315 (Fla. 1997).
3. Improper to characterize defense counsel’s argument as “misleading and a smoke screen.” *Waters v. State*, 486 So.2d 614, 616 (Fla. 5<sup>th</sup> DCA 1986). *Accord Crump v. State*, 622 So.2d 963, 971 (Fla. 1993)(improper to characterize defense as “an octopus clouding the water in order to slither away”); *see also*, *Brown v. State*, 733 So.2d 1128 (Fla. 4<sup>th</sup> DCA 1999); *Briggs v. State*, 455 So.2d 519 (Fla. 1<sup>st</sup> DCA 1984).
4. Improper to argue that defense counsel used “cheap tricks.” *Reddish v. State*, 525 So.2d 928, 929 (Fla. 1<sup>st</sup> DCA 1988); *see also* *Simpson v. State*, 352 So.2d 125, 126 (Fla. 1<sup>st</sup> DCA 1977)(improper for prosecutor to argue “one of the favorite tricks of a defense attorney”).
5. Improper to suggest that defense counsel is not being truthful. *Landry v. State*, 620 So.2d 1099 (Fla. 4<sup>th</sup> DCA 1993); *see also* *Valdez v. State*, 613 So.2d 916, 917 (Fla. 4<sup>th</sup> DCA 1993)(defense “really doesn’t give you an accurate story”); *Huff v. State*, 544 So.2d 1143, 1144 (Fla. 4<sup>th</sup> DCA 1989) (improper reference to defense as “fabrication”); *Briggs v. State*, 455 So.2d 519 (Fla. 1<sup>st</sup> DCA 1984); *see generally* *Lewis v. State*, 780 So.2d 125(Fla. 3d DCA, 2001) (error to argue that opposing counsel is trying to confuse or mislead the jury).
6. Improper to comment that one of the amusing things about defense counsel is the arguments they will come up with. *Melton v. State*, 402 So.2d 30 (Fla. 1<sup>st</sup> DCA 1981); *Carter v. State*, 356 So.2d 67 (Fla. 1<sup>st</sup> DCA 1978)(“it’s almost criminal sometimes the extent these people go to

represent these criminals”); *see also Kellogg v. State*, 761 So.2d 409 (Fla. 2d DCA 2000).

7. Improper to put defense counsel in the place of the victim when discussing what defense counsel would have done. *Palazon v. State*, 711 So.2d 1176, 1177 (Fla. 2d DCA 1998)(defense counsel would “be a pretty tough rape victim”).
8. Improper to argue that defense counsel was insulting the jury’s intelligence. *Alvarez v. State*, 574 So.2d 1119, 1121 (Fla. 3d DCA 1991).
9. Improper for the prosecution to ask jurors whether they would buy a used car from [defense counsel]. *Jackson v. State*, 421 So.2d 15, 16 (Fla. 3d DCA 1982); *see also Barnes v. State*, 743 So.2d 1105, 1106 (Fla. 4<sup>th</sup> DCA), *rev. denied*, 744 So.2d 457 (Fla. 1999)(defense counsel’s statements were “the mercenary actions of a hired gun.”); *Ryan v. State*, 457 So.2d 1084, 1089 (Fla. 4<sup>th</sup> DCA 1984), *rev. denied*, 462 So.2d 1108 (Fla. 1985)(referring to defense counsel as “out of town”).
10. Improper to argue that the police have to “deal with people like...[defendant’s] lawyer.” *Peterson v. State*, 376 So.2d 1230, 1233 (Fla. 4<sup>th</sup> DCA 1979), *cert. denied*, 386 So.2d 642 (Fla. 1980).
11. Improper to suggest that defense counsel was “fishing for gullible jurors.” *Baker v. State*, 705 So.2d 139 (Fla. 3d DCA 1998).
12. Improper to argue that defense counsel “probably would make an excellent armed robber and he would probably handle being robbed in a better situation....It’s easy for him to come in here in hindsight, 20/20 vision and say how this robbery could have been handled by the victim any differently.” *Riggins v. State*, 757 So.2d 567, 569 (Fla. 2d DCA 2000).
13. Improper to criticize defense counsel for cross-examining a child victim in a sex case. *Fuller v. State*, 540 So.2d 182 (Fla. 5<sup>th</sup> DCA 1989).
14. Improper to attack the credibility of defense counsel for objecting during trial to the attempted introduction of hearsay evidence. *Knight v. State*, 672 So.2d 590 (Fla. 4<sup>th</sup> DCA 1996).
15. Improper for the prosecutor to argue: “[Defense counsel] is a good attorney. She’s appointed to represent Mr. Hightower. She’s an assistant public defender. She doesn’t get to choose her clients, and it’s her job and she does a good job and she does good at confusing witnesses, trying to put words in the witnesses’ mouths as she did on her cross-examination.” *Hightower v. State*, 592 So.2d 689, 690 (Fla. 3d DCA 1991).

16. It was proper advocacy for the prosecutor to argue that defense counsel's claim that the evidence was insufficient was to be expected because "That's her job. She is defending the defendant...When you have the law, you [emphasize] the law. When you have the facts, you emphasize the facts. And when you don't have anything, you bang on the table and attack the credibility of the witnesses." *DeJesus v. State*, 684 So.2d 875, 876 (Fla. 3d DCA 1996).
17. Improper for the prosecutor to argue that former defense counsel's testimony was "the mercenary actions of a hired gun."
18. Improper for the prosecutor to attack the credibility of defendant's wife testifying as an alibi witness by telling the jury, in closing argument, that the wife was not listed as a witness until four months after the defendant was arrested. *Willis v. State*, 669 So.2d 1090 (Fla. 3d DCA 1996).
19. Improper for a prosecutor to attack the credibility of a witness by asking "whether the witness slept with the victim without knowing his last name." *Hahn v. State*, 626 So.2d 1056, 1058 (Fla. 4<sup>th</sup> DCA 1993).
20. It is not improper for a prosecutor to argue that a juvenile witness was not involved in the burglary for which the defendant was on trial, even though the juvenile witness confessed and plead guilty to the crime in juvenile court. *Martin v. State*, 710 So.2d 58 (Fla. 4<sup>th</sup> DCA 1998).
21. Although not per se reversible as harmful error, the law is clear that attacks on defense counsel are highly improper and impermissible. *Lewis v. State*, 780 So.2d 125 (Fla. 3d DCA 2001); and, *Adams v. State*, 830 So.2d 911 (Fla. 3d DCA 2002)(Prosecutor's repeated derogatory closing remarks about defense counsel, and his improper comment on defendant's failure to take the stand, warranted mistrial; effect of remarks could not be remedied by a curative instruction.

#### C. PERSONAL ATTACK ON THEORY OF DEFENSE

1. A prosecutor may not make comments to discredit a legally recognized defense. Such comments constitute reversible error, whether made on cross-examination or during closing argument. *Garron v. State*, 528 So. 2d 353, 357 (Fla. 1988) (prosecutor repeatedly tried to discredit insanity defense); *Miller v. State*, 712 So.2d 451, 452-53 (Fla. 2d DCA 1998) ("their defense [voluntary intoxication] is defense of lack of responsibility. That's simply what it is"); *Taylor v. State*, 640 So. 2d 1127, 1133 (Fla. 1<sup>st</sup> DCA 1994), *rev. denied*, 649 So. 2d 235 (Fla. 1994) (prosecutor referred to defendant's insanity defense as "cop out"); *Riley v. State*, 560 So. 2d 279 (Fla. 3d DCA 1990).



2. Improper for a prosecutor to argue: “I have 10 minutes to talk to you about the defense of insanity. The defense by which a person comes into court and says, I murdered a 15 year old girl...and I get to walk. I get to get off. I am not legally guilty. I am not responsible and you cannot hold me responsible.” *Rosso v. State*, 505 So. 2d 611, 612 (Fla. 3d DCA 1987).

It is permissible, however, for a prosecutor to argue that based on all of the facts the defendant’s reliance on an insanity defense is incredible. *Blaylock v. State*, 537 So. 2d 1103, 1108 (Fla. 3d DCA 1988), *rev. denied*, 547 So. 2d 1209 (Fla. 1989).

3. Characterization of the mitigating circumstances as flimsy, phantom, and repeatedly characterizing such circumstances as excuses, was clearly an improper denigration of the case offered by the defendant. *Brooks v. State*, 762 So. 2d 879 (Fla. 2000).
4. The court felt obligated to comment on the impropriety of the prosecutor’s comments, which inferred the defendant has suborned perjury and had otherwise introduced manufactured testimony by the defense witnesses. The prosecutor stated: “The stream from which [the defense] evidence came is corrupt, it’s corrupt because it’s not truthful. It’s not truthful, it’s corrupt, and it’s polluted. It’s ridiculous, the case that they presented, and why did they present a case like this, why? Because [Cooper’s] back is against the wall and he has nowhere else to go, so he gets these three people, his friends.” *Cooper v. State*, 712 So. 2d 1216, 1217 (Fla. 3d DCA 1998).

#### D. PERSONAL OPINION OF PROSECUTOR

1. It is not per se improper to use the personal pronoun “I,” or to say “I think” or “I believe.” These phrases do not express a personal opinion, but are simply figures of speech. *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010, 1029 (Fla. 2000).
2. A prosecutor may not express a personal belief in the guilt of the accused or about the credibility of witnesses. *Cochran v. State*, 711 So. 2d 1159 (Fla. 4<sup>th</sup> DCA 1998); *Lewis v. State*, 711 So. 2d 205 (Fla. 3d DCA 1998); *Cummings v. State*, 412 So. 2d 436 (Fla. 4<sup>th</sup> DCA 1982).
3. Improper for the prosecutor to state: “it is not my job to prosecute innocent people,” *McGuire v. State*, 411 So. 2d 939, 940 (Fla. 4<sup>th</sup> DCA 1982), or “my response to that is, doesn’t that demonstrate to you the vigor and conviction I have about this case..It is obvious. It is so apparent what justice is in this case, to find this defendant guilty for what everyone

in this courtroom knows he did.” *D’Ambrosio v. State*, 736 So. 2d 44, 47 (Fla. 5<sup>th</sup> DCA 1999).

4. Improper for a prosecutor during cross-examination of the defendant to comment “I don’t like people who kill women...I am [trying to kill you] because somebody who does what you do deserves to die.” *Gore v. State*, 719 So. 2d 1197, 1201 (Fla. 1998).
5. Reversible error to tell the jury: “ I can look each of you right straight, square in the eye and never bat my eye, and tell you I believe with my heart, mind and soul, this defendant to be guilty.” *Wilson v. State*, 371 So. 2d 126, 127 (Fla. 1<sup>st</sup> DCA 1978).
6. Reversible error for the prosecutor to say: “All the State asks for in this case is fairness. The State doesn’t prosecute someone because of their religion or their race or their nationality. We prosecute them because we believe they are guilty of crimes.” *Reed v. State*, 333 So. 2d 524, 525-26 (Fla. 1<sup>st</sup> DCA 1976).
7. Improper for the prosecutor to say: “I don’t come into a courtroom with the wrong persons...If that woman goes to jail that is on my conscience...I would cry at night if that girl is innocent behind bars. I wouldn’t sleep.” *Dugue v. State*, 460 So. 2d 416, 418 (Fla. 2<sup>d</sup> DCA 1984), *rev. denied*, 467 So. 2d 1000 (Fla. 1985).
8. Improper argument for the prosecutor to argue: “Defense counsel said ‘I don’t like him either. I don’t like people who rape, rob, burglarize.’” *Conley v. State*, 592 So. 2d 723, 731 (Fla. 1<sup>st</sup> DCA 1992), *rev’d on other grounds*, 620 So. 2d 180 (Fla. 1993).
9. Improper for the prosecutor to ask: “[w]hat interest do we as representatives of the citizens of this county have in convicting somebody other than the [defendant].” Those statements suggest to the jury that the defendant already has been found guilty. *Ruiz v. State*, 743 So. 2d 1, 5 (Fla. 1999).
10. Improper where prosecutor’s statement offering a guarantee that the defendant could not look Levi in the eye was the equivalent of the prosecutor guaranteeing that the defendant was lying. *Kelly v. State*, 842 So. 2d 223 (Fla. 1<sup>st</sup> DCA 2003).

#### E. GOLDEN RULE

1. In general, it is improper to ask the jurors to place themselves in the victim’s position, imagine what the victim felt or went through, or to argue that the jurors may be future victims of the defendant by acquitting the

defendant. *State v. Wheeler*, 468 So. 2d 978 (Fla. 1985); *Defreitas v. State*, 701 So. 2d 593 (Fla. 4<sup>th</sup> DCA 1997).

2. Improper to point a shotgun at one juror while commenting that this was same circumstance that confronted the victim. *Jenkins v. State*, 563 So. 2d 791 (Fla 1<sup>st</sup> DCA 1990). Also improper to say: “It’s a gun with a laser on it. Just imagine how terrifying this laser would be if it was on your chest?” *DeFreitas v. State*, 701 So. 2d 593, 601 (Fla. 4<sup>th</sup> DCA 1997).
3. Improper to ask the jury to imagine the pain and suffering that the victim felt after getting shot in the chest. *See Muhammad v. State*, 782 So.2d 343, 360 (Fla. 2001); *Garron v. State*, 528 So. 2d 353, 358-59 (Fla. 1988).
4. Not improper for the state in closing argument to ask the jury to consider the circumstances facing the child as a plausible explanation for the confusion about certain testimony. The argument was “not a plea for the jury to abandon its obligation to determine the case based solely on the evidence and place itself in the victim’s position.” *Williams v. State*, 689 So. 2d 393,399 (Fla. 3d DCA), *rev. denied*, 697 So. 2d 513 (Fla. 1997).
5. Prosecutor’s comment (“how are you going to get around that”) was rhetorical, not used in an attempt to ask jurors to place themselves in the shoes of anyone else. *Parsonson v. State*, 742 So. 2d 858, 859 (Fla. 2d DCA 1999).
6. Prosecutor’s comment in sexual battery case “I submit to you if you were a young woman, 12:30 at night, and you’re in your car, and you have a man with his penis hanging out...” is improper golden rule argument. *Geske v. State*, 770 So. 2d 252, 253 (Fla. 5<sup>th</sup> DCA 2000).
7. *Urbin v. State*, 714 So. 2d 411 (Fla. 1998) (Imaginary script where prosecutor stated victim died pleading for this life was improper.); and, *Doorbal v. State*, 837 So. 2d 940 (Fla. 2002) (improper “Golden Rule” argument asking jurors to imagine the pain with being tasered).

#### F. MESSAGE TO COMMUNITY

1. Improper to ask the jury to send a message to the community by sentencing the defendant to death. *Campbell v. State*, 679 So. 2d 720 (Fla. 1996); *Boatwright v. State*, 452 So. 2d 666, 667 (Fla. 4<sup>th</sup> DCA 1984) (“I’m asking you to send a message to folks that we’re not going to put up with this.”).
2. Improper to argue that a guilty verdict will send a message to the community that the defendant’s conduct is unacceptable. *Williard v. State*, 462 So. 2d 102 (Fla. 2d DCA 1985).

3. Improper to make sarcastic comment that potential criminals will find encouragement in a not guilty verdict. *Perdomo v. State*, 439 So. 2d 314 (Fla. 3d DCA 1983).
4. Improper to argue: “after hearing the facts, if you want to let [the defendant] walk out of here, if you want to let this horrible crime go on here in this county.” *McMillan v. State*, 409 So. 2d 197, 198 (Fla. 3d DCA 1982).
5. Improper to argue: “you have the ultimate power over controlling drug abuse for...[t]he welfare of the citizens of Florida and the People of [this county], I’m contending, ask that you return a verdict of guilty[.]” *Reed v. State*, 333 So. 2d 524, 525 (Fla. 1<sup>st</sup> DCA 1976).
6. Improper to argue: “I’m asking you to return a verdict...that you can feel good about and be proud of, I am asking you to tell the community that you are not going to tolerate the violence that took place [here].” *Hines v. State*, 425 So. 2d 589, 591 (Fla. 3d DCA 1982), *rev. denied*, 430 So. 2d 452 (Fla. 1983).
7. Improper to argue that any verdict other than guilty would establish “a one free murder rule” in the community. *Cochran v. State*, 711 So. 2d 1159, 1162 (Fla. 4<sup>th</sup> DCA 1998).
8. Improper to argue that Miami is a place “where death is cheap,” and that “the law protects all of us or the law protects none of us...in the south we saw it happen to Blacks. In Germany we saw it when it happened to the Jews.” *Del Rio v. State*, 732 So. 2d 1100, 1101 (Fla. 3d DCA 1999).
9. Improper to argue in a trafficking in cocaine case that “the substance was cocaine. Obviously, we’re not talking about sugar here, and this substance does not make lemonade. This substance makes crack cocaine that we find out on the streets of our cities day in and day out. Crack cocaine that destroys people and their families.” *Sandoval v. State*, 689 So. 2d 1258, 1259 (Fla. 3d DCA 1997).
10. Improper to argue that “your verdict is not to send a message to [the deputy]. Believe me, I already took care of that out in the hall after you folks were excused...your verdict is not to send a message to anybody, not my office.” *Caraballo v. State*, 762 So. 2d 542, 543-44 (Fla. 5<sup>th</sup> DCA 2000) (opinion lists 16 improper comments by prosecutor).
11. Telling the jury that they spoke on behalf of their community was an impermissible appeal to the conscience of the community, but argument deemed harmless. *Smith v. State*, 818 So. 2d 707 (Fla. 2d DCA 2002).

## G. JURY SYMPATHY OR FEAR

1. Closing arguments must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime of the defendant. *King v. State*, 623 So. 2d 486, 488 (Fla. 1993) (improper penalty closing argument that jurors “would be cooperating with evil and would themselves be involved in evil just like [the defendant]” if they recommended life imprisonment); *See also Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988) (“When comments in closing argument are intended to and do inject elements of emotion and fear in the jury’s deliberations, a prosecutor has ventured far outside the scope of proper argument.”); *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985) (“The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must both be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence and the applicable law.”)
2. The prosecutor was guilty of misconduct during final argument by impermissibly making a comparison between the defendant’s case and the “O.J. Simpson” case. *DeFreitas v. State*, 701 So. 2d 593 (Fla. 4<sup>th</sup> DCA 1997).
3. Improper for a prosecutor in a trial for carrying a concealed firearm to argue: “If you read the newspapers today, there was a funeral of an officer.” *Freeman v. State* 717 So. 2d 105, 106 (Fla. 5<sup>th</sup> DCA 1998).
4. Improper for the prosecutor in a “possession” of cocaine and marijuana case to argue that the defendant was “a drug dealer” when the defendant was not charged with selling drugs or with possession with intent to sell drugs. *Jackson v. State*, 690 So. 2d 714, 717 (Fla. 4<sup>th</sup> DCA 1997).
5. Improper for the prosecutor to appeal to jury sympathy for a victim and for potential victims who may have been hurt in the high speed chase. *Blackburn v. State*, 447 So. 2d 424 (Fla. 5<sup>th</sup> DCA 1984).
6. Improper to say: “Don’t let [the victim] with three children and a wife walk away without justice in this case.” *Gomez v. State*, 415 So. 2d 822, 823 (Fla. 3d DCA 1982).
7. Improper to attempt to paint the victim as an object of sympathy and to color defendants as vile drug users who exposed their families to the street trade of drugs. *Gonzalez v. State*, 450 So. 2d 585 (Fla. 3d DCA), *rev. denied*, 458 So. 2d 274 (Fla. 1984).

8. Improper for prosecutor to ask whether a murder victim had ever seen his posthumously born child. *Macias v. State*, 447 So. 2d 1020 (Fla. 3d DCA 1984).
9. Improper for a prosecutor to strike a table with the murder weapon as well as his express conjecture concerning the child's dying words. *Taylor v. State*, 640 So. 2d 1127 (Fla. 1<sup>st</sup> DCA), *rev. denied*, 649 So. 2d 235 (Fla. 1994).
10. Prosecutor's demonstration during closing argument in which he repeatedly struck a stack of books on his table with the aluminum strip to demonstrate that the strip could cause great bodily harm, was misleading and inaccurate because it did not fairly resemble the evidence at trial. *Nardone v. State*, 798 So. 2d 870 (Fla. 4<sup>th</sup> DCA 2001).
11. In *Dial v. State*, 922 So. 2d 1018 (Fla. 4<sup>th</sup> DCA 2006), the defendant was convicted of aggravated manslaughter of a child. During the prosecutor's rebuttal closing argument, the prosecutor told the story of the case through the voice of the eight (8) year old victim. The argument began "Hi, I'm Joy and I'm 8," and continued in the first person for 10 pages of transcript. The court noted that while the prosecutor is not limited to a "flat, robotic recitation of just the facts," *Diaz v. State* 797 So. 2d 1286, 1287 (Fla. 4<sup>th</sup> DCA 2001), in this case, the prosecutor's closing through the perspective of the eight (8) year old victim improperly appealed to the jury for sympathy and hostility toward the defendant.
12. In *Cronin v. State*, 863 So. 2d 412, 413 (Fla. 4<sup>th</sup> DCA 2003), improper for prosecutor to refer to upcoming "Mother's Day," in trial wherein defendant was charged with attempted murder of his mother.

#### H. PROSECUTOR VOUCHING FOR WITNESS CREDIBILITY

1. Improper to argue that jury should believe police officer because the officer would not put his career on the line by committing perjury. *Sinclair v. State*, 717 So. 2d 99 (Fla. 4<sup>th</sup> DCA 1998); *Davis v. State*, 663 So. 2d 1379 (Fla. 4<sup>th</sup> DCA 1995); *Clark v. State*, 632 So. 2d 88 (Fla. 4<sup>th</sup> DCA 1994).
2. Improper to argue that the officer must be believed solely because he is a police officer. *Freeman v. State*, 717 So. 2d 105 (Fla. 5<sup>th</sup> DCA 1998); *Robinson v. State*, 637 So. 2d 998 (Fla. 1<sup>st</sup> DCA 1994).
3. Improper to refer repeatedly to the officer's "unblemished record." *Landry v. State*, 620 So. 2d 1099 (Fla. 4<sup>th</sup> DCA 1993).

4. Improper to argue that the state believes the police officer. *Blackbarn v. State*, 447 So. 2d 424 (Fla. 5<sup>th</sup> DCA 1984).
5. Improper to argue that the police officer had been chosen “officer of the year” and would not lie to convict the defendant. *Livingston v. State*, So. 2d 591, 592 (Fla. 2d DCA 1996); *see also Buckner v. State*, 689 So. 2d 1202 (Fla. 3d DCA 1997).
6. Improper to argue that a police officer who testified for the state in a narcotics prosecution was “not the type of man to come in and violate [his] sacred oath.” *Cisneros v. State* 678 So. 2d 888, 889 (Fla. 4<sup>th</sup> DCA 1996).
7. Improper to argue to jury that defendant lied. *Bass v. State*, 547 So. 2d 680, 681 (Fla. 1<sup>st</sup> DCA), *rev. denied*, (Fla. 1989):

As many years as I have been a trial lawyer, I’m always flabbergasted by the fact that literally every trial somebody is going to come up here and raise their hand before God to tell the truth and they’re going to lie. Somebody lied today. There is no way to get around it. Somebody lied today, and it is just absolutely phenomenal to me as many times as I have done this that people are able to come in here and raise their hand before God and flat out lie...Now, your verdict is going to tell somebody they lied. If you are going to tell Tom Swafford [the police officer] he lied today, find this fellow not guilty. If you want to tell Jimmy Wayne Bass [the defendant] he lied, there is only one verdict, guilty. The man is guilty.”

8. Improper to argue that the victim “was honest. He didn’t lie. He didn’t exaggerate, He didn’t lie...Don’t let [the defendant] walk because [the victim] is super honest or super accurate.” *Lewis v. State*, 711 So. 2d 205,207 (Fla. 3d DCA), *rev. denied*, 725 So. 2d 1109 (Fla. 1998).
9. Improper to argue that jury should believe the police officer because the officer would not put his career on the line by committing perjury. *Davis v. State*, 937 So. 2d 273 (Fla. 5<sup>th</sup> DCA 2006); *Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001).
10. Improper to argue that arresting officer’s interest in the case was not “great enough to lie, to get up here, to take an oath and perjure himself.” *McCoy v. State*, 928 So. 2d 503 (Fla. 4<sup>th</sup> DCA 2006).
11. Improper bolstering to argue that “[t]hey want you to think that these officer(s), everyone of these officers would put their careers at stake after they have been police officers so long on this case,” and “[w]hy would he

risk his career and all the other officers.” *Mazile v. State*, 798 So. 2d 833 (Fla. 3d DCA 2001).

12. Prosecutor’s remarks did not constitute improper bolstering where prosecutor argued that retired police officers had nothing to prove, and that if they wanted to make up a story and put words in defendant’s mouth, they would have made a better story. The comments only pointed out that, “given the facts at hand, it was unlikely either that the officers’ testimony concerning the recitation of events surrounding Johnson’s admissions were untrue or that Johnson had been coerced as the defense suggested.” *Johnson v. State*, 858 So. 2d 1274 (Fla. 3d DCA 2003).
13. Improper to argue that the officer must be believed solely because he is a police officer. *Johnson v. State*, 801 So. 2d 141 (Fla. 4<sup>th</sup> DCA 2001).
14. Comments that officer came and testified, that it was officer’s job to investigate, that officer told jury what happened and had no interest how the case was decided was deemed improper and analogized to cases holding that it is improper to tell jury to believe an officer simply because he or she is an officer. *Servis v. State*, 855 So. 2d 1194 (Fla. 5<sup>th</sup> DCA 2003).
15. Prosecutor improperly vouched for credibility of police officer witness by stating that the officer was “our public servant” who was “sworn to protect” and that the officer came “in here and she has taken an oath.” *Jorlett v. State*, 766 So. 2d 1226 (Fla. 5<sup>th</sup> DCA 2000).
16. Improper to argue that officer was “just doing his job and telling you all the truth,” and that officer had “no reason to pick out this defendant from anyone else in the street and arrest him for burglary...” *Williams v. State*, 747 So. 2d 474 (Fla. 5<sup>th</sup> DCA 1999).
17. References to defendant as a liar, whose in-court version of events constituted “lies” and a “cockamamie story,” and who was “a big zero,” with “no credibility whatsoever,” were improper and resulted in harsh admonition of prosecutor in appellate court’s opinion. *Gomez v. State*, 751 So. 2d 630 (Fla. 3d DCA 1999).
18. Although prosecutor may argue that defendant’s testimony was not credible, if the record evidence suggests that it is not, prosecutor could not argue that defendant’s lack of candor was scripted by defense counsel. *Lewis v. State*, 780 So. 2d 125, 130 (Fla. 3d DCA 2001) (*see also* cases cited in section J, *infra*).
19. Comments referring to victim as “very honest” while testifying, and as well as arguing “honest,” “very candid,” and “a credible witness,” were



improper. The prosecutor added that he thought what the victim said was true and was truthful testimony. *Myers v. State* 788 So. 2d 1112 (Fla. 2d DCA 2001).

20. Decisions finding prosecutor's comments improper regarding the truthfulness or lack of truthfulness of defendants or other witnesses should be considered in the context of other cases which have noted that prosecutors' arguments regarding credibility of witnesses, including defendants, are permissible when they are based on evidence in the case. "Except to the extent he bases any opinion on the evidence in the case, [prosecutor] may not express his personal opinion on the merits of the case or the credibility of witnesses." *Ruiz v. State*, 743 So. 2d 1,4 (Fla. 1999), quoting *United States v. Garza*, 608 F. 2d 659, 662 (5<sup>th</sup> Cir. 1979).
21. Where prosecutor's isolated comment urging the jury to find the victim honest and straightforward was based "on the state of the evidence" before the jury, the comment was proper. *Yok v. State*, 891 So. 2d 602, 603 (Fla. 1<sup>st</sup> DCA 2005). The court noted that bolstering is improper when it "places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." *Id.*, quoting *Hutchinson v. State*, 882 So. 2d 943, 954 (Fla. 2004). "As a general rule, a prosecutor may argue any reasons, if supported by the evidence, why a given witness might or might not be biased in a case..." *Johnson v. State*, 858 So. 2d 1274, 1276 (Fla. 3d DCA 2001), quoting *Williams v. State*, 747 So. 2d 474, 475 (Fla. 5<sup>th</sup> DCA 1999).
22. "It is of course permissible for counsel to argue, based on the record, that one witness should be believed and another should not." *Convington v. State*, 842 So. 2d 170, 172 (Fla. 3d DCA 2003). Thus, comments that officers had no reason to lie and that the best evidence was the testimony of the officer were not deemed improper where the comments were not asking the jury to believe the officer simply because the officer was an officer. *Johnson v. State*, 801 So. 2d 141 (Fla. 4<sup>th</sup> DCA 2001). See also *Smith v. State*, 818 So. 2d 707 (Fla. 5<sup>th</sup> DCA 2002) (comments of prosecutor questioning what would cause officers to shade their testimony, embellish their testimony or perjure themselves were not improper where they were based on factors in standard jury instruction regarding evaluation of witnesses). See also *Miller v. State*, 936 So. 2d 1243 (Fla. 2006) (permissible to argue that eyewitnesses were worthy of belief where comment was based on evidence); *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004) (permissible to argue that witness had no motive to hurt defendant where argument was not based on facts outside the record); *Glispy v. State*, 940 So. 2d 608 (Fla. 4<sup>th</sup> DCA 2006) (prosecutor could properly argue that state trooper was being truthful where comment was not based on matters outside the record).

23. Improper to argue that State's witness "obviously isn't lying." *Richardson v. State*, 922 So. 2d 331 (Fla. 4<sup>th</sup> DCA 2006).
  24. Comment that sworn statements were taken to assure police department and State Attorney's Office that prosecution was in good faith was improper. *Cartwright v. State* 885 So. 2d 1010 (Fla. 4<sup>th</sup> DCA 2004). Such comments are analogous to expressions of personal opinions of prosecutors regarding the guilt of the defendant.
- I. ASKING JURY TO DETERMINE WHO WAS LYING AS TEST FOR DECIDING CASE
1. Improper for a prosecutor to ask the jury to determine who was lying as the test for deciding if the defendant was guilty because that invites the jury "to convict the defendant for a reason other than his guilt of the crimes charged." *Bass v. State*, 547 So.2d 680, 682 (Fla. 1<sup>st</sup> DCA), *rev. denied*, 553 So.2d 1166 (Fla. 1989); *see also Evre v. State*, 764 So.2d 798 (Fla. 2d DCA 2000)(jury should acquit if they thought officer was lying, but convict if they believed officer was not lying).
  2. Improper to state in opening statement that "after you review all the evidence...you will...come back with a verdict...that simply reflects the truth." Improper to argue in closing that "to find him not guilty you're going to have to believe that the defendant was telling the truth and officer was lying." *Northard v. State*, 675 So.2d 652, 653 (Fla. 4<sup>th</sup> DCA), *rev. denied*, 680 So.2d 424 (Fla. 1996).
  3. Improper to argue that the defendant's testimony "is not a reasonable doubt...You have to believe his story over the story of those police officers that saw him that night to have reasonable doubt." *Clewis v. State*, 605 So.2d 974 (Fla. 3d DCA 1992).
  4. Improper to argue that the only way to believe a murder defendant's version of events was to disbelieve a state witness's testimony. *Riggins v. State*, 757 So.2d 567 (Fla. 2d DCA 2000).
  5. Improper for prosecutor to argue to the jury: "If you believe he's lying to you, he's guilty." *Gore v. State*, 719 So. 2d 1197 (Fla. 1998).
  6. Improper to argue that the only way to believe defendant's version is to disbelieve another witness's testimony. *Perry v State*, 787 So. 2d 67 (Fla. 2d DCA 2001). It was improper for prosecutor to argue that the determination of whether the defendant possessed a weapon came down to whether the jury believed a police officer or another witness, as this misstated the burden of proof by allowing the jury to convict merely on

the determination that they did not believe a defense witness. *Covington v. State*, 842 So. 2d 170 (Fla. 3d DCA 2003).

7. It was improper burden shifting for prosecutor to argue that if the jury believed police officers instead of defendant, they should find the defendant guilty, and that the question was who to believe. *Freeman v. State*, 717 So. 2d 105 (Fla. 5<sup>th</sup> DCA 1998).
8. During closing argument, the prosecutor argued that “the state has the burden of proving all these elements beyond a reasonable doubt. And if the defense attorney wants to present theories of how she believes this case should play out, there has got to be some level of proof that the witness was lying.” The appellate court found the prosecutor’s comment improperly shifted the burden to the defendant because it insinuated that the defendant needed to prove that the prosecutor’s witness was lying in order to be found not guilty. *Paul v. State*, 980 So.2d 1282 (Fla. 4<sup>th</sup> DCA 2008).

#### J. CLAIMING WITNESS IS LIAR

1. Counsel in closing argument may characterize specific witnesses as “liars,” if counsel relates the argument solely to the testimony of the witnesses and evidence in the record. *Craig v. State*, 510 So.2d 857,865 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1998). *See also Davis v. State*, 937 So. 2d 273 (Fla. 4<sup>th</sup> DCA 2006); *Zack v. State*, 911 So. 2d 1190 (Fla. 2005); *Lugo v. State*, 845 So. 2d 74 (Fla. 2003).
2. Prosecutor’s question to witness regarding whether witness thought defendant’s statement that he was unaware that victim was pregnant at time of murder was an “outright lie,” was not improper, as it was made in fair reference to the evidence. *Blackwood v. State*, 946 So. 2d 960 (Fla. 2006).
3. There was no error when the prosecutor referred to certain statements in the defendant’s taped confessions as “bald face lies.” *Davis v. State*, 698 So.2d 1182, 1190 (Fla. 1997), *cert. denied*, 522 U.S. 1127 (1998).
4. The trial court erred in rebuking defense counsel in front of the jury by stating that defense counsel improperly had called state witnesses liars. *Brown v. State*, 678 So.2d 2d 910 (Fla. 4<sup>th</sup> DCA 1996), *see also Perry v. State*, 718 So.2d 1258 (Fla. 1<sup>st</sup> DCA 1998) (no error in prosecutor using word “lie” when commenting on defendant’s testimony).
5. Improper for a prosecutor simply to assert a personal opinion that a witness is a liar. *First v. State*, 696 So. 2d 1357 (Fla. 2d DCA 1997). *See also Montanye v. State*, 976 So. 2d 29(Fla. 5<sup>th</sup> DCA 2008)(comment that

defendant's brother was lying in court testimony was improper personal opinion); *Gomez v. State*, 751 So. 2d 630 (Fla. 3d DCA 1999) (reference to defendant as liar and defendant's version of events as "lies" was improper).

6. Comment that defense witnesses were all a pack of liars was improper. *Perry v. State*, 787 So. 2d 67 (Fla. 2d DCA 2001).
7. Improper for the prosecutor to suggest that the defendant suborned perjury or that a defense witness manufactured evidence, without a foundation in the record. *Cooper v. State*, 712 So. 2d 1216, 1217 (Fla. 3d DCA), *rev. denied*, 720 So.2d 518 (Fla. 1998) (prosecutor argued that "the stream from which [the defense] evidence came is corrupt, it's corrupt because it's not truthful"); *Servis v. State*, 855 So.2d 1194 (Fla. 5<sup>th</sup> DCA 2003).
8. References to defendant as a liar, whose in-court version of events constituted "lies" and a "cockamamie story," and who was "a big zero," with "no credibility whatsoever," were improper and resulted in harsh admonition of prosecutor in appellate court's opinion. *Gomez v. State*, 751 So.2d 630 (Fla. 3d DCA 1999).
9. Although prosecutor may argue that defendant's testimony was not credible, if the record evidence suggests that it is not, prosecutor could not argue that defendant's lack of candor was scripted by defense counsel. *Lewis v. State*, 780 So.2d 125, 130 (Fla. 3d DCA 2001) (*see also* cases cited in section H, *infra*).
10. Improper to argue that the victim "was honest. He didn't lie. He didn't exaggerate. He didn't lie....Don't let [the defendant] walk because [the victim] is super honest or super accurate." *Lewis v. State*, 711 So.2d 205, 207 (Fla. 3d DCA), *rev. denied*, 725 So.2d 1109 (Fla. 1998).
11. Comments referring to victim as "very honest with you when he came in here today," "honest," "very candid," and "a credible witness," were improper. The prosecutor added that he thought what the victim said was true and was truthful testimony. *Myers v. State*, 788 So.2d 1112 (Fla. 2d DCA 2001).
12. The foregoing cases finding comments improper regarding the truthfulness or lack of truthfulness of defendants or other witnesses should be considered in the context of other cases which have noted that prosecutors' arguments regarding credibility of witnesses, including defendants, are permissible when they are based on the evidence in the case. "Except to the extent he bases any opinion on the evidence in the case, [prosecutor] may not express his personal opinion on the merits of the case or the credibility of witnesses." *Ruiz v. State*, 743 So.2d 1, 4 (Fla. 1999), quoting *United States v. Garza*, 608 F.2d 659, 662 (5<sup>th</sup> Cir. 1979).

13. Where prosecutor's isolated comment urging the jury to find the victim honest and straightforward was based "on the state of the evidence" before the jury, the comment was proper. *Yok v. State*, 891 So.2d 602 (Fla. 1<sup>st</sup> DCA 2005). The court noted that bolstering is improper when it "places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." *Id.*, quoting *Williams v. State*, 747 So.2d 474, 475 (Fla. 5<sup>th</sup> DCA 1999).
14. "It is of course permissible for counsel to argue, based on the record, that one witness should be believed and another should not." *Covington v. State*, 842 So.2d 170, 172 (Fla. 3<sup>d</sup> DCA 2003).

#### K. FAILURE TO PRESENT WITNESSES

1. The general rule is that comments by a prosecutor that a defendant has failed to call a witness are improper because they may lead the jury to believe that the defendant has the burden of proving his innocence. *Evans v. State*, 838 So. 2d 1090 (Fla. 2002); *Whittaker v. State*, 770 So. 2d 737 (Fla. 4<sup>th</sup> DCA 2000).

A "narrow exception" to this rule was recognized by the Florida Supreme Court in *Jackson v. State*, 575 So. 2d 181,188 (Fla. 1991):

[W]hen the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, self defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the State.

*See also Rodriguez v. State*, 753 So.2d 29 (Fla. 2000); *Early v. State*, 915 So.2d 1288 (Fla. 2<sup>d</sup> DCA 2005); *Miele v. State*, 875 So.2d 812 (Fla. 2<sup>d</sup> DCA 2004); *Otero v. State*, 754 So. 2d 765 (Fla. 3<sup>d</sup> DCA 2000); *Conner v. State*, 910 So. 2d 313 (Fla. 5<sup>th</sup> DCA 2005).

2. In *Lawyer v. State*, 627 So.2d 564 (Fla. 4<sup>th</sup> DCA 1993), *dismissed*, 639 So.2d 981 (Fla. 1994), the Fourth District Court of Appeal held:

[T]he rule in this state is that the prosecution can comment on a defendant's failure to produce a witness only if:

- a) The defendant puts on evidence of defenses such as alibi or self- defense which reflects the existence of a witness who could give relevant testimony; *and*
- b) That witness has a special relationship with the defendant.

3. It was error for the state to comment on the defendant's failure to call his restaurant manager as there was no showing that the defendant had a special relationship with the manager, nor was the manager less equally available to the state to testify regarding the defendant's alibi. *Davis v. State*, 744 So.2d 1091 (Fla. 5<sup>th</sup> DCA 1999).
4. In a prosecution of the offense of operating a chop shop, it was improper for the prosecution to cross examine the defendant as to whether the owner of another business at the same site was going to testify. *Grant v. State*, 753 So. 2d 760 (Fla. 4<sup>th</sup> DCA 2000).
5. In *Reid v. State*, 799 So. 2d 394 (Fla. 4<sup>th</sup> DCA 2001), where the defendant asserted the defense of "mistaken self defense," and the defendant's wife would have had relevant information regarding that defense, the court rejected the defendant's argument that the prosecutor could not comment on his failure to call the wife because she was in Jamaica and he did not know where she was.
6. In *Hogan v. State*, 753 So. 2d 570 (Fla. 4<sup>th</sup> DCA 1999), the defendant and another individual were both homeless and the defendant's defense included the fact that this other homeless person told him that he could stay in an unoccupied dwelling. The Fourth District concluded that there was no "special relationship," and it was therefore improper for the prosecution to comment on the failure of the defense to call this individual as a witness.
7. Error to comment on "missing" witness when the defendant had not presented an affirmative defense for which he had the burden of proof. *White v. State*, 757 So.2d 542 (Fla. 4<sup>th</sup> DCA 2000).
8. In *Thomas v. State*, 726 So.2d 369, 370 (Fla. 4<sup>th</sup> DCA 1999), the prosecutor stated in closing argument "they told that she was gone into this unknown neighborhood to drop off a busboy. Where is this busboy today?" Even though the defense raised the subject of the busboy, and had placed the busboy in issue as an explanation for the otherwise suspicious circumstances leading up to the defendant's arrest, the court nonetheless found the state's comment "where is the busy boy" to be improper.

Compare *Highsmith v. State* 580 So.2d 234 (Fla. 1<sup>st</sup> DCA), *rev. denied*, 589 So.2d 291 (Fla. 1991); *Brinson v. State*, 364 So.2d 66 (Fla. 4<sup>th</sup> DCA 1978) (state may comment on absence of witness whom defendant testified either explicitly or implicitly would exonerate him); *Weeks v. State*, 363 So.2d 176 (Fla. 4<sup>th</sup> DCA 1978); *Allen v. State*, 320 So.2d 828 (Fla. 4<sup>th</sup> DCA 1975), *dismissed*, 330 So.2d 725 (Fla. 1976) (state may comment on defendant's failure to call witness who defendant identified as true perpetrator of crime).

9. In *Morrison v. State*, 818 So. 2d 432 (Fla. 2002), four justices, concurring in result only, concluded that it was not improper for the prosecutor, in closing argument, to state that the prosecutor had not yet “heard the defense in this case.” The comment did not impermissibly shift the burden of proof; the opinion noted that the comment preceded defense counsel’s closing argument and was therefore an accurate statement of fact.
10. Where the defendant asserted the affirmative defense of necessity, and the arresting officer testified that the defendant stated that he took a firearm away from his cousin because he feared the cousin might shoot someone, it was permissible for the prosecutor to comment on the defendant’s failure to call the cousin as a witness. *Washington v. State*, 811 So. 2d 724 (Fla. 3d DCA 2002).
11. The prosecutor may not comment on the defendant’s failure to call witnesses as a means of shifting the burden of proof. *State v. Rodriguez*, 753 So.2d 29 (Fla. 2000); *see also Jones v. State*, 653 So.2d 1110 (Fla. 4<sup>th</sup> DCA 1995).
12. It was improper to question the defendant on cross-examination as to whether the defendant’s father was in the courtroom. This was deemed a comment on the failure to call the father as a witness to corroborate matters to which the defendant had testified. *Miele v. State*, 875 So. 2d 812 (Fla. 2d DCA 2004).
13. Where the defendant’s wife had allegedly been with the defendant at home at the time of the charged offenses, it was improper for the prosecutor to comment that the wife was “sitting at home right now,” as this constituted a comment on a failure to call a witness. *Rodriguez v. State*, 875 So. 2d 748 (Fla. 2d DCA 2004).
14. It was improper for the prosecutor to comment in the absence of a predicate showing that the defendant had tattoos on the day of the offense. *Ramirez v. State*, 847 So. 2d 1147 (Fla. 3d DCA 2003).
15. In a drug prosecution in which the defendant claimed that he had visited a cousin and the cousin’s friend gave him a package to take back to South Carolina to give a woman named Sheila, it was improper for the prosecutor to comment on the defendant’s failure to call the cousin and friend as witnesses. *White v. State*, 757 So.2d 542 (Fla. 4<sup>th</sup> DCA 2000).
16. The prosecutor cannot create a defense for the defendant and then comment on the failure to produce a witness supporting that defense. *Morgan v. State*, 700 So. 2d 29 (Fla. 2d DCA 1997). *Scippio v. State*, 943

So. 2d 942 (Fla. 4<sup>th</sup> DCA 2006) (prosecutor suggested alibi defense which had not been asserted by defendant, as a strawman argument and then tried to negate it by commenting on the failure to call co-tenants of defendant).

17. Proper for prosecution to comment in closing argument that there was no evidence whatsoever to support defense counsel's statements, made throughout the entire trial, that the victim's death was a suicide. *Brown v. State*, 771 So.2d 603 (Fla. 4<sup>th</sup> DCA 2000); *see also Dunbar v. State*, 458 So.2d 424 (Fla. 2d DCA 1984) (state may comment on the defendant's failure to call a witness where defense counsel told the jury, in opening statement, he would call that witness).
18. Prosecutor's comment that there was no material conflict in the evidence did not constitute impermissible burden shifting. *Mitchell v. State*, 771 So. 596 (Fla. 3d DCA 2000).
19. The state may comment on the defendant's failure to call a witness whom the defendant in opening statement indicated that he would call. *Dunbar v. State*, 458 So.2d 424 (Fla. 2d DCA 1984).
20. Improper to comment in opening statement: "there is one piece of evidence that will be presented that he will not be able to explain and that will be evidence that links the defendant to the crime as charged." *Roberts v. State*, 443 So.2d 192 (Fla. 3d DCA 1983).
21. Improper in opening statement for the prosecutor to comment: "the testimony may be different if [the defendant] testifies." *Manofsky v. State*, 354 So.2d 1249, 1250 (Fla. 4<sup>th</sup> DCA 1978).
22. Improper for prosecutor to initially raise the constitutional right of the accused not to testify. *Harrell v. State*, 647 So.2d 1016 (Fla. 4<sup>th</sup> DCA 1995).

However, not improper for a prosecutor to respond to a juror's statement that the juror would like to hear both sides of the story by stating that the defendant did not have to testify. *Rosa v. State*, 696 So.2d 1299 (Fla. 3d DCA 1997).

23. Proper for the trial court to discuss with the jurors the law regarding a defendant's right to remain silent. *Grieve v. State*, 731 So.2d 84 (Fla. 4<sup>th</sup> DCA 1999).
24. Proper for prosecutor during voir dire examination to ask whether any of the prospective jurors "couldn't find the defendant guilty of anything unless there was an eyewitness, other than the victim, testifying." *Barnette v. State*, 768 So.2d 1246 (Fla. 5<sup>th</sup> DCA 2000).



25. The trial court erred in allowing the prosecutor to ask a state witness if any of the other person she identified as being present at the incident were present in court. The appellate court noted that the defense has no obligation to present witnesses and the state cannot argue that the defendant has failed to present witnesses. *Love v. State*, 971 So.2d 280 (Fla. 4<sup>th</sup> DCA 2008).
26. Before counsel makes an argument about the other side's failure to call a witness, counsel should first obtain a ruling from the court. *Jean-Marie v. State*, \_\_So.2d\_\_, 33 Fla.L.Weekly D2592 (Fla. 4<sup>th</sup> DCA, November 5, 2008); *Gass v. United States*, 416 F.2d 767 (D.C. Cir. 1969).

#### L. RIGHT TO REMAIN SILENT

1. A defendant has a constitutional right to decline to testify and therefore "[a]ny comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." *State v. Marshall*, 476 So. 2d 150, 153 (Fla. 1985); *see also Heath v. State*, 648 So. 2d 660 (Fla. 1994).

The "fairly susceptible" test is a "very liberal rule," *State v. Diguilio*, 491 So. 2d 1129, 1135 (Fla. 1986), and comments on a defendant's failure to testify can be of an "almost unlimited variety."

2. Prosecutor's comment that there was no evidence indicating that someone other than the non-testifying defendant was involved with the co-defendant in the murders constituted improper comment on the defendant's right to remain silent. *State v. Rodriguez*, 753 So. 2d 29 (Fla. 2000).

The lessons to be learned from Rodriguez are:

- a) any comment which is fairly susceptible of being interpreted as referring to a defendant's failure to testify is error;
- b) where the evidence is uncontradicted on a particular point, but only the defendant could contradict the matter, commenting about the "uncontradicted evidence" will be an impermissible comment on the failure of the defendant to testify;
- c) the exception to the rule (*see Jackson v. State*, 575 So. 2d 181 (Fla. 1991)) that the state may not comment on a defendant's failure to mount a defense applies only where, first, the defendant has asserted an "affirmative defense" such as alibi, self defense or defense of others, and, second, the witness bears a special

relationship with the defendant. Note that both prongs must exist for the exception to apply.

- d) in short, don't use the words "uncontradicted" or "uncontroverted." You are only asking for trouble (unless the comments are deemed "invited" by defense counsel's argument).
3. The following comments are improper comments on a defendant's decision not to testify:

"Did you hear any testimony that Willie Brown told Lamar Cruse 'Stop Lamar, we don't want to kill him, we just want to scare him.'" *Brown v. State*, 427 So. 2d 304 (Fla. 3d DCA 1983).

Commenting that defense counsel owed an explanation about a fingerprint. *Cunningham v. State*, 404 So. 2d 759 (Fla. 3d DCA 1981).

Improper for prosecutor to ask defense counsel "where is the gun," suggesting that defense counsel knew what happened to the missing gun. *Wright v. State* 363 So. 2d 617, 618 (Fla. 1<sup>st</sup> DCA 1978).

"I haven't heard a defense yet." *Fernandez v. State*, 427 So. 2d 265, 265 (Fla. 2d DCA 1983).

The defendant "could shed some light on it." *Wilson v. State* 371 So. 2d 126, 127 (Fla. 1<sup>st</sup> DCA 1978).

"[T]here has been no rebuttal, no evidence from the stand to say other than it was the defendant[.]" *Holloman v. State* 573 So. 2d 134, 135 (Fla. 2d DCA 1991).

Playing a tape and then pointing to the defendant and saying "he can't deny this." *Watkins v. State*, 363 So. 2d 575,577 (Fla. 3d DCA 1978).

Commenting "there is no explanation and there is no other evidence anywhere else that [the defendant] was anywhere...but in that jewelry store." *Jackson v. State*, 707 So. 2d 412, 415 (Fla. 5<sup>th</sup> DCA 1998).

Prosecution presented a hypothetical situation in closing that the accused denied committing the hypothetical crime, whereas in the case being tried, the defendant did not testify. The court held the use of the hypothetical constituted an impermissible comment on

the fact the defendant did not testify. *Homes v. State*, 757 So. 2d 620 (Fla. 3d DCA 2000); *Bain v. State*, 552 So. 2d 283 (Fla. 4<sup>th</sup> DCA 1989).

During the penalty phase of a capital case, defense mental health experts testified as to the details of the crime and the personal background that the defendant provided to them. On cross-examination, the prosecutor impermissibly inquired whether the experts would consider the type of testimony the jury would have received-sworn testimony subject to cross examination-as superior to that which the experts received from the defendant. *Spencer v. State*, 842 So. 2d 52 (Fla. 2003).

“You have not heard one thing from the witness stand that contradicts that those are [the defendant’s] fingerprints...”; and “You’ve not heard one ounce of testimony, one word even spoken from anybody during this trial from that witness stand that even placed [the defendant] there at that bank even on a different day.” *Ealy v. State*, 915 So. 2d 1288 (Fla. 2d DCA 2005).

Prosecutor during closing argument advised the jury that the judge “also instructed you that defendant has the right to remain silent. And he does. He did not take the stand in this case. But there were two witnesses.” *Miller v. State*, 847 So. 2d 1093 (Fla. 4<sup>th</sup> DCA 2003).

The defendant, a school monitor, allegedly recorded a conversation with the principal regarding a complaint by a teacher regarding the defendant, and was ultimately prosecuted for unlawfully intercepting oral communications and perjury. The prosecutor responded to defense counsel’s question regarding the whereabouts of the tape as being ridiculous, since the defense knew that the State did not have the tape. The prosecutor continued: “The Defense fully knows well that there’s something called the Fifth Amendment, self-incrimination...” It was impermissible to utilize the Fifth Amendment as the explanation for the State’s impediment to its ability to produce the tape. *Kearney v. State*, 846 So. 2d 618 (Fla. 4<sup>th</sup> DCA 2003).

Prosecutor argued in closing argument: “Although defendant has no obligation to put forward evidence, they have a right to if they choose to. He could call a witness if he wants to.” And: “there has been no evidence whatsoever that the property that the defendant sold [to the pawnshop] came from anywhere else but the home of [the victim].” *Wolcott v. State*, 774 So. 2d 954 (Fla. 5<sup>th</sup> DCA 2001).

Prosecutor referred to another witness who, unlike the defendant, “took the stand at least.” *Adams v. State*, 830 So. 2d 911 (Fla. 3d DCA 2002).

Prosecutor argued that defendant had no obligation to come into court and testify and prosecutor could not suggest that jury infer something from the exercise of that right. This was a comment on silence, especially in context of earlier statement where prosecutor emphasized that defendant’s prior explanation to police was an incomplete story. *Williams v. State*, 877 So. 2d 884 (Fla. 4<sup>th</sup> DCA 2004).

Prosecutor advised jury that the court would instruct the jury on the presumption from possession of recently stolen property “unless [the defendant] can explain that away.” *Mannarino v. State*, 869 So. 2d 650 (Fla. 4<sup>th</sup> DCA 2004).

Prosecutor argued in closing that if the defendant was going into a restaurant for an employment application, “of which there is no evidence by the way, [and] no sworn testimony by the way.” *Durrant v. State* 839 So. 2d 821 (Fla. 4<sup>th</sup> DCA 2003). The opinion contains a discussion of other cases in which comments on silence had been deemed invited by the defense.

Prosecutor asked the defendant on cross-examination if this was the first time he told his version of the shooting. *Shabazz v. State*, 928 So. 2d 1267 (Fla. 4<sup>th</sup> DCA 2006).

Prosecutor asked whether the jury heard “anybody else testify” to dispute officer’s testimony, in case where the officer and the defendant were the only individuals who would have knowledge of what transpired. *Watts v. State*, 921 So. 2d 722 (Fla. 4<sup>th</sup> DCA 2006).

The defendant’s version of the incident was that she had been accosted by loss prevention employees in a store, that the cart was filled with items from her friend, and that cocaine in her pocket belonged to another friend. The prosecutor’s comment on the absence of those two friends as witnesses was improper because the defendant was not relying on any affirmative defense. *Conner v. State*, 910 So. 2d 313 (Fla. 5<sup>th</sup> DCA 2005).

In *Mitchell v. State*, 911 So. 2d 1278 (Fla. 4<sup>th</sup> DCA 2005), the defendant was observed by officers engaging in hand to hand transactions with passengers in cars. When officers approached

the defendant, and identified themselves, the defendant tried to run, but was arrested. In closing argument the state argued: “if you’re innocent, you stand there, you tell the cop why you are innocent, you don’t take off running.” The Fourth District held that the prosecutor’s comment was an improper comment on the defendant’s right to remain silent after being arrested. *See, State v. Hoggins*, 718 So. 2d 761 (Fla. 1998).

4. The following comments were held not to constitute improper comments on silence:

Opening argument comment that only two people knew what happened in that murder victim’s apartment, so the prosecutor had to reconstruct what happened with scientific and other evidence. *Dessaure v. State*, 891 So. 2d 455 (Fla. 2004).

Prosecutor argued in closing argument that you could tell what a man intended by what he did, not by what he desired. The emphasis was on the defendant’s actions, in response to the defense’s argument that the defendant did not want to kill the victim. *Caballero v. State*, 851 So. 2d 655 (Fla. 2003).

Prosecutor argued that when the defendant spoke to the police, he could have avoided “the chaos, the calamity, and the conflict.” *Yok v. State*, 891 So. 2d 602 (Fla. 1<sup>st</sup> DCA 2005).

The prosecutor asked the jury to “come back and tell the defendant what he knows *sitting there today*, that he is guilty...” *State v. Jones*, 867 So. 2d 398 (Fla. 2004).

Prosecutor asked the defendant’s wife about her conversations with the defendant regarding his involvement in the double murder. The wife responded that she did not ask the defendant about the double murder. The Court stated that this was close to a violation of the right to remain silent, but, in the context of the wife’s answer, it was not reasonably susceptible to being interpreted as a comment on the failure to testify. *Rimmer v. State*, 825 So. 2d 304 (Fla. 2002).

Penalty phase comment that there was no evidence that blood on the tire iron came from the defendant. *Waterhouse v. State*, 792 So. 2d 1176 (Fla. 2001).

Prosecutor argued that the only person contradicting the victim’s testimony was the defendant’s prior statement to the police. *Russman v. State*, 869 So. 2d 635 (Fla. 5<sup>th</sup> DCA 2004).

Comment that the defendant “never makes one mention of...,” was permissible in the context of the argument in which the prosecutor was commenting on inconsistencies in the hypothesis of innocence that the defendant presented at trial. The prosecutor was discussing the reasonableness of a statement the defendant previously gave to his stepfather. *Pace v. State*, 854 So. 2d 167 (Fla. 2003).

Closing argument that it was uncontradicted that the defendant was the boss of a drug operation was permissible since such contradictory testimony could have been provided by individuals other than the defendant. *Williams v. State*, 987 So. 2d 1 (Fla. 2008).

Closing argument in second degree murder prosecution: “What was [the defendant] feeling?” This was not a comment on silence; it was addressing the defendant’s state of mind at the time of the offense-whether a depraved mind, ill will, hatred, spite or evil intent existed. *Moore v. State*, 2008 WL 34791, 33 FL W D104 (Fla. 3d DCA Jan. 2, 2008).

Prosecutor questioned was there any evidence that the defendant left a palm print on the vehicle on a day other than the day of the offense. This was a permissible comment on the uncontradicted nature of the evidence. *Lubin v. State*, 963 So. 2d 822 (Fla. 4<sup>th</sup> DCA 2007).

Prosecutor argued that there was no evidence that the victim consented to sexual intercourse with the defendant. This was deemed an invited response based on the asserted defense of rough consensual sex and that the defendant did not kill or rape the victim. *Belcher v. State*, 961 So. 2d 239 (Fla. 2007).

5. “Where the evidence is uncontradicted on a point that only the defendant can contradict, a comment on the failure to contradict the evidence becomes an impermissible comment on the failure of the defendant to testify.” *Wolcott v. State*, 774 So. 2d 954 (Fla. 5<sup>th</sup> DCA 2001); *see also State v. Rodriguez*, 753 So. 2d 29 (Fla. 2000).
6. Improper for a prosecutor to comment that a defendant who testified failed to bring the same facts to the attention of the police after the defendant’s arrest. *State v. Hoggins* 718 So. 2d 761 (Fla. 1998); *see also Boyette v. State*, 585 So. 2d 1115 (Fla. 5<sup>th</sup> DCA 1991); *Murphy v. State*, 511 So. 2d 397 (Fla. 4<sup>th</sup> DCA 1987).

7. The prosecutor's comments and testimony describing the defendant's physical flight from an officer after a lawful stop were not impermissible comments on the defendant's silence, nor did the prosecution's comments that the defendant refused to provide identification following the lawful stop violate the defendant's right to remain silent. However, it was error for the prosecutor's comment on the defendant's silence and failure to explain to the officer what he was doing in the area. *Charton v. State* 716 So. 2d 803 (Fla. 4<sup>th</sup> DCA 1998).
8. Improper to use the defendant's post-arrest pre-*Miranda* silence for impeachment. *State v. Hoggins*, 718 So. 2d 761 (Fla. 1998). This decision gives greater rights to Florida citizens than provided under the Federal Constitution, which permits use of defendant's post-arrest, pre-*Miranda* silence for impeachment. See *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980).
9. It is proper to use defendant's pre-arrest, pre-*Miranda* silence for impeachment, if relevant. *State v. Hoggins*, 718 So. 2d 761, 770 (Fla. 1998); *Parker v. State*, 641 So. 2d 483 (Fla. 5<sup>th</sup> DCA 1994). In order for a defendant's pre-arrest, pre-*Miranda* silence to be used for impeachment, the prior silence must have occurred under circumstances when it would have been natural for the defendant to have denied the accusation made against him. See *State v. Smith*, 573 So. 2d 306 (Fla. 1990); *White v. State*, 757 So. 2d 542 (Fla. 4<sup>th</sup> DCA 2000) (applying *Hoggins* to permit impeachment in context of reference to defendant's failure to provide drug detectives with the identity of the owner of the package of drugs where the defendant had given a prearrest statement and said that the package he was carrying did not belong to him).

*Hoggins* does not address the issue of the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt. It may be implicit in *Hoggins* that such use as substantive evidence of guilt is barred, since the use of pre-arrest, pre-*Miranda* silence for impeachment is limited; if the evidence was admissible and subject to comments as substantive evidence, there would arguably be no need for any conditions on its use for impeachment. Federal Courts are split on the issue of whether pre-arrest, pre-*Miranda* silence can be used as substantive evidence and thus be used as proper comments. See *United States v. Oplinger*, 150 F. 3d 1061, 1066 (9<sup>th</sup> Cir. 1998) (admissible as substantive evidence of guilt); *Combs v. Coyle*, 205 F. 3d 269, 283 (6<sup>th</sup> Cir. 2000) (and cases cited therein) (not admissible). The Third District, in an analogous case, has held that prosecutorial comment on a pre-arrest, pre-*Miranda* request for counsel was proper for the purpose of rebutting an insanity defense. *Baylock v. State*, 537 So. 2d 1103, 1108 (Fla. 3d DCA 1989). There are clearly significant concerns and potential problems with comments on pre-arrest, pre-*Miranda* silence as substantive evidence of guilt and extreme caution

on the subject is necessary, along with a thorough consideration of developments in case law.

10. *Yok v. State* 891 So. 2d 602 (Fla. 1<sup>st</sup> DCA 2005), held that it was proper to comment on the “chaos, the calamity, and the conflict” that could have been avoided when the defendant spoke to the police, since the defendant gave a full statement to the police and the defendant testified at trial.
11. Improper to comment on defendant’s prior refusal to give a stenographically recorded statement. *Smith v. State* 754 So. 2d 54 (Fla. 3d DCA 2000).
12. The prohibition against comments on silence does not apply when the defendant spoke to officers prior to trial and did not invoke Fifth Amendment rights. *Connor v. State*, 979 So.2d 852 (Fla. 2007); *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004) (comment on the fact that detective interviewed defendant does not constitute comment on silence).
13. Improper for officer to testify that defendant invoked right to counsel during interrogation. *Johnson v. State*, 951 So. 2d 11 (Fla. 1<sup>st</sup> DCA 2007).
14. Proper for a prosecutor to comment and point out inconsistencies between the defendant’s trial testimony and statements that he voluntarily made to the police. *See Wray v. State*, 639 So. 2d 621 (Fla. 4<sup>th</sup> DCA 1994); *Watson v. State*, 504 So. 2d 1267 (Fla. 1<sup>st</sup> DCA 1986); *rev. denied*, 506 So. 2d 1043 (Fla. 1987).
15. Prosecutor’s reference to the defendant’s right to remain silent during voir dire was proper where it was a response to a juror’s comment that the juror would probably have to hear from the defense and the prosecutor did not raise the subject and the prosecutor restated the judge’s preliminary instruction accurately. *Grieve v. State*, 731 So. 2d 84 (Fla. 4<sup>th</sup> DCA 1999).
16. Penalty phase comment in capital case that the detective terminated the conversation with the defendant who “wouldn’t speak to him anymore” was not improper where guilt had already been determined. *Rose v. State*, 985 So.2d 500, 507 (Fla. 2008).
17. At trial, the prosecutor asked defendant whether the first time he had told his story about how a crash occurred was at a prior hearing and defendant stated, “yes.” The First District held that the question was a comment on the defendant’s right to remain silent and the trial court erred in refusing a mistrial. The conviction is reversed. *Chamblin v. State*, \_\_So.2d \_\_, 33 Fla.L.Weekly D2353 (Fla. 1<sup>st</sup> DCA, October 7, 2008).



18. During a DUI prosecution, the state violated the defendant's right to remain silent by arguing that an innocent person would have spoken up and protested his innocence and volunteered to take a breath test to prove his innocence. *Morris v. State*, 988 So.2d 120 (Fla. 5<sup>th</sup> DCA 2008).
19. In his closing argument, the prosecutor argued "the defendant has had the opportunity to be able to have a jury trial and he has that right. He had the right to remain silent," whereupon defense counsel objected. The trial court denied the motion for mistrial. On appeal, the Third District reversed and remanded for a new trial. *Wilson v. State*, 988 So.2d 43 (Fla. 3d DCA 2008).
20. During closing argument, the prosecutor argued that the evidence presented at trial was "un-controverted" and "uncontradicted." The appellate court held that such comments were improper as they shifted the burden of proof to the defendant, and were comments on the defendant's right to remain silent. *Hill v. State*, 980 So.2d 1195 (Fla. 3d DCA 2008).

#### M. MISSTATEMENTS OF LAW

1. Improper for counsel to misstate the law *Rodriguez v. State*, 493 So.2d 1067 (Fla. 3d DCA 1986), *rev. denied*, 503 So.2d 327 (Fla. 1987).
2. Improper for the prosecutor to argue:

Voluntary intoxication. Let's talk about this. Their defense is the defense of lack of responsibility. That's simply what it is. He has the nerve to tell you he drank 21 beers. No one tied him down, no one forced him to do it... No one forced him to drink those 21 beers he claims to have drunk that night, but still is able to at least walk... This is not a case about lack of intent, it's a question of the lack of responsibility.

*Miller v. State*, 712 So. 2d 451, 452-53 (Fla. 2d DCA 1998).

Note: As a result of the enactment of § 775.051, *Florida Statutes*, effective October 1, 1999, voluntary intoxication is no longer a valid defense, and the fact pattern of *Miller* would not arise for offenses committed since October 1, 1999.

3. Improper for prosecutor to misstate the law regarding the duty to retreat under the defense of justification. *State v. Mathis*, 933 So. 2d 29 (Fla. 2d DCA 2006). *See also Pollock v. State*, 818 So. 2d 654 (Fla. 3d DCA 2003). In *Pollock*, the prosecutor's erroneous statements regarding the defense of justifiable use of deadly force constituted fundamental error. The prosecutor led the jury to believe that justifiable use of force could be

relied on only to prevent imminent death or great bodily harm; that argument neglected the alternative situation in which the defense was available - to prevent the commission of a forcible felony.

4. Improper for prosecutor during voir dire to minimize reasonable doubt standard. *Williams v. State*, 674 So.2d 155 (Fla. 4<sup>th</sup> DCA 1996).
5. Improper comments regarding the burden of proof are one of the most frequent forms of misstatements of the law:

Improper for a prosecutor to argue that “reasonable doubt” is a doubt that “goes to your heart, your gut... Nobody can describe what a reasonable doubt is, but you have to have it in your heart of hearts.” *Alvarez v. State*, 574 So. 2d 1119, 1120 (Fla. 3d DCA 1991).

Improper for prosecutor to argue that the defendant no longer has the presumption of innocence simply because evidence had been presented by the State; it is up to the jury to determine if the State met its burden of proof. *Nurse v. State*, 932 So. 2d 290 (Fla. 2d DCA 2005).

Improper to argue that the issue of whether the defendant possessed a gun came down to whether the jury believed a police officer or the defendant. *Covington v. State*, 842 So. 2d 170 (Fla. 3d DCA 2003).

Improper to argue that the jury had to find the defendant “totally blameless” is order to acquit. *Stires v. State*, 824 So. 2d 943 (Fla. 5<sup>th</sup> DCA 2002).

Prosecutor erroneously shifted burden when arguing on four separate occasions that the defendant has the burden of proving an alibi beyond a reasonable doubt. *Sanders v. State*, 779 So. 2d 522 (Fla. 2d DCA 2000).

Improper for prosecutor to argue that a defense expert failed to prove the defendant was insane beyond a reasonable doubt. *Milburn v. State*, 742 So. 2d 362 (Fla, 2d DCA 1999). *See also Almeida v. State*, 748 So. 2d 922 (Fla. 1999) (references to defendant having to prove insanity beyond a reasonable doubt).

Improper, during voir dire in capital case, for prosecutor to tell jury if the evidence of aggravating factors outweighs the mitigating factors, the jury must recommend death. *Cox v. State*, 966 So. 2d 337 (Fla. 2007).

Prosecutor misstated the law during penalty phase of capital prosecution when arguing that the aggravating circumstances of armed robbery and pecuniary gain were more powerful because they merged together. *Brooks v. State*, 762 So. 2d 879 (Fla. 2000),

6. Several cases have noted improper comments by prosecutors when attempting to state the elements of the offenses. *See, e.g., Polite v. State*, 973 So. 2d 1107 (Fla. 2007) (prosecutor argued that the state did not have to prove that the defendant knew the officer's status as an officer in prosecution for resisting an officer with violence); *Servis v. State*, 855 So. 2d 1190 (Fla. 5<sup>th</sup> DCA 2003) (prosecutor argued that jury could find the defendant guilty as long as blood alcohol level was .08 at any point during the night rather than at the time the defendant was driving).
7. Improper for prosecutor to comment on evidence that was excluded following the granting of a state pretrial motion *in limine*. *See Gonzalez v. State*, 774 So. 2d 796, 798 (Fla. 3d CA 2000); *see also Garcia v. State*, 622 So.2d 1325, 1331 (Fla. 1993). Improper for a prosecutor to comment on certain excluded evidence as defendant had her "own motives and reasons, some evidence I can't comment on." *Landry v. State*, 620 So. 2d 1099, 1101-02 (Fla. 4<sup>th</sup> DCA 1993).
8. Improper for a prosecutor to comment that defense counsel waived opening statement although "[h]e could have told you every detail of what his story was going to be, but he waited, sitting back until the evidence was all in and fabricated a story based solely on that evidence." *Huffham v. State*, 400 So. 2d 133,136 (Fla. 5<sup>th</sup> DCA 1981).

However, the United States Supreme Court held that it is proper for a prosecutor to comment on the fact that, before the defendant testified, he was able to sit and listen to all the witnesses testify. *Portuondo v. Agard*, 529 U.S. 61 (2000).

9. In *State v. Mathis*, 933 So. 2d (Fla. 2d DCA 2006), prosecutor's closing arguments to the jury that the defendant had a duty to retreat when people at the store jokingly informed him that the victim was going to kill him. Such comments misstated the law but the error was not preserved by contemporaneous objection. *Id.*, at 31-32.
10. Improper for a prosecutor in response to the defense closing argument that the police had tricked the defendant into giving a confession to argue: "[t]here is nothing wrong with the police doing what they did on that tape. It's not illegal. If it was, you wouldn't be hearing that tape." *Stephenson v. State*, 645 So.2d 161, 163 (Fla. 4<sup>th</sup> DCA 1994).

11. Improper for a prosecutor to comment in closing: “I impeached her a little bit because I wanted to show you that somebody got to her.” *Henry v. State*, 651 So.2d 1267, 1268 (Fla. 4<sup>th</sup> DCA 1995).

12. Penalty phase comments:

Improper to argue that defendant’s poverty and living circumstances were “not mitigating in this case, at all, because they don’t give us any understanding of why he did what he did.” *Hitchcock v. State*, 775 So. 2d 638 (Fla. 2000).

Proper for prosecutor to argue that “there is no sentence other than” death, as that was a factual argument. *Lugo v. State*, 845 So. 2d 74 (Fla. 2003).

Improper for prosecutor, in arguing for the death penalty over life imprisonment, to comment that, although the law presently was life without parole, laws can change. *Urbini v. State*, 714 So. 2d 411 (Fla. 1998).

13. Neither prosecutor nor defense counsel, except in capital cases, can disclose the length of sentence for the crime charged or for lesser included offenses. *Legette v. State*, 718 So. 2d 878 (Fla. 4<sup>th</sup> DCA 1998).

14. Improper for prosecutor to argue under state law that a witness’s out-of-court identification was considered stronger than a subsequent in-court identification. *Profitt v. State*, 961 So. 2d 239 (Fla. 2007), *cert. denied*, 120 S.Ct. 621 (2008).

15. While most of the case law on the subject of misstatements of law pertains to comments by prosecutors, several cases have disapproved of comments made by defense counsel:

Improper for defense counsel to argue to the jury that it could not find the defendant guilty of first degree murder unless they found that the defendant personally killed the victim, thus misstating the law on felony murder. *Cave v. State*, 476 So. 2d 180 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986).

Improper for defense counsel to ask the jury to disregard the law (i.e., jury nullification). *Harding v. State*, 736 So. 2d 1230 (Fla. 2d DCA), *rev. denied*, 744 So. 2d 454 (Fla. 1999).

Improper for defense counsel to have the court exclude a lead detective’s child hearsay testimony by motion in limine, and then to comment in closing how “interesting” it is that the state did not call the lead detective as a witness, adding “[d]o you think that’s because he had favorable

evidence to present for the state?” *Bauta v. State*, 698 So. 2d 860, 863 (Fla. 3d DCA 1997), *rev. denied*, 717 So. 2d 528 (Fla. 1998).

N. COMMENTS WITHOUT SUPPORTING EVIDENCE

1. Improper to argue facts not in evidence. *Knight v. State*, 672 So.2d 590, 591 (Fla. 4<sup>th</sup> DCA 1996); accord *Wolcott v. State*, 774 So.2d 954 (Fla. 5<sup>th</sup> DCA 2001).
2. In *Jones v. State*, 730 So.2d 346, 348 (4<sup>th</sup> DCA 1999), the defendant raised the defense of involuntary intoxication, claiming that somebody had put something in his non-alcoholic drink. It was held improper for a prosecutor to argue, without supporting evidence, that there is no drug, controlled substance or prescription drug that would cause the defendant to get angry.
3. Improper for a prosecutor to describe the attempted murder: “the victim was on his knees, begging for his life,” when the victim testified that he was shot as he was walking away. Prosecutors do not have a “license to argue fiction.” *Dunsizer v. State*, 746 So.2d 1093, 1094 (Fla. 2d DCA 1999).
4. Improper for the prosecutor to argue that “people are raped all the time in their homes, in shopping malls and in cars, “when there was no evidence presented to support that comment. *Pacifico v. State*, 642 So.2d 1178, 1184 (Fla. 1<sup>st</sup> DCA 1994).
5. Improper for a prosecutor to imply that the defendant had forged a guarantee agreement as the motive for murder when there was no evidence to support that suggestion. *Huff v. State*, 437 So.2d 1087 (Fla. 1983).
6. Improper for a prosecutor to argue that the defendant had gone prowling through the house looking for a woman when the comment was not supported by the fact that a purse was present in the burglarized home. *Breedlove v. State*, 413 So.2d 1 (Fla.), *cert. denied*, 459 U.S. 1060 (1982).
7. Improper for a prosecutor to read portions of a witness’s deposition that had not been admitted into evidence. *Aja v. State*, 658 So.2d 1168 (Fla. 5<sup>th</sup> DCA 1995).
8. Improper for the prosecutor to argue that there was other evidence that could have been introduced, but was not. *Landry v. State*, 620 So.2d 1099 (Fla. 4<sup>th</sup> DCA 1993).

9. Improper for a prosecutor to argue that there was other witnesses who could have corroborated the state's case had they been called to testify. *Hazelwood v. State*, 658 So.2d 1241 (Fla. 4<sup>th</sup> DCA 1995).
10. Improper for a prosecutor to suggest that there were other experts, not called, who supported the prosecution's case. *Mackey v. State*, 703 So.2d 1183 (Fla. 3d DCA 1997), *quashed in part on other grounds*, 719 So.2d 284 (Fla. 1998).
11. Improper for the prosecutor, even in response to defense counsel's comment about the state's failure to call police witnesses, to say that the witnesses were not necessary because they merely would have reiterated the testimony of other witnesses. *Tillman v. State*, 647 So.2d 1015 (Fla. 4<sup>th</sup> DCA 1994).
12. Improper for defense counsel to comment on the state's failure to call a witness when the witness was available to both parties. *Haliburton v. State*, 561 So.2d 248 (Fla. 1990), *cert. denied*, 501 U.S. 1259 (1991); *Jean-Marie v. State*, \_\_So.2d\_\_, 33 Fla.L.Weekly D2592 (Fla. 4<sup>th</sup> DCA, November 5, 2008), no error in prohibiting defense counsel from commenting during closing argument that an inference could be drawn from the State's failure to call a detective as a witness that the testifying of the witness would have favored the defendant. The court held the witness was equally available to the defense and the defense could have therefore called him as a witness.

The *Haliburton* rule does not apply when the witness actually testified at trial. Thus, in *Amos v. State*, 618 So.2d 157 (Fla. 1993), when the prosecutor called the passenger of a car and the defense called the driver as a witness, it was proper for the defense to comment on the state's failure to call the driver as a witness and to suggest to the jury that the state was attempting to tailor the evidence.

13. Proper for the prosecutor to discuss during opening statement a tape recording of the murder even though tape later ruled inadmissible. *Rutledge v. State*, 374 So.2d 975, 979 (Fla. 1979), *cert. denied*, 446 U.S. 913 (1980).
14. Improper for prosecutor to argue that court reporter interrupted the proceedings when in fact it was the translator, and thereafter improper to argue that the defendant used a translator as factual support for the prosecutor's accusation that the defendant is a liar. *Rodriguez v. State*, 822 So.2d 587, 588 (Fla. 2d DCA 2002).
15. Fundamental error for prosecutor to argue in closing argument that the defendant told the officer "I don't smoke crack," and thereafter to argue

that the defendant thus had knowledge of the illicit nature of the glass tube and substance therein, wherein the record shows the defendant never made such statement. *Mackenzie v. State*, 830 So.2d 234, 237-238 (Fla. 4<sup>th</sup> DCA 2002).

16. *Spoor v. State*, 975 So.2d 1233 (Fla. 4<sup>th</sup> DCA 2008), closing argument defense counsel argued that the victims had mistakenly identified the defendant because they did not notice his “extensive disfiguring tattoos.” The prosecutor argued that the defendant had “in the meantime over the last year he’s gone out and gotten the arm tattooed. Do you know why he did that? So he could stand up here in court and go like this and saw look I’ve got tattoos.” The prosecutor further argued that once the defendant had learned what the victims’ testimony was going to be, he went out and got tattoos. The Fourth District held that there was no evidence as to when the defendant obtained his tattoos, and held the argument of the prosecutor constituted reversible error.
17. In *Frizzle v. State*, 982 So.2d 1292 (Fla. 4<sup>th</sup> DCA 2008), the defendant was charged with felony murder for the death of his disabled wife. The trial court admitted evidence that the police found pornographic videos and vaseline in the defendant’s bedroom. On appeal, the court held that the trial court erred in admitting such evidence as it had no relevance to any fact in issue in the case. In his concurring opinion, Judge Hazouri noted: “I concur fully in the majority opinion but right to express my concern about the tactics used by the prosecutor in seeking this conviction. In arguing for the admission of the pornographic tapes and vaseline, the prosecutor asserted that this evidence tended to counter the portrayal of the defendant as a devoted and caring husband. However, in her final argument, the prosecutor used this evidence to argue that the pornographic tapes and vaseline showed that the defendant had sexual needs and what must have occurred is that in satisfying these needs, he forced himself on his disabled wife who then struggled and resisted, which resulted in the defendant strangling his wife to death. There was no physical evidence presented to even suggest that this occurred...perhaps the prosecutor in this case needs to be reminded that she took an oath to seek justice, not just convictions.” *Id.*, at 1293.
18. The prosecutor improperly argued during closing argument that the reason none of the witnesses reported seeing tattoos on the defendant’s hand was that the defendant got the tattoos after the robbery. There was no evidence in the case as to when the defendant got the tattoos. Conviction reversed. *Hosang v. State*, 984 So.2d 671 (Fla. 4<sup>th</sup> DCA 2008).

O. COMMENTS CONCERNING INFERENCES DRAWN FROM EVIDENCE

1. Proper for the prosecutor to comment on defendant's tattoo, which the defendant displayed to the jury, and give a possible explanation why certain witnesses did not speak to the police. *Ramsaran v. State*, 664 So.2d 1106 (Fla. 4<sup>th</sup> DCA 1995).
2. Proper for the prosecutor in closing argument to comment that the defendant "is a convicted felon. He admitted that on the stand. He knows the ropes. He knows what could happen to him [.]" *Gale v. State*, 483 So.2d 53, 54 (Fla. 1<sup>st</sup> DCA), *rev. denied*, 492 So.2d 1332 (Fla. 1986).
3. Proper for the prosecutor to argue all reasonable inferences from the evidence in the record, but improper for the prosecutor intentionally to misstate the evidence or mislead the jury concerning the inferences it may draw. *ABA Standards for Criminal Justice* 3-5.8 (a).
4. In *Miller v. State*, 926 So. 2d 1243 (Fla. 2006), the Florida Supreme Court held that an attorney is allowed to argue reasonable inferences from the evidence and to argue the credibility or any other relevant issue, so long as the argument is based on the evidence.
5. In *Frazier v. State*, 970 So. 2d 929,930 (Fla. 4<sup>th</sup> DCA 2008), the prosecutor argued that if the jury did not follow the law regarding the definition of dwelling, they would not be following the law just as the defendant had done. The Fourth District held that it is a proper argument to argue a conclusion "that can be drawn from the evidence."
6. In *Fencher v. State*, 931 So. 2d 184 (Fla. 5<sup>th</sup> DCA 2006), the Fifth District held the trial court correctly prohibited defense counsel from arguing in closing that a state witness' felony convictions had significance to evidence of tampering, wherein there was no evidence that the witness had tampered with the evidence.
7. In *Jones v. State*, 949 So. 2d 1021 (Fla. 2006), the Florida Supreme Court held that prosecutor's closing argument that victim's shoes might have been off because the defendant wanted her pants off, was based on an inference that reasonably could have been drawn from the evidence given that the jeans on victim's body were unzipped, which exposed her public area and buttocks.
8. In *Jackson v. State*, 949 So. 2d 1180 (Fla. 4<sup>th</sup> DCA 2006), error for prosecutor to argue in closing based upon improper cross examination of the defendant, that the defendant failed to dispute that the eyeglass case containing cocaine was not his at any time before trial. Such cross-



examination and closing argument impermissibly shifted the burden of proof to defendant to prove his innocence.

9. In *Gibbs v. State*, 904 So. 2d 432 (Fla. 4<sup>th</sup> DCA 2005), the defense argued that the prosecutor committed misconduct in his closing argument by his multiple references to the defendant's statement that the victim was "bitching like a typical female," and such comments were particularly harmful because of the all female jury. The Fourth District rejected the defendant's argument holding the prosecutor was entitled to argue to the jury the relevant evidence, including the defendant's statements and to argue that the defendant's comment showed ill will towards the victim.
10. The defendant was charged with murdering the victim and stealing her ring. The prosecutor argued that the ring had blood on it when the defendant gave it to his girlfriend is improper, wherein the evidence only showed that the ring was dirty, not that there was any blood on it. The Supreme Court noted that either party may argue logical inferences from the evidence in their closing arguments, but where the inference is not based on the evidence, the court errs in allowing the argument to be made. *Gosciminski v. State*, \_\_So.2d\_\_, 33 Fla.L.Weekly S810 (Fla., October 8, 2008).

#### P. INVITED RESPONSE

1. In *United States v. Young*, 470 U.S. 1, 11-13 (1985), the Supreme Court explained the doctrine of "fair reply," more commonly called "invited response," as it applies to closing arguments:

The situation [herein is] but one example of an all too common occurrence in criminal trials--the defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments--two apparent wrongs--do not make for a right result. Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by doing so can it be determined whether the prosecutor's conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the "invited response" or "invited reply" rule[.]

[T]he reviewing court must not only weigh the impact of the prosecutor's remarks, but 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.

2. “The doctrine of invited comment does not contemplate that a prosecutor will sit silently while defense counsel pursues an impermissible line of argument so that he or she can then pursue his or her own impermissible and highly prejudicial response. In order to avail himself of the doctrine of invited comment the prosecutor [must] object to the improper comments as they [are] made so that the trial judge [can] impose timely restrictions on defense counsel...The prosecutor’s ‘invited response’ could have been tailored to such as would be consistent with fairness and due process of law.” *Fryer v. State*, 693 So.2d 1046, 1051-52 (Fla. 3d DCA 1997) (Sorondo, J., concurring).

In light of *Fryer*, must a prosecutor first object so as to justify a comment as being invited? In *Washington v. State*, 758 So.2d 1148, 1155 (Fla. 4<sup>th</sup> DCA), *rev. denied*, 786 So.2d 1192 (Fla. 2000), the defense “opened the door” to the details of the defendant’s involvement in uncharged crimes. The Fourth District Court of Appeal held that, although the state could have objected to defense counsel’s inquiries, it was under “no obligation to do so.” [O]ften as one side will allow the opposition to introduce inadmissible evidence so as to attack it on cross-examination.]

3. Proper for the prosecutor to respond: “The only testimony and, again, think about what the opening statement was, what the defense told you where the case was going. The opening statement was the defendant never threw a rock. Did you ever hear anything from this stand, but the fact that that man threw a rock? You have no testimony from this stand that indicates otherwise,” when defense counsel in opening statement denied that the defendant had thrown a brick at the victim. *Austin v. State*, 700 So.2d 1233, 1234-35 (Fla. 4<sup>th</sup> DCA 1997).
4. Proper for the prosecutor to argue that “you haven’t ...heard any evidence that [the defendant] had any legal papers in the cell with him,” in rebuttal to defense counsel’s statement that an adverse witness could have had access to and based his testimony on the defendant’s “legal papers.” *Dufour v. State*, 495 So.2d 154, 160 (Fla. 1986), *cert. denied*, 479 U.S. 1101 (1987); *see also Wolcott v. State*, 774 So.2d 954 (Fla. 5<sup>th</sup> DCA 2001)(state’s comment that no witnesses rebutted testimony of fingerprint expert proper, as falling within invited response exception of *State v. Rodriguez*, 753 So.2d 29 (Fla. 2000), because defense counsel tried to discredit fingerprint expert by suggesting that police mishandled fingerprint evidence).

5. Proper for the prosecutors to state: “what fact, what testimony, what anything have you heard as a result of him going down to that police station would create a reasonable doubt in your mind” in response to defense counsel suggesting that an impropriety had taken place when the defendant made a taped confession. *Barwick v. State*, 660 So.2d 685, 694 (Fla. 1995), *cert. denied*, 516 U.S. 1097 (1996).
6. In *Richards v. State*, 635 So.2d 983, 984 (Fla. 4<sup>th</sup> DCA 1994), the defendant in his closing argument asserted that the state failed to have any fingerprint experts testify. In response, the prosecutor argued “[I]et me tell you this. If there was any evidence that proved that someone else committed that crime—Counsel had an opportunity to bring forth any evidence that raised a reasonable doubt.” The Fourth District Court of Appeal held that the prosecutor’s comments went beyond a proper reply to defense counsel’s argument. Instead of simply responding that the defense could have called the same fingerprint experts to testify that his prints were not identified, the prosecutor made a more general remark about the defendant’s failure to present “any evidence that provides someone else committed the crime.” This comment implied that the defense had the burden to bring forth evidence to prove his innocence and hence the comment was improper and not justified as an “invited response.”
7. Proper for the state to argue that “the un-controverted testimony in evidence in this case is that” the defendant was never threatened to make the statement and it was un-controverted that the detective never told the defendant his girlfriend would not be arrested if he confessed in response to the defense arguments that the confession had been coerced and the detective had threatened to arrest the defendant’s girlfriend. *Rich v. State*, 756 So.2d 1095, 1096 (Fla. 4<sup>th</sup> DCA 2000).
8. Proper for prosecutor to respond to defense counsel’s closing argument that the police officers lied on the witness stand to cover up their misidentification of the defendant by arguing “where is the evidence in this case of crooked cops?” *Mitchell v. State*, 771 So.2d 596, 597 (Fla. 3d DCA 2000).
9. Proper for prosecutor to respond to defense counsel’s repeated arguments that the victim’s death was a suicide by commenting that “nobody testified that [the victim’s] death was a suicide.” *Brown v. State*, 771 So.2d 603, 604 (Fla. 4<sup>th</sup> DCA 2000).
10. In *Caballero v State*, 851 So. 2d 655 (Fla. 2003), the Florida Supreme Court approved prosecutor’s closing argument under “invited response doctrine,” wherein prosecutor in responding to defense argument that the

defendant did not want to kill the victim argued “you can tell what a man intends by what he does, not by what he desires. What did he do? According to the defendant’s statement, uncontradicted, what does he do?” Court held that such argument did not improperly shift the burden of proof. “It is permissible for the State to emphasize the uncontradicted evidence for the narrow purpose of rebutting the defense’s argument since the defense has invited the response.” *Id.* 660.

11. In *Glispy v State*, 947 So. 2d 608 (Fla. 4<sup>th</sup> DCA), *rev. den.* 952 So. 2d 1189 (Fla. 2006), prosecutor’s comments to the jury that the State’s sole witness, a state trooper was being truthful and reliable, was not improper bolstering, but proper response to the defense’s attack on the trooper’s credibility.
12. In *Wilson v. State*, 964 So. 2d 241(Fla. 4<sup>th</sup> DCA 2007), prosecutor’s comments were not invited by defense counsel’s impeachment of the victim’s ability to recall so as to justify prosecutor’s arguments that the defense was to “[cheapen the victim, which cheapens the crime, and that if the jury did not think the victim deserved protection under the law, you should find the defendant not guilty.]” The court held such comments were an appeal for sympathy for the victim and were thus improper.
13. In *McKinney v. State*, 967 So. 2d 951(Fla. 3<sup>rd</sup> DCA 2007), defense counsel repeatedly emphasized the fact the State only offered testimony of one witness, and that no other person at the scene had given testimony. The court held that the prosecutor properly responded by telling the jury that it was a matter of commonsense, wherein the case involved a horrific crime scene and thirty (30) plus rounds from an assault rifle had been fired so that bystanders would not not be willing to come forward as witnesses.

#### Q. JUDICIAL INVOLVEMENT

1. “It is no longer-if it ever was-acceptable for the judiciary to act simply as a fight promoter, who supplies an arena in which parties may fight it out on unseemly terms of their own choosing.” *Borden, Inc. v. Young*, 479 So.2d 850, 851 (Fla. 3d DCA 1985), *rev. den.*, 488 So.2d 832 (Fla. 1986).
2. *DiAmbrosio v. State*, 736 So.2d 44, 48 (Fla. 5<sup>th</sup> DCA 1999), in reversing and remanding case for a new trial, “[i]t is very difficult to understand why an experienced prosecutor, which this one is, would act so unprofessionally, and why two other lawyers, the defense attorney and the judge, would permit such behavior to jeopardize a very sensitive trial for the most terrible of crimes.”
3. *Gomez v. State*, 751 So.2d 630, 632-633 (Fla. 3d DCA 1999), sixteen improper comments were made by the prosecutor. In ordering a new trial,

the court noted, “it is not solely the prosecutor who must be admonished here. The trial court retains the ultimate responsibility for the proper conduct of trial counsel and trial proceedings in her courtroom.... There comes a point and time in the conduct of a trial that the trial judge should and must intervene in the egregious conduct, whether it has been challenged or not.”

4. *Bellsouth Human Resources Administration, Inc. v. Colataric*, 641 So.2d 427, 430 (Fla. 4<sup>th</sup> DCA 1994), Judge Klein stated, “it is the trial court’s responsibility, when objections are made to improper argument, to sustain the objection and let counsel know that these tactics will not be tolerated.... [I]t should not be difficult for trial judges to recognize when counsel are exceeding the bounds of propriety.”
5. The trial court must understand the applicable law so as not to allow the prosecutor to unfairly comment on the defendant’s failure to call a witness. *White v. State*, 757 So. 2d 542 (Fla. 4<sup>th</sup> DCA 2000).

#### R. MISCELLANEOUS MATTERS

1. Improper for a prosecutor to comment on a defendant’s right to a jury trial. *Bell v. State*, 723 So. 2d 896 (Fla. 2d DCA 1998).
2. References to Biblical passages should be avoided. *Bonifay v. State*, 680 So. 2d 413, 418, n. 10 (Fla. 1996).
3. Improper to comment on evidence that has been suppressed or that the parties agreed would not be discussed. *Bauta v. State*, 698 So. 2d 860 (Fla. 3d DCA 1997), *rev. denied*, 717 So. 2d 528 (Fla. 1998); *Hampton v. State*, 680 So. 2d 581 (Fla. 3d DCA 1996).
4. Before a defendant’s guilt can be conceded, an on-the-record inquiry must be made of the defendant to verify that the defendant consents to defense counsel’s actions of conceding guilt; silent acquiescence is not sufficient. *Nixon v. Singletary*, 758 So. 2d 618 (Fla.), *cert. denied* 121 S. Ct. 429 (2000).
5. The following voir dire questions were found improper during a trial for aggravated battery on a woman:

Do you think we need to have a real serious injury in order to be here, that we should wait for that to happen?

Do you talk to other nurses about the cycle of violence that they see?

If the victim didn't want to prosecute, and I prove to you beyond a reasonable doubt that a crime had occurred, would you be able to follow the law and still find the person guilty, the fact that the person didn't want to prosecute?

If people become involved in domestic violence-type situations and the police become involved, and feelings change later on, how would you feel about the situation? *Sackett v. State*, 764 So. 2d 719, 721 (Fla. 2d DCA 2000).

6. Failure to timely object to improper prosecutorial comments precludes appellate review, unless the comments are so prejudicial as to constitute fundamental error. *Thomas v. State*, 748 So. 2d 970 (Fla. 1999); *Street v. State*, 636 So. 2d 1297 (Fla. 1994), *cert. denied*, 513 U.S. 1086 (1995); *Jones v. State*, 666 So. 2d 995 (Fla. 5<sup>th</sup> DCA 1996).

“Fundamental error” was defined in *McDonald v. State*, 743 so.2d 501, 504 (Fla. 1999), as “the type of error which ‘reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.’”

7. The cumulative effect of (16) improper comments by the prosecution constituted fundamental error. *Caraballo v. State*, 762 So. 2d 542 (Fla. 5<sup>th</sup> DCA 2000).
8. Timely objection to improper prosecutorial comment must be made, and a motion for a mistrial must be made at least at the end of closing argument. *Gutierrez v. State*, 731 So. 2d 94 (Fla. 4<sup>th</sup> DCA 1999).
9. For a trial court to grant a new trial on the basis of improper comments during closing arguments to which no objection was timely made, it must be shown that the comments were improper, harmful, incurable, and so damaged the fairness of the trial “that the public’s interest in our system of justice” required a new trial. *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010, 1031 (Fla. 2000); *see also Darden v. State*, 329 So. 2d 287, 289 (Fla. 1976).
10. In *Belcher v. State*, 961 So. 2d 239 (Fla. 2007), *cert. denied*, 128 S. Ct. 621 (2008), prosecutor’s comments during voir dire questioning that presumption of innocence did not mean that capital murder defendant was innocent, but that he was presumed to be innocent until jury heard evidence to the contrary was not error. The court held that the prosecutor was merely explaining presumption of innocence.
11. In *Hayes v. State*, 932 So. 2d 381 (Fla. 2d DCA 2006), prosecutor in opening statement told jury that defendant confessed his crime to a fellow

inmate, but subsequently failed to present evidence to support claim. Trial court erred in not granting a mistrial.

12. During closing argument, the prosecutor made the following remark:

“At the end of the day you might say to yourself: what is this really all about with the evidence? What are we doing here? Why are we sitting in the box as jurors? The reason we are here is because this defendant doesn’t want to take responsibility or be held accountable for his actions.” The First District held that the comment constituted an inappropriate comment on the defendant’s right to a jury trial, but declared the error harmless. *Lingebach v. State*, \_\_So.2d\_\_,33 Fla.L.Weekly D2242 (Fla. 1<sup>st</sup> DCA, September 22, 2008).