CHAPTER 35

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The Closing Argument

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It has been noted that no aspect of our adversary fact-finding process is more important than the opportunity of the criminal defendant to marshal the evidence in his favor at the conclusion of a trial.[1] The pivotal significance of this part of the trial also enhances the prejudicial impact of improper argument by the prosecutor and has led the Supreme Judicial Court to declare that it "shall not tolerate misconduct by lawyers during the persuasion phase of a criminal trial."[2] This chapter addresses (1) the governing procedural rules, (2) the appropriate content of a closing argument, (3) the most frequent prosecutorial errors in closing argument, (4) remedies for improper closings, and (5) elements of effective advocacy in a closing argument.

§ 35.1 PROCEDURE

§ 35.1A. RIGHT TO MAKE A CLOSING ARGUMENT

The defense in a criminal trial has the right to make a closing argument, and that right applies with no less force when the case is tried to a judge rather than to a

[1] Commonwealth v. Triplett, 398 Mass. 561, 568–69 (1986) (citing Herring v. New York, 422 U.S. 853, 858–62 (1975)).

[2] Commonwealth v. Smith, 387 Mass. 900, 903 (1983) (quoting Commonwealth v. Haas, 373 Mass. 545, 557 (1977)).

jury.[3] A defendant who is denied the right to present a closing argument will generally be entitled to a new trial without the need to make a showing of prejudice.[4]

§ 35.1B. ORDER AND TIMING

The closing argument is governed by Mass. R. Crim. P. 24(a), which mandates that the defendant must present his closing argument before the prosecution. This provision has withstood constitutional challenge.[5]

The Rule is silent in regard to the order of closing arguments among multiple defendants with separate attorneys. Although one commentator has suggested that the order should follow the chronological sequence of the indictments or complaints,[6] most judges will allow defense counsel to agree among themselves on the order in which counsel will proceed throughout the trial, with the proviso that the same order will prevail in all aspects of the case.

Rule 24(a)(2) provides that the closing argument by counsel for each party shall be limited to thirty minutes. The judge retains the discretion, acting before the argument commences and either on motion or *sua sponte*, to reduce or extend the time period, provided that she acts "reasonably."[7] Where the issues of the case are not complex and defense counsel has ample time to cover the essential aspects, a judge does not abuse her discretion to restrict counsel to the thirty minutes allotted.[8] The judge also has broad discretion to limit lengthy, repetitious summations.[9]

In a complex case, counsel should not hesitate to request additional time for summation. It is advisable to broach the issue with the court prior to the arguments in order to avoid the risk of an arbitrary restriction being imposed in mid argument.

Judges are given broad discretion regarding the scheduling of closing arguments, bearing in mind that a "defendant is entitled to have summations and instructions delivered at a time when the jurors are fresh enough to be attentive and receptive to such critical information."[10] Although the Supreme Judicial Court noted that "it would have been better practice for the judge, at the end of a seven-week trial

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[3] Herring v. New York, 422 U.S. 853 (1975). Indeed, the Court in *Herring* suggested that the right to give a closing argument may even be of greater importance in a case tried before a judge because she would otherwise lack "the stimulation of opposing viewpoints inherent in the collegial decision-making process of a jury." *Herring*, *supra*, 422 U.S. at 863–64 n.15. *See* Commonwealth v. Martelli, 38 Mass. App. Ct. 669 (1995) (reversible error with prejudice assumed when judge declined to hear defense counsel's closing in jury-waived trial).

[4] Commonwealth v. Miranda, 22 Mass. App. Ct. 10, 12–13 (1986). Counsel should object to the denial, however, in order to preserve the issue for appellate review. *Miranda*, *supra*, 22 Mass. App. Ct. at 13.

[5] Commonwealth v. Seminara, 20 Mass. App. Ct. 789, 799 (1985). *Contrast* Fed. R. Crim. P. 29.1, which requires the prosecution to argue first but which also grants the prosecution an opportunity for a rebuttal argument following the defendant's closing.

[6] SMITH, *Criminal Practice and Procedure*, 30A MASS. PRAC. § 1848 (2d ed. 1983).

[7] Mass. R. Crim. P. 24(a)(2).

[8] Commonwealth v. Cameron, 385 Mass. 660, 667 (1982). *See also* Commonwealth v. Johnson, 42 Mass. App. Ct. 948, 951 (1997) (20 minutes).

[9] Commonwealth v, Bourgeois, 391 Mass. 869, 883 (1984). *See also* Commonwealth v. Mahar, 6 Mass. App. Ct. 875 (1978) (counsel informed after 55 minutes that his time was "exhausted" and that he should "sum up").

[10] Commonwealth v. Paszko, 391 Mass. 164, 192 (1984).

[in which the defense rested at 3:15 P.M. on a Thursday], to defer closing arguments and instructions until the next day instead of keeping the jury into the night [until 10:10 P.M.]," the Court found no prejudicial error or abuse of discretion in this circumstance.[11] The lesson for counsel is that one must be ready to give the closing argument regardless of the time the defense rests.

The court has not endorsed a procedure used elsewhere that when a jury reports an impasse, the jurors may be asked if there are subjects on which they would benefit from additional closing argument from counsel.[11.5]

§ 35.1C. RULINGS ON PROPOSED JURY INSTRUCTIONS REQUIRED BEFORE ARGUMENT

Counsel is required to submit any requests for particular jury instructions at the close of all the evidence and prior to the closing arguments unless the court directs otherwise.[12] Rule 24 mandates that the court rule on the instructions prior to the summations, and one court has noted that "[t]he purpose of the rule is to enable counsel to argue intelligently to the jury."[13] Counsel can request additional time to revise her closing argument if the judge reverses his charging-conference decision on whether to give a lesser-included instruction.[13.5]

Seeking rulings related to the court's charge is particularly important in the area of lesser-included offenses. Counsel must know if the jury will be allowed to consider these crimes so that he can make a decision with the client whether to try to cut his losses or go for broke. In a murder trial, counsel also should seek a ruling on which theories of first-degree murder will be submitted to the jury. Failure to obtain this ruling enables the prosecutor to make an argument in support of extreme atrocity and cruelty, for example, even if the judge ultimately determines that the evidence does not warrant an instruction on that theory of law.[14]

§ 35.1D. PREVIEW OF CLOSING FOR THE JUDGE

The trial court may have counsel provide a preview to the judge of the summation by relating the primary points that will be argued. This discussion may be held in chambers or as part of the discussion regarding jury instructions.[15]

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[11] Commonwealth v. Paszko, 391 Mass. 164, 191–92 (1984).

[11.5] Commonwealth v. Gomez, 55 Mass. App. Ct. 247 (2002)(both parties objected to the procedure, and sought to halt the process by a petition to a single justice).

[12] Mass. R. Crim. P. 24(b). The failure to submit the requested instructions in a timely fashion, however, does not relieve the court of the obligation to charge the jury correctly. Commonwealth v. Yunggebauer, 23 Mass. App. Ct. 46, 52 (1986). *See also* Commonwealth v. Deagle, 10 Mass. App. Ct. 748, 751 (1980) (requests submitted following arguments but before the charge).

[13] Commonwealth v. Thomas, 21 Mass. App. Ct. 183, 186–87 (1985).

[13.5] Commonwealth v. Degro, 432 Mass. 319, 331-332 (2000). *See, e.g.*, Commonwealth v. Dyous, 436 Mass. 719, 729-730 (2002).

[14] Commonwealth v. Shipps, 399 Mass. 820, 838–40 (1987).

[15] *See, e.g.,* Commonwealth v. Hoppin, 387 Mass. 25, 28 (1982); Commonwealth v. Earltop, 372 Mass. 199, 206–07 (1977) (Hennessey, C.J., concurring).

Although not a recommended substitute for a motion in limine or the submission of requests for instructions, this conference can provide counsel with an opportunity to have the court rule on certain lines of argument that are anticipated from the prosecutor. An example is a request that the prosecutor not comment on the failure of the defendant to present certain witnesses or evidence.[16] A judge has the discretion to interrupt counsel during closing argument if the judge previously has ruled that a line of argument was improper because it was unsupported by the evidence at trial.[16.5]

The Supreme Judicial Court has noted with approval the practice of Justice Robert A. Barton (ret.) to admonish both counsel prior to closing argument that they are not to express their personal opinions, appeal to sympathy, discuss the appellate or societal consequences of the verdict, or ask the jurors to put themselves or a loved one in the position of the victim or the defendant.[17]

§ 35.1E. INSTRUCTIONS GIVEN PRIOR TO THE CLOSING ARGUMENTS

The court may give the jury a brief charge prior to closing arguments concerning the purpose and limitations of summation. The court will often inform the jurors that closing arguments are not evidence, that the jury's collective memory controls their recollection of the facts if there is a discrepancy with counsel's recollection, and that it is improper for counsel to express a personal opinion during the argument.

Counsel may waste valuable moments if she repeats this boilerplate at the outset of her closing argument rather than immediately addressing the contested issues of the case and putting forward a succinct summary of why the defendant is not guilty.[18] These same instructions are likely to be repeated by the court in the body of the main charge to the jury.[19]

§ 35.2 CONTENT OF THE CLOSING

§ 35.2A. COMMENT LIMITED TO THE EVIDENCE IN THE RECORD AND REASONABLE INFERENCES THEREFROM

"The proper scope of a . . . closing argument may be simply summarized: counsel may argue as to the evidence and any inferences that may be drawn from it."[20]

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[16] *See*, *e.g.*, Commonwealth v. Melendez, 12 Mass. App. Ct. 980 (1981). Counsel might wish to make a motion in limine asking the court to forbid the prosecutor from resorting to a large number of specific arguments, listed in the motion, that have been ruled improper in past cases. *See* Defense Motion in Limine Addresses Improper Closing, Crim. Prac. Man. (BNA) 446–50 (1991).

[16.5] Commonwealth v. Williams, 53 Mass. App. Ct. 719, 725-726 (2002).

[17] Commonwealth v. Finstein, 426 Mass. 200, 205 n.1 (1997).

[18] Further explication of this point is contained *infra* at § 35.5.

[19] The use of a precharge has a bearing on whether prosecutorial excesses in closing argument will constitute reversible error. *See infra* § 35.4.

[20] Commonwealth v. Ridge 455 Mass 307, 330 (2009) (quoting Commonwealth v. Murchison, 418 Mass. 58, 59-60 (1994) and noting that counsel "may argue from the evidence and may argue fair inferences that might be drawn from the evidence"); Commonwealth v. Francis, 391 Mass. 369, 371–74 (1984). *See also* Commonwealth v. Pearce, 427 Mass. 642, 646 (1998), S.C., 43 Mass. App. Ct. 78 (1997) ("We remind both prosecutors and defense attorneys,

This includes comments on the demeanor of the witnesses as they testified before the jury.[20.5] Arguments that are not supported by the evidence are considered speculative and conjectural and thus improper.[21] In addition, counsel may not use evidence substantively if it was admitted for a limited purpose.[21.5]

Counsel is permitted and indeed is expected to marshal the evidence in favor of her client, and this process involves pointing out not only the strength of her client's case but also the weaknesses of the opponent's position.[22] Counsel may argue any inferences from the evidence that are favorable to her theory of the case, "as long as the inferences drawn are reasonable."[23] The definition of an "inference" is "simply an observable, common sense, reasonable relationship between evidentiary facts."[24] The

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as well as attorneys in civil cases, that arguments must be based solely on the evidence and all inferences therefrom."); See *also* Commonwealth v. Lamrini, 392 Mass. 427, 431 (1984).

[20.5] Commonwealth v. Crimmins, 46 Mass. App. Ct. 489, 495 (1999) (proper to argue that jury could see that the victim "was terrified while sitting across from the defendant and testifying against him"); Commonwealth v. Payne, 426 Mass. 692, 695–697 (1998) (proper to comment on fear shown by witnesses during testimony, as opposed to generalized fear of defendants).

[21] Commonwealth v. Kozec, 399 Mass. 514, 522 (1987).

[21.5] Commonwealth v. Randall, 50 Mass. App. Ct. 26, 28 (2000)(statement that was admitted only to show the basis for police action, and not for the truth of the statement, could not be used substantively in closing argument); Commonwealth v. Rosa, 412 Mass. 147, 156-158 (1992)(testimony admitted for the limited purpose of impeachment could not be used for substantive purposes).

[22] Commonwealth v. Johnson, 374 Mass. 453, 457–60 (1978).

[23] *See, e.g.,* Commonwealth v. Wallace, 460 Mass 118, 125-126 (2011) (prosecutor's closing argument, in capital murder prosecution, that defendant had asked owner/driver of van to "wipe down" the van after victim was shot and killed from gunshots fired from the van, was a fair inference from a passenger's testimony that "everybody" who had been in the van "was saying" after the shooting that they "wanted their prints off of" the van, and "everybody" included defendant, who had been a passenger in the van); Commonwealth v. Semedo, 456 Mass. 1 (2010) (statement during prosecutor's closing argument at murder and robbery trial that defendant must have been aware that co-defendant had a gun because victim's car was stopped in the middle of the street and money was taken, asked jury to draw a reasonable inference from the evidence and was not improper); Commonwealth v. Moorer, 431 Mass. 544, 548 (2000) (reasonable inference that victim was racially biased, and error for judge to preclude that line of argument); Commonwealth v. Cotter, 415 Mass. 183, 184 (1993) (reasonable inference that defendant played leadership role in crime); Commonwealth v. Cotter, 415 Mass. 183, 184 (1993) (reasonable inference that defendant played leadership role in crime); Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 848 (2010) (prosecutor's assertion in closing argument that defendant was "nervous" during traffic stop during which firearm was discovered was a fair inference from the evidence, though no witness used the word "nervous" at trial, where jury heard testimony that the defendant was avoiding eye contact with the officer, not answering the officer's questions, and answering the officer's questions falsely; Commonwealth v. Thomas, 44 Mass. App. Ct. 521, 525–527 (1998) (prosecutor could ask jury whether based on their common experience, it was plausible that a man would register well over 0.08 on a breathalyzer based on two beers over three hours). *Contrast* Commonwealth v. Nurse, 50 Mass. App. Ct. 36, 40-41 (2000)(when defense promised in opening to call the witness, not fair to permit defense to comment in closing on prosecution's failure to call the witness).

[24] HUGHES, EVIDENCE § 43, at 66 (Supp. 1989) (an inference is properly described as "that relationship which exists between the facts such that proof of a basic fact permits the jury, but does not require it, to find the dependent fact"); Commonwealth v. Thomas, 52 Mass.

precise form in which the inference is argued is not significant unless it tends to lead the jury to believe that the inference is not from the evidence but from the apparent personal knowledge of the attorney.[25]

"Within the bounds of the evidence and the fair inferences from the evidence, great latitude should be permitted to counsel in argument."[26] Counsel may ask the jury to apply its common sense and everyday experience when evaluating the testimony, and may argue inferences that are based on the jurors' common knowledge.[27] It is also proper for counsel to use "analogy, example and hypothesis as an aid to effective and aggressive argument."[28] As a general proposition, it is permissible for counsel to dramatize an argument by using imaginary dialogue or to illustrate it by reference to an imaginary occasion, but counsel must not imply that it is based on a true account if that is not in evidence.[29] Finally, counsel may attempt to assist the jury in analyzing, evaluating, and applying evidence by suggestions as to what conclusions should be drawn from the evidence.[30]

App. Ct. 286, 292-293 (2001)(in the absence of evidence connecting defendant to drugs and paraphernalia in car, prosecution argument impermissibly amounted to guilt by association).

[25]Commonwealth v. Palmariello, 392 Mass. 126, 132–36 (1984) (citing Commonwealth v. Nordstrom, 364 Mass. 310, 315 (1973)). *See* Commonwealth v. Deloney, 59 Mass. App. Ct. 47, 51 (2003) (permissible to use a narrative style in the opening statement where it did not suggest personal knowledge of the facts of the case or constitute improper vouching of the credibility of the witnesses; there is nothing wrong with a narrative as long as it remains clear to the jury that the narrative is a prediction of what will be established by the evidence.);Commonwealth v. Ortiz-Soto, 49 Mass. App. Ct. 645, 649-650 (2000)(prosecutor drew fair inference of what defendant had been saying in Spanish at the scene); Commonwealth v. Antivine, 417 Mass. 637 (1994) (judge properly interrupted counsel who stated that a fact was true, where correct assertion would have been that it was a reasonable inference).

[26] Commonwealth v. Gilmore, 399 Mass. 741, 744–46 (1987).

[27] Commonwealth v. Oliveira, 431 Mass. 609, 613 (2000) (argument that there are a variety of reasons, social and economic, why women stay with men who abuse them, was grounded in common sense and common knowledge); Commonwealth v. Palmariello, 392 Mass. 126, 134 (1984) (defendant could not have watched codefendant kill the defendant's mother without sharing his intent); Commonwealth v. Silva, 388 Mass. 495, 508–09 (1983) (prosecutor compared defendant's actions to carrying a baby); Commonwealth v. Fitzgerald, 376 Mass. 402, 416–24 (1978) (knowledge that fear exists in urban public housing projects could be based on jurors' common experience).

[28] *See* Commonwealth v. Silva, 388 Mass. 495, 508 (1983) (quoting Leone v. Doran, 363 Mass. 1, 18, *modified on other grounds,* 363 Mass. 886 (1973)); *see, e.g.*, Commonwealth v. Ridge, 455 Mass. 307, 330-1 (2009) (prosecutor's passing remark about criminal cases on television was a "brief utterance" and "permissible analogy to better communicate the Commonwealth's standard of proof"); Commonwealth v. Matthews, 45 Mass. App. Ct. 444, 446–447 (1998) (proper for defense counsel to ask rhetorically how many of the jurors keep a diary so that they would know where they were every day as this was an attempt to invoke logic and common sense).

[29] Commonwealth v. Clary, 388 Mass. 589–94 (1983) (reference to television program to downplay discrepancies in identification cases was improper because not reference to "imaginary" event, but rather to one prosecutor wished jurors to accept as true).

[30] Commonwealth v. Lamrini, 392 Mass. 427, 431 (1984) (citing Commonwealth v. Ferreira, 381 Mass. 306, 316 (1980)). *See also* Commonwealth v. Richenburg, 401 Mass. 663, 674–75 (1988).

Specific examples of appellate scrutiny of the inferences suggested by defense counsel are rare, with the exception of cases in which the prosecution claimed to be "fighting fire with

It can be a proper defense argument that a reasonable inference is that the police witnesses are lying and motivated by a desire to make the charges "stick" by providing details to make their testimony sound more credible.[31] In addition, counsel can comment that the extensive courtroom experience of seasoned police officers would make them appear more credible than defense witnesses.[32]

§ 35.2B. ETHICAL CONSTRAINTS

The Supreme Judicial Court has promulgated specific disciplinary rules that are applicable to closing arguments in criminal cases.[33] It is unprofessional conduct for an attorney intentionally to misstate the evidence, although she is not precluded from arguing all reasonable inferences from the evidence in the record.[34] In addition, it is unprofessional conduct to express her personal belief or opinion in her client's innocence or the truth or falsity of any testimony or evidence.[35] Finally, defense counsel may not attribute the commission of the crime to another person unless such an inference is warranted by the evidence.[36]

The Supreme Judicial Court has mandated that a judge shall report to the Board of Bar Overseers any serious misconduct by counsel during closing argument and, in the case of appointed defense counsel, also advise the Committee for Public Counsel Services of "egregiously improper closing argument."[37] The present sanction for a prosecutor's unprofessional conduct during closing argument is a private reprimand by the Board of Bar Overseers and could result in dismissal of the case.[38]

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fire," discussed *infra* at § 35.3K. *See, however,* Commonwealth v. Owens. 402 Mass. 639, 642–44 (1989) (defendant properly argued that an alleged rape victim accused the defendant because of guilt and low self-esteem after an instance of casual sex, and that the police investigation was biased by an assumption at the outset that a rape had in fact occurred); Commonwealth v. Person, 400 Mass. 136, 138–43 (1987) (proper for defense to argue that all of defendant's postshooting actions were consistent with claim of accident). *Compare* Commonwealth v. Core, 370 Mass. 369, 376–77 (1976) (no error to preclude defense counsel comment on "racial aspects of case" in absence of evidence that racial bias or prejudice played any part in case).

[31] Commonwealth v. Murchison, 418 Mass. 58, 61 (1994), S.C., 35 Mass. App. Ct. 269 (1993) ("Where there is evidence from which the inference may be drawn that a police witness is lying, the fact that the witness is a police officer may have a material bearing on the credibility of his testimony in a particular case.").

[32] Commonwealth v. Murchison, 418 Mass. 58 (1994), S.C., 35 Mass. App. Ct. 269 (1993).

[33] S.J.C. Rule 3:08, PF 13 (prosecution function) and DF 14 (defense function).

[34] S.J.C. Rule 3:08, PF 13(a) and DF 14(a).

[35] S.J.C. Rule 3:08, PF 13(b) and DF 14(b). Commonwealth v. Farley, 432 Mass. 153, 157 n. 5 (2000).

[36] S.J.C. Rule 3:08, DF 14(b).

[37] Commonwealth v. Kozec, 399 Mass. 514, 519 n.10 (1987).

[38] Commonwealth v. Merry, 453 Mass. 653, 664 (2009); Commonwealth v. Smith, 387 Mass. 900, 914 (1983) (Abrams, J., concurring). One justice has advocated that the name of the errant prosecutor be published in the Court's opinion issued on the case. *Smith, supra. See also* Commonwealth v. McLeod, 30 Mass. App. Ct. 536, 541–42 (1991), suggesting adoption of New York practice of filing relevant opinions separately in the Court Clerk's office, indexed against the name of the prosecutor, for future reference in disciplinary proceedings.

§ 35.2C. ABANDONING A DEFENSE MAY CONSTITUTE INEFFECTIVE ASSISTANCE

As with every part of a criminal trial, the defendant has the right to the effective assistance of counsel during the closing argument.[39] In assessing a claim of ineffective assistance, an appellate court will determine whether serious deficiencies of counsel deprived the defendant of an otherwise available, substantial ground of defense.[40]

A common basis for a claim of ineffective assistance is that the defense counsel put forward a specific theory supporting his client's innocence during the opening statement but then abandoned that theory during the closing argument. This will constitute ineffective assistance if there was evidence presented during the trial that supported the original theory and counsel's abandonment of this viable argument "[i]n effect . . . left his client denuded of a defense."[41] Similarly, if there is a viable theory of defense, it is ineffective in closing argument for the defense counsel to simply recite the testimony, and not marshal the evidence favorable to the defendant in an effort to create a reasonable doubt.[41.5]

On the other hand, counsel may make concessions in closing argument that are based on a legitimate tactical judgment. For example, counsel would not necessarily be ineffective by virtually conceding malice during the closing argument of a murder trial where the evidence was overwhelming and counsel was seeking a verdict of second-degree murder instead of first-degree murder.[42]

§ 35.2D. COMMENT ON FAILURE OF POLICE TO USE CERTAIN TESTS OR PROCEDURES

The fact that certain tests were not conducted or certain police procedures not followed can be argued by defense counsel as a circumstance that raises a reasonable

[39] Commonwealth v. Triplett, 398 Mass. 561, 567–69 (1986) ("no aspect" of a criminal trial "could be more important" than the summation).

[40] Commonwealth v. Triplett, 398 Mass. 561, 568 (1986); Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). *Contrast* Commonwealth v. Filippidakis, 29 Mass. App. Ct. 679 (1991) (closing argument that "rings with self-indulgent bombast whose effect on an intelligent jury is questionable" may still not deprive client of a defense). Regarding ineffective assistance generally, *see supra* § 8.1C.

[41] Commonwealth v. Street, 388 Mass. 281, 285–88 (1983) (abandonment of insanity defense in a murder trial). *See also* Commonwealth v. Westmoreland, 388 Mass. 269, 271–74 (1983) (same); *See, e.g.*, Commonwealth v. Nieves, 429 Mass. 763, 771–772 (1999) (defense counsel's comments about "this rigmarole about the law, the burden of proof, and he is presumed innocent — but let's be realistic, you either believe the defendant or you don't" were cured by instructions); Commonwealth v. Triplett, 398 Mass. 561, 567–69 (1986) (concession of the defendant's lack of credibility on the only theory of the defense).

[41.5] Commonwealth v. Farley, 432 Mass. 153, 156-157 (2000).

[42] Commonwealth v. Doane, 428 Mass. 631, 634 (1999) ("defense counsel might reasonably have concluded that the best hope ... was not to ask for too much, that conceding the inevitable was the best way perhaps to obtain all that seemed available"); see also, Commonwealth v. Arriaga, 453 Mass. 556, 581 (2003); Commonwealth v. Gould, 413 Mass. 707 (1992).

doubt as to the defendant's guilt.[43] Counsel may go so far as to suggest that had the police conducted certain aspects of their investigation differently, it would have supported the defense.[44] Although the court may instruct the jury regarding the inferences that may be drawn from failure to conduct tests, the defendant is not entitled to such an instruction as of right.[45]

Examples of the failure to follow certain procedures include the conducting of a show-up in an identification case, whether in person or by use of a single photograph, rather than using a lineup or an array of photographs,[46] the use of scientific tests that have inherent inadequacies or in lieu of more reliable tests,[47] the failure to introduce in evidence a photograph of the defendant that could have corroborated the scratches allegedly present on his face,[48] the failure to seize or secure the defendant's clothing as evidence,[49] and the failure to test for the presence of drugs in the alleged murder victim's body where the defendant claimed that the death was due to a drug overdose.[50] The fact that the defendant makes an argument that certain tests should have been performed does not permit the prosecutor to rebut it by stating that the defendant should have asserted this defense prior to the trial, thereby allowing the tests to be done.[44.5] Any rebuttal by the prosecutor of an "omissions in police investigation" argument should raise a red flag to defense counsel.[44.7]

§ 35.3 PROSECUTORIAL ERRORS IN THE CLOSING

The most common errors made by prosecutors in closing arguments generally will fall into three categories: (1) improper comment on the defendant's conduct or on his trial strategy, (2) expression of personal opinion on the witnesses or the evidence and appeals to a juror's sympathy or duty, and (3) misstatements of law and evidence or the drawing of unreasonable inferences from the evidence.

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[43] Commonwealth v. Bowden, 379 Mass. 472, 485–86 (1980) (failure to conduct fingerprint tests). *See also* Commonwealth v. Fitzgerald, 412 Mass. 516, 525 (1992); Commonwealth v. Cordle, 412 Mass. 172, 176–77 (1992).

[44] Commonwealth v. Person, 400 Mass. 136, 140 (1987) (had police fingerprinted gun, they would have found the victim's prints on the barrel, supporting the defendant's contention that she had grabbed it and yanked it toward her, causing its accidental discharge).

[44.5] Id. At 140.

[44.7] Commonwealth v. Tu Trinh, 458 Mass. 776, 788-789 (2011) (improper for the prosecutor to contend that attack on alleged police investigative failure or incompetence "is just not fair and it's not right." A forceful curative instruction cured error).

[45] Commonwealth v. Adams, 34 Mass. App. Ct. 516, 519 (1993).

[46] Commonwealth v. Rodriguez, 378 Mass. 296, 311 (1979) (a jury may take into account that "an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness").

[47] Commonwealth v. Benoit, 382 Mass. 210, 221 (1981); Commonwealth v. Rodriquez, 378 Mass. 296, 308 (1979).

[48] Commonwealth v. Gilmore, 399 Mass. 741, 744 (1987).

[49] Commonwealth v. Gilmore, 399 Mass. 741 (1987).

[50] Commonwealth v. Pettie, 363 Mass. 836, 840–41 (1973).

§ 35.3A. PROSECUTOR HELD TO A STRICTER STANDARD

The Supreme Judicial Court has applied much greater scrutiny to prosecutors' summations after a series of admonitions by the Court on the proper bounds of argument appeared to have little impact.[51] While conceding that it is essential to our adversary system that trials be "vigorously prosecuted," the Court has also cautioned that "final arguments cannot be freewheeling, extemporaneous verbal slugfests."[52] It has explicitly acknowledged that the Commonwealth and its prosecutors "are held to a stricter standard of conduct than are errant defense counsel and their clients"[53] and noted that a "prosecutor, as an 'administrator of justice,' has a special obligation to present a fair argument to the jury."[54]

§ 35.3B. COMMENT ON DEFENDANT'S SILENCE OR TRIAL STRATEGY

1. Defendant's Failure to Testify at the Trial

Perhaps the most egregious error that the prosecutor can make during closing argument is to comment on the failure of the defendant to take the stand and testify during the trial.[55] Such action completely compromises the defendant's constitutional right to remain silent and is impermissible.[56] When there is comment on the defendant's failure to testify, the conviction must be reversed unless it can be said that the misconduct was harmless beyond a reasonable doubt.[57] A comment made by a co-

[51] Commonwealth v. Earltop, 372 Mass. 199, 205 (1977) (Hennessey, C.J., concurring) (the fact that "prosecutors are frequently not familiar with the boundaries of argument, or choose to ignore them, is shown by the list of [twelve] cases set out in the margin, as culled from the reports of just the past two years"). The heightened attention to prosecution arguments eventually evoked a protest from the District Attorneys' Association, which claimed that the scrutiny was having an "improper chilling effect on their forceful advocacy" because of the spate of reversals and the potential for disciplinary action for violations of the rules. Commonwealth v. Kozec, 399 Mass. 514, 516 (1987).

[52] Commonwealth v. Smith, 387 Mass. 900, 903 (1983).

[53] Commonwealth v. Kozec, 399 Mass. 514, 519 (1987) (improper argument by prosecutor which leads to a conviction may result in a reversal, whereas improper defense argument may lead to an unreviewable acquittal).

[54] Commonwealth v. Borodine, 371 Mass. 1, 11 (1976) (quoting ABA Standards Relating to the Prosecution Function 1.1(b) (Approved Draft 1971)).

[55] Commonwealth v. Ferreira, 381 Mass. 306, 315 (1980) ("there is no doubt that reference to a defendant's failure to testify at trial is improper"). *See also* Commonwealth v. Coyne, 44 Mass. App. Ct. 1, 8 (1997) (characterization of defense strategy as "run and hide" can constitute a comment on the defendant's failure to testify). *Cf.* Commonwealth v. Carrion, 407 Mass. 263 (1990) (judge's embellished instruction, giving example of kind of adverse inference jury is prohibited from drawing, "teetered on brink of reversible error" but saved by other instruction).

[56] Commonwealth v. Texiera, 396 Mass. 746, 752 (1986). In addition to the constitutional rights under the federal constitution's Fifth Amendment and art. 12 of the Mass. Const. Declaration of Rights, the S.J.C. has noted that G.L. c. 233, § 20 also prohibits comment on the defendant's failure to testify. Commonwealth v. Paradiso, 368 Mass. 205 (1975).

[57] Commonwealth v. Hawley, 380 Mass. 70, 88 (1980). The S.J.C. has noted (but declined to follow "in all its rigidity") the rule of the First Circuit Court of Appeals that comment on the defendant's failure to take the stand will be "prejudicial as a matter of law"

defendant's counsel about the defendant's failure to testify at trial, in contrast to the co-defendant, will be analyzed as if the statement were made by the judge or prosecutor.[57.5]

An insidious form of this impropriety occurs when the prosecution characterizes the Commonwealth's evidence as "uncontested" or "unrebutted" in circumstances where the defendant himself is the only one who can contradict the evidence.[58] To constitute error, the prosecutor's remarks need only be "reasonably susceptible of being interpreted as a comment on [the defendant's] failure to take the stand."[59]

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unless the judge interrupts the argument, instructs the jury fully on the defendant's right not to testify and the jury's obligation not to draw adverse inferences, and in addition states that the U.S. Attorney was guilty of misconduct. Commonwealth v. Gouveia, 371 Mass. 566, 570–72 (1976) (citing United States v. Flannery, 451 F.2d 880, 882 (1st Cir. 1971)).

[57.5] Commonwealth v. Russo, 49 Mass. App. Ct. 579, 581-584 (2000).

[58] *See*, e.g., Commonwealth v. Buzzell, 53 Mass. App. Ct. 362 (2001)(where defendant did not testify, it was improper to characterize prosecution witnesses as uncontradicted or uncontroverted, and assert that defense offered no explanation to counter inculpatory inferences); Commonwealth v. Smith, 413 Mass. 275, 282 n.6 (1992) (where defendant's intent is issue, improper for prosecutor to comment, "I can't get inside his brain" regarding nontestifying defendant); Commonwealth v. Hawley, 380 Mass. 70, 84 (1980) (conversations were at issue between the defendant and a Commonwealth witness without others being present; to rebut allegations of statements made, the defendant would have had to testify); Commonwealth v. Borodine, 371 Mass. 1, 10 (1976) ("a claim that certain evidence is uncontested should be made with caution and only after careful reflection concerning the specific circumstances in which the defendant could have produced contradictory evidence"). *Cf.* Commonwealth v. King, 33 Mass. App. Ct. 905, 907 (1992) (prosecutor's labeling of certain facts as "not in dispute" did not imply that they had to be accepted as true or serve as a comment on defendant's failure to testify). *Contrast* Commonwealth v. Garvin, 456 Mass. 778, 782-783 (2010) (prosecutor's statement during closing at first degree murder trial that there was not credible evidence that anyone other than defendant had shot victim was not a comment on failure to testify but rather on strength of his own case); Commonwealth v. Grant, 418 Mass. 76, 82–83 (1994) (rhetorical question, "What was in the defendant's mind as he pulled back the trigger?" not a comment on his failure to testify but directed toward reasonable inference); Commonwealth v. Lashway, 36 Mass. App. Ct. 677, 682 (1994) (not error to note, "There is no other evidence before you," when showing support by bystander testimony); Commonwealth v. McGeoghean, 412 Mass. 839, 841–42 (1992) (failure of defendant when questioned by police to have explanation of child's burn scars did not impinge on defendant's failure to testify at trial).

[59] Commonwealth v. Braley, 449 Mass. 316, 327-328 (2007) (error for prosecutor to comment that following arrest, the defendant only said, "How did you get on to me?" and then asserted his right to remain silent rather than asked why he was being arrested); Commonwealth v. Phoenix, 409 Mass. 408, 426–27 (1991) ("Does he have an alibi? Does anybody know where he was?"); Commonwealth v. Smith, 387 Mass. 900, 908–09 (1983) (quoting Commonwealth v. Domanski, 332 Mass. 66, 69 (1954) (improper to state that the only evidence of what the defendant has said outside of court has been "not guilty, not guilty, and no more")); Commonwealth v. Hawley, 380 Mass. 70, 82 (1980) (error to refer inferentially to defendant's invocation of the privilege not to testify).

The Court has not found error where prosecution comment that the defendant never meaningfully addressed prior bad act evidence involving similar crimes was not a comment on the defendant's failure to present evidence, and did not shift burden of proof. Commonwealth v. Montez, 450 Mass. 736, 743-747 (2008)(proper attempt to expose an effective defense strategy of dismissive treatment of evidence that was designed to divert the jury's attention from the identification potential of the prior bad acts), where the prosecution comment on the absence of contrary evidence was directed to the defense contention that the jury had not heard "the whole story," Commonwealth v. Brown, 392 Mass. 632, 640–42 (1984) (argument that the

2. Defendant's Failure to Testify or Offer Evidence at a Preliminary Hearing or Prior Trial

Pursuant to G.L. c. 278 § 23, the prosecutor may not comment on the fact that the defendant did not testify at a preliminary hearing, such as a probable-cause hearing or a bench trial, or that he did not offer evidence in his own defense at that proceeding.[60]

3. Defendant's Invocation of Miranda Rights or His Failure to Deny the Allegations or Express Remorse.

It is axiomatic that the prosecutor cannot ask the jury to draw an adverse inference from the defendant's post-arrest exercise of *Miranda* rights.[61] If the defendant did submit to questioning, the prosecutor may not develop an inference of guilt "from the mere fact that [the defendant] did not spontaneously volunteer [during interrogation] that he was innocent," because no person being questioned bears this burden.[62] Similarly, it is improper to say that the defendant "has never had a shred of

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prosecution had produced the only evidence available to it), or to the contention that the chief identification witness was in error, Commonwealth v. Manago, 26 Mass. App. Ct. 262, 265–67 (1989) (statement that "what have you heard that . . . would suggest that it was an honest mistake?"). *Contrast* Commonwealth v. Thompson, 431 Mass. 108, 118 (2000) (assertion that there was no "credible evidence" supporting defense theory was proper where defense witnesses were impeached).

[60] This statute has been interpreted to preclude impeachment of defense witnesses by their failure to testify at the prior trial or hearing, and the Court has indicated that this holding may be of constitutional dimension as well. Commonwealth v. Palmarin, 378 Mass. 474, 476–78 (1979). *Contrast*, Commonwealth v. Greineder, 458 Mass. 207, 243-245 (2010) (prosecutor did not improperly cross-examine defendant as to his prearrest and postarrest silence in violation of defendant's right to silence in murder prosecution, where defendant had not exercised his right to silence and the prosecutor did not comment directly or indirectly on an exercise of the right to remain silent.) For further discussion, *see supra* § 2.3.

[61] Commonwealth v. Clarke, 48 Mass. App. Ct. 482, 485–486 (2000) (although prosecutor can elicit evidence that the defendant stopped the interview with police, it was error to argue that this was because it was to concoct a new defense); Commonwealth v. Amirault, 404 Mass. 221, 236–40 (1989) (evidence of postarrest, post-*Miranda* silence cannot be used as an inference of guilt; improper to suggest that the defendant should have come forward voluntarily with his version to the police); Commonwealth v. Mahdi, 388 Mass. 679, 697 (1983) (prosecutor could not rebut the defendant's claim of insanity by contrasting the defendant's assertion of his *Miranda* rights after his arrest); Commonwealth v. Cobb, 374 Mass. 514, 516–22 (1978). *See also* Doyle v. Ohio, 426 U.S. 610, 618 (1976) (it is a deprivation of due process to allow an arrested person's silence to be used to impeach an explanation subsequently offered at trial); Commonwealth v. Egardo, 426 Mass. 48, 50–54, S.C., 42 Mass. App. Ct. 41 (1997) (defendant's failure to assert at arrest that he had been acting under duress); Commonwealth v. Crichlow, 30 Mass. App. Ct. 901, 902–03 (1991) (improper opening but harmless error). The subject of confessions is more fully discussed *supra* at ch. 19.

[62] Commonwealth v. Haas, 373 Mass. 545, 559 (1977). *See also* Commonwealth v. Lavalley, 410 Mass. 641, 647–52 (1991) (improper to argue that defendant did not deny crime at arrest); Commonwealth v. Azar, 32 Mass. App. Ct. 290, 306–08 (1992) (improper to suggest that defendant remained silent when questioned about cause of daughter's death). A different conclusion would be warranted if the circumstance were one in which the defendant would be expected to rebut the allegation if it were untrue. *See, e.g.*, Commonwealth v. Bregoli, 431

remorse from the beginning right up to now" because the defendant had no obligation to express to anyone his feelings about the incident.[63] However, the prosecutor may comment on the defendant's failure to deny killing his wife to his friend when asked by him, where an innocent person would have done so.[63.5]

4. Comment on Defendant's Opportunity to Hear Prior Witnesses Before Testifying

A prosecutor may not argue that because the defendant heard all of the evidence presented at trial by the Commonwealth, he was able to "fabricate a cover story tailored to answer every detail of the evidence against him."[64] This essentially asks the jury to draw a negative inference from the fact that the defendant remained silent until he testified and also impinges on the defendant's right to hear the Commonwealth's evidence and confront the witnesses against him.[65]

5. Defendant's Failure to Present Evidence or Call Witnesses

Mass. 265, 275-277 (2000) (proper for prosecutor to comment on fact that when defendant's friend asked if he had killed his wife, the defendant did not deny it, as an innocent person would have done); Commonwealth v. Texiera, 396 Mass. 746, 751–52 (1986) (failure to deny the mother's assertion to him that he was the father of her child constituted a tacit admission by the defendant). Moreover, the prosecutor may comment on adverse and inconsistent answers given by the defendants during the stop by the police and prior to their arrest. Commonwealth v. Modica, 24 Mass. App. Ct. 334, 342 (1987). *Contrast* Commonwealth v. McClary, 33 Mass. App. Ct. 678 (1992) (where defendant waived *Miranda* right and gave statement that differed from this trial testimony, comment proper).

[63] Commonwealth v. Borodine, 371 Mass. 1, 10–11 (1976) (defendant accused of murder of his girlfriend). *See also* Commonwealth v. Olszewski, 416 Mass. 707, 725–27 (1993).

[63.5] *See also*, Commonwealth v. Jones, 45 Mass. App. Ct. 254 (1998) (improper to argue that defendant used the discovery process to tailor his testimony at trial).

[64] Commonwealth v. Person, 400 Mass. 136, 138–43 (1987). A similar proscription applies to comment that the defendant had a chance to read the rape victim's version of events in the police report and grand jury transcript before he gave his explanations at trial. Commonwealth v. Kowalski, 33 Mass. App. Ct. 49, 53–54 (1992). *See also* Commonwealth v. Jones, 45 Mass. App. Ct. 254 (1998) (improper to argue that the defendant's access to the police version of the crime in police reports had allowed him to tailor his trial testimony).

[65] Commonwealth v. Kowalski, 33 Mass. App. Ct. 49, 53–54 (1992) (prosecutor's attempt to have jury in rape case draw an inference of guilt from defendant's remaining silent until he testified at trial was a substantial miscarriage of justice). A different situation is presented if the defendant gave a prior statement that is inconsistent with his testimony at trial, thereby providing "independent evidentiary support for the prosecution's assertion of [recent] fabrication." Commonwealth v. Sherick, 401 Mass. 302, 304 (1987). *See also* Commonwealth v. Martino, 412 Mass. 267, 282–84 (1992) (prosecutor could comment on inconsistency between defendant's detailed statement to police and his testimony at trial, and argue that the omissions from the first version constitute consciousness of guilt); Commonwealth v. Lavalley, 410 Mass. 641, 647–52 (1991) (same); Commonwealth v. McClary, 33 Mass. App. Ct. 678 (1992) (when defendant provided statement to police, prosecutor could highlight failure to provide name of alleged culprit until trial); Commonwealth v. Azar, 32 Mass. App. Ct. 290, 306–08 (1992) (proper to contrast defendant's lack of explanation to family regarding child's death with details offered at trial).

"Ordinarily, it is improper for the prosecutor to comment on the failure of the defense to present certain evidence."[66] For example, in the trial of a defendant accused of murdering his girlfriend, the prosecutor should not have said that the victim "did not have an enemy in the world, [because if] she did, you would have heard about it, that is for sure."[67]

A prosecutor should not comment on the defendant's failure to call witnesses unless it is shown that there are witnesses known to the defendant who should support his innocence and are available to be called by him, and that the evidence against him is so strong that, if innocent, he would be expected to call them.[68] Ordinarily, the judge should exercise her discretion cautiously and with a strict regard for the defendant's rights before permitting such comment by a prosecutor.[69] If defense counsel has made

[66] Commonwealth v. Smith, 404 Mass. 1, 7 (1989). *See also* Commonwealth v. Marchese, 54 Mass. App. Ct. 916, 917-918 (2002); Commonwealth v. Fernandes, 30 Mass. App. Ct. 335, 342–43 (1991) (citing art. 12, Mass. Const. Declaration of Rights).

[67] Commonwealth v. Borodine, 371 Mass. 1, 9–12 (1976). *See also* Commonwealth v. Kelly, 417 Mass. 266 (1994) (error to assert that defendant would have presented a record from prior cases if police officer tended to lie). *Contrast* Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 231–32 (1992) (argument permitted that defense expert did not perform certain tests because he knew that they would produce inculpatory evidence); Commonwealth v. Szczuka, 391 Mass. 666, 673–74 (1984) (argument by prosecutor that the defendant's version of fight was unsupported by any corroborating evidence "was permissible comment on the credibility of the defendant's testimony").

[68] Commonwealth v. Szerlong, 457 Mass. 858, 868 (2010) (not proper for an attorney in closing argument to invite jury to draw an inference from the failure of a spouse to testify); Commonwealth v. Rodriguez, 49 Mass. App. Ct. 370 (2000) (reversible error for prosecutor to ask jury to draw adverse inference from defense failure to call a witness when the judge had ruled the argument unsupported by the evidence). *See also*, Commonwealth v. Fredette, 396 Mass. 455, 465–67 (1985).

[69] Commonwealth v. Cobb, 397 Mass. 105, 108–09 (1986); Commonwealth v. Rodriguez, 49 Mass. App. Ct. 370, 372 & n.2 (2000) (factors which should be considered include the strength of the case against the defendant, whether he would call the witness if innocent, whether the witness is available, and the importance of the witness to the defense); Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 407–408 (1999) (where defendant asserted that he had no memory of where he was the day of the incident, it was neither fair nor reasonable comment to argue that he would have found people he had been with if he were innocent); Commonwealth v. Resendes, 30 Mass. App. Ct. 430, 431–34 (1991). The rule regarding missing witness instructions against the Commonwealth is discussed in Commonwealth v. Sena, 29 Mass. App. Ct. 463, 467–69 (1990) (reversed); Commonwealth v. Fulgham, 23 Mass. App. Ct. 422 (1987). *Contrast* Commonwealth v. Anderson, 411 Mass. 279, 282–85 (1991) (not error to refuse to give instruction when prison inmate likely to be hostile toward Commonwealth); Commonwealth v. Cornish, 28 Mass. App. Ct. 173, 177–78 (1989). For instances of prosecutorial comment held to be improper, *see* Commonwealth v. Calcagno, 31 Mass. App. Ct. 25, 29 (1991) (improper — but harmless — comment on defendant's failure to call victim's mother as witness; no comment may be made without prior ruling from judge that there is sufficient evidentiary foundation for same); Commonwealth v. Zagranski, 408 Mass. 278, 286–88 (1990) (where no showing that witness was available to testify, prosecutor argument and instruction by judge were improper, but error harmless); *Cobb, supra* (defendant's failure to call coworkers of victim in store robbery when misidentification claimed); Commonwealth v. Fredette, 396 Mass. 455 (1985) (failure to call alibi witnesses from bar where defendant had been drinking when no evidence that he knew these persons or that they were available to him); Commonwealth v. Schatvet, 23 Mass. App. Ct. 130, 133–36 (1986) (error to permit adverse inference when testimony would be unimportant, or merely corroborative or

unavailing efforts to locate a missing witness, he should submit a motion in limine, accompanied by affidavits detailing these efforts, in order to prevent argument or instruction on adverse inferences from his failure to call the witness.[70]

6. Adverse Inference from the Defendant's Seeking Counsel or the Nature of His Defense

A prosecutor may not suggest that the defendant's decision to consult an attorney promptly after a shooting reflected consciousness of guilt because the defendant's action "is not probative in the least of guilt or innocence."[71] A similar proscription applies to the defendant's request for counsel during an interrogation by the police.[72]

The defendant's strategy at trial of challenging the credibility of Commonwealth witnesses, particularly of police officers, may not be criticized by the prosecutor.[73] Similarly, it is improper, unprofessional, inflammatory, and disparaging

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cumulative of other witnesses; inference should only be permitted "in clear cases"); Commonwealth v. Cancel, 394 Mass. 567, 573–76 (1985) (failure to call any alibi witnesses).

For examples of comment that was allowed, *see* Commonwealth v. Anderson, 411 Mass. 279 (1991); Commonwealth v. Tavares, 27 Mass. App. Ct. 637, 642–44 (1989) (defense counsel in opening statement said that he would produce witnesses who would provide alibi for defendant; none produced); Commonwealth v. Bryer, 398 Mass. 9, 11–13 (1986) (roommate could confirm defendant's sobriety); Commonwealth v. Lee, 394 Mass. 209, 219 (1985) (girlfriend could corroborate alibi).

[70] Commonwealth v. Graves, 35 Mass. App. Ct. 76 (1993) (not error for prosecution to comment on unproduced out-of-state defense witness). *But see*, Commonwealth v. Rodriguez, 49 Mass. App. Ct. 370, 372 n.2 (2000) ("The fact that the witness is equally available to both sides cuts against permitting the inference.").

[71] Commonwealth v. Person, 400 Mass. 136, 138–43 (1987) (a prosecutor may not imply that only guilty people contact their attorneys); Commonwealth v. Liptak, 80 Mass. App. Ct. 76, 88 (2011) (improper for prosecutor to ask rhetorically why defendant's mother would ask officer if her son needs a lawyer).

[72] *Cf.* Commonwealth v. Haas, 373 Mass. 545, 561 (1977). *See also* Commonwealth v. Sazama, 339 Mass. 154, 158 (1959) (assertion of a constitutional right negates any inference of an admission). It should also be noted, however, that it is inappropriate for defense counsel to ask the jury to draw a favorable inference from the fact that the defendant submitted to police interrogation without the presence of a lawyer. *Hass, supra*, 373 Mass. at 561; Commonwealth v. Person, 400 Mass. 136, 141 n.6 (1987).

[73] Commonwealth v. Grandison, 433 Mass. 135, 141-143 (2001), S.C., 432 Mass. 278 (2000) (improper for the prosecutor to suggest jury that it was impermissible for defense counsel to question the veracity of the police officers). Commonwealth v. Murchison, 418 Mass. 58 (1994), S.C., 35 Mass. App. Ct. 269 (1993) (defense counsel can contend that police were lying and motivated to make charges "stick" and that their extensive courtroom experience made them inherently more credible than defense witnesses; "[w]here there is evidence from which the inference may be drawn that a police witness is lying, the fact that the witness is a police officer may have a material bearing on the credibility of his testimony in a particular case"); Commonwealth v. Olszewski, 401 Mass. 749, 760 (1988) (improper argument to contend that if both the law and the facts are against you, the typical strategy is to "pick on the cops"). *See also*, Commonwealth v. Sylvia, 456 Mass. 182, 193-195 (2010) (prosecutor's remark during closing argument at murder trial that defense counsel, by suggesting that police officers may have planted identification evidence on clothing, would have the jury "convict the police," was improper); Commonwealth v. McCravy, 430 Mass. 758, 764–766 (2000) (highly improper and "particularly disturbing" to characterize the entire defense as a "sham"); Commonwealth v.

of the defendant's confrontation rights to compare the cross-examination of a rape victim to the original incident.[73.5] Other defense tactics are not immune from comment, however, if based on conduct that occurred during the trial in the presence of the jury.[74] However, the prosecutor may not elicit evidence of (or comment on) the defendant's opportunity to discuss the law of self-defense with his attorney prior to the testifying.[75] It also is improper to ridicule the defense emphasis on the defendant's state of mind when insanity was interposed.[75.5]

Boyer, 400 Mass. 52, 59 (1987) (comment by judge that the police officer "is not on trial here," the defendant is, was unnecessary and would have been better left unsaid); Commonwealth v. Lewis, 81 Mass. App. Ct. 119, 120-127 (2012) (improper argument at assault trial that the defense in case was a "sham," "choreographed," "staged," and consisted of "lies");); Commonwealth v. Brown, 34 Mass. App. Ct. 222, 227–28 (1993) (characterizing defense as saying the police are lying was "inelegant" but not unfair); Commonwealth v. Deveau, 34 Mass. App. Ct. 9, 10–14 (1993) (improper to assert that cross-examination by counsel caused victim further trauma); Commonwealth v. Simmons, 20 Mass. App. Ct. 366, 371 (1985) (inaccurate to suggest that the only time when the defendant would attack the credibility of the Commonwealth witnesses was when there was no other defense available). *Cf.* Commonwealth v. McLeod, 30 Mass. App. Ct. 536, 540 (1991) (improper for prosecutor to talk of "tragedy" of witness having to testify in public). *Contrast* Commonwealth v. Buckley, 410 Mass. 209, 221–22 (1991) (not improper to assert that defendant wants jury to believe that every Commonwealth witness is lying, where defendant contradicted every witness in part).

[73.5] Commonwealth v. Lorenzetti, 48 Mass. App. Ct. 37, 43 (1999); Commonwealth v. Deveau, 34 Mass. App. Ct. 9, 13 (1993).

[74] Commonwealth v. Borodine, 371 Mass. 1, 11 (1976). *See, e.g.*, Commonwealth v. Montez, 450 Mass. 736, 743-747 (2008) (prosecutor's comment that the defendant never meaningfully addressed the prior bad act evidence involving similar crimes was not a comment on the defendant's failure to present evidence, and did not shift burden of proof. It was a proper attempt to expose an effective defense strategy of dismissive treatment of the evidence that was designed to divert the jury's attention from the identification potential of the evidence; Commonwealth v. Grimshaw, 412 Mass. 505, 506–11 (1992) (not improper to comment adversely on multiple theories advanced by defense); Commonwealth v. Cohen, 412 Mass. 375, 384–89 (1992) (not improper to assert that defense contentions were inconsistent, i.e., defendant not there but if he were, then acted in self-defense); Commonwealth v. Shea, 401 Mass. 731, 736–39 (1988) (prosecution argument that the defendant was trying to confuse and distract the jury by diverting attention away from strong evidence of guilt was proper comment on the defendant's theory of police contrivance); Commonwealth v. Bradshaw, 385 Mass. 244, 271–77 (1982) (proper argument that the defendant had pursued two inconsistent theories of defense until he saw how his witnesses held up); Commonwealth v. Fernandez, 79 Mass. App. Ct. 1117 (2011) (in response to the defendant's challenge to the date of a photograph of the defendant's brother and the identity of the people it depicted, the prosecutor's suggestion in closing that the defense would have presented contrary evidence if the photograph did not actually show the defendant's brother five weeks after the Hecla Street rape was a fair response to defense counsel's comment that testimony dating the photograph should not be believed). Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 404–406 (1999) (where defendant implied that he had fully cooperated with voice identification procedure ordered by the grand jury, prosecutor could show that he had been held in contempt and jailed before doing so);. *But see* Commonwealth v. Vermette, 43 Mass. App. Ct. 789, 802–03 (1997) (error to comment that defense counsel had made more objections or sidebar requests); Commonwealth v. Rogers, 43 Mass. App. Ct. 782 (1997) (improper to ask defense counsel rhetorical questions during closing).

[75] Commonwealth v. Beauchamp, 424 Mass. 682, 690–91 (1997).

[75.5] Commonwealth v. McLaughlin, 431 Mass. 506, 510–512 (2000) (egregious errors by prosecution in closing argument where defense was insanity).

§ 35.3C. ADVERSE INFERENCE FROM THE DEFENDANT'S COURTROOM BEHAVIOR

No adverse inference may be argued by a prosecutor from the defendant's proper courtroom behavior, such as reading transcripts, taking notes, and consulting with counsel.[76] It is likewise improper to comment on the defendant's failure to do something during trial while alleging that his motive was to avoid revealing incriminating evidence.[77] Finally, it is unfair and improper to assert that the defendant's sad demeanor during trial reflected consciousness of her guilt.[78]

Comment on the defendant's appearance is proper only when he has an observable physical characteristic[79] or he engages in unusual courtroom behavior.[80] The Court has cautioned that if the prosecutor believes that the defendant did something while not testifying from which the prosecutor intends to argue consciousness of guilt, she should make no reference to it "without first obtaining the judge's approval."[81]

§ 35.3D. INSULTING CHARACTERIZATION OF THE DEFENDANT, DEFENSE WITNESSES, OR DEFENSE COUNSEL

Reference to the defendant as an "animal" is an impermissible excess,[82] and it is clearly improper to suggest that a person like the defendant should not be let loose on

[76] Commonwealth v. Young, 399 Mass. 527, 529 (1987) (improper to characterize the defendant as a "cool customer" who could hide his true feelings from people).

[77] *See, e.g.*, Commonwealth v. Pullum, 22 Mass. App. Ct. 485, 488 (1986) (reversible error to suggest consciousness of guilt from the defendant's not smiling during the trial in which intruder described as missing front teeth); Commonwealth v. Kater, 388 Mass. 519, 532–33 (1983) (improper for prosecutor to contend that the defendant did not wear short-sleeved shirts during the trial in order to conceal his hairy arms).

[78] Commonwealth v. Kozec, 399 Mass. 514, 523–24 (1987) (there are a number of emotions that may cause an appearance similar to sorrow, and a number of reasons why the defendant may have felt sorrow; to urge an inference of guilt was unwarranted).

[79] Commonwealth v. Young, 399 Mass. 527, 530 (1987); Commonwealth v. Kater, 388 Mass. 519, 535 (1983) ("the prosecutor was entitled to comment on the fact that the defendant had changed his hairstyle between the time of the crime and the time of trial"). *See, e.g.*, Commonwealth v. Cohen, 412 Mass. 375, 384–89 (1992) (proper to infer that defendant was right-handed based on his note taking during trial).

[80] *See, e.g.*, Commonwealth v. Glass, 401 Mass. 799, 805–07 (1988) ("it was . . . not improper for the prosecutor to comment on the defendant's demeanor (playing up to the jury) and the fact that he wore his military uniform throughout the trial"); Commonwealth v. Smith, 387 Mass. 900, 907 (1983) (no error in prosecutor's comment that "you have had an opportunity to look at him during the trial as he squirms and smirks and laughs, or whatever you have seen him do").

[81] Commonwealth v. Young, 399 Mass. 527, 532 (1987).

[82] Commonwealth v. Collins, 374 Mass. 596, 601 (1978); Commonwealth v. Sheehan, 435 Mass. 183, 190-191 (2001)(improper to call the defendant a "predator" who "picked the weak chick to prey upon"); Commonwealth v. Dominick, 79 Mass.App.Ct. 1114 (2011) (prosecutor rhetorically asking the jury, "Is this an individual you want to see next to you on the roadway?" was improper, but does not constitute reversible error); Commonwealth v. Rivera, 52 Mass. App. Ct. 321, 328 (2001)(defense witness called a "punk" and a "stooge"); Commonwealth v. Rosario, 430 Mass. 505, 515–516 (1999) (defendant a "monster"); Commonwealth v. Cohen, 412 Mass. 375, 384–89 (1992) (comparison of jury and defendant as

society or ever "walk the streets" again.[83] When the crime is a gruesome one and the defendant's background is not likely to engender admiration or sympathy for him, the prosecutor has a special obligation to try the case dispassionately and without inflammatory tactics.[84] Persistent use of prejudicial labels for defendant in order to suggest that he was of bad character or had a propensity to commit crime is improper, and without adequate curative instructions, can be reversible error.[84.5]

The prosecutor must not claim that only the defendant was not outraged by the brutality of the incident,[85] or that only the defendant had a motive to lie,[86] or attempt to disparage the character of the defendant if that has not been placed in issue.[87] However, strong language may be permitted if it is grounded in the evidence.[88]

"hunter" and "hunted" was inappropriate). *Contrast* Commonwealth v. Glass, 401 Mass. 799, 805–07 (1988) (argument that the defendant's acts were "Mansonesque" was close to accurate, although claim that they were "cannibalistic" was obvious hyperbole).

[83] Commonwealth v. Smith, 387 Mass. 900, 910–11 (1983); Commonwealth v. Burke, 373 Mass. 569, 575 (1977). These remarks also touch on the consequences of the verdict, an improper area for closing argument. *E.g.*, *Smith*, *supra*, 387 Mass. at 900; Commonwealth v. Killelea, 370 Mass. 638 (1976).

[84] Commonwealth v. Smith, 387 Mass. 900, 905 (1983) ; Commonwealth v. Worcester, 44 Mass. App. Ct. 258, 263–268 (1998) (improper to impugn the character of the defendant by asserting that he was like his associates, who were impeached by prior criminal records). *But see* Commonwealth v. Deveau, 34 Mass. App. Ct. 9, 10–14 (1993) (not improper to undercut defense character evidence by asserting that "people like [the defendant]" commit child molestation in secret, implying he was a pedophile).

[84.5] Commonwealth v. Daley, 55 Mass. App. Ct. 88 (2002), f.a.r. granted 437 Mass. 1106 (2002)(prosecutor repeatedly called defendant a crack dealer (based on prior conviction), thief (based on misstatement of evidence), alcohol abuser, and probationer.).

[85] Commonwealth v. Johnson, 24 Mass. App. Ct. 947, 949–50 (1987).

[86] Commonwealth v. Thomas, 401 Mass. 109, 116–17 (1987).

[87] Commonwealth v. Waite, 422 Mass. 792, 800–02 (1996) (characterization of defendant as a "liar" based on postarrest denials was unwarranted where he did not testify at trial); Commonwealth v. Simmons, 419 Mass. 426, 433–44 (1995) (defendant's military service did not warrant claim that he "knows how to kill"); Commonwealth v. Chase, 26 Mass. App. Ct. 578, 584 (1988) (reference to "type of person" and "kind of man" the defendant was based on prior bad acts was improper where evidence had been introduced for limited purpose of showing the defendant's state of mind and motive); Commonwealth v. Hightower, 400 Mass. 267, 270–71 (1987) (improper to attack the defendant by asserting that his defaulting on bail posted by his sister reflected his character); Commonwealth v. Kozec, 399 Mass. 514, 524–25 (1987) (evidence that the defendant had once engaged in "jello wrestling" had no probative value and simply suggested that the defendant was promiscuous); Commonwealth v. Dougan, 377 Mass. 303, 311–12 (1979) (attack on defendants' character based on membership in motorcycle "club" was improper); Commonwealth v. Costello, 36 Mass. App. Ct. 689, 696–97 (1994) (comments that defendant not as nice as he seemed was improper attack on his character); Commonwealth v. Deveau, 34 Mass. App. Ct. 9, 10–14 (1993) (improper to assert that "people like the defendant" commit their crimes in secret, implying he was a pedophile). *Compare* Commonwealth v. Blake, 409 Mass. 146, 160–62 (1991) (prosecutor's description of defendant as "powder keg" permitted because defendant first offered that description).

[88] *See, e.g.*, Commonwealth v. Connor, 392 Mass. 838, 853 (1984) (characterizations of the defendant as "the master manipulator," "the mastermind," and "the schemer" were adequately supported by the evidence and thus permissible); Commonwealth v. Varney, 391 Mass. 34, 43–45 (1984) (proper argument that the defendant's undisclosed source of income was from the sale of narcotic drugs); Commonwealth v. Fitzgerald, 376 Mass. 402, 416–24 (1978)

Disparaging remarks also may not be made concerning the qualifications or motivations of the defendant's witnesses, including experts hired by him.[89]

It is highly improper for a prosecutor to state that, unlike the jury, the role of the defense counsel is not to seek the truth but rather to create doubts in the jury's minds.[90] It is the function of both counsel "to assist the jury to discover the truth."[91] In addition, the prosecutor must not suggest that the defense counsel was involved in seeking to have witnesses commit perjury.[92] There also can be no suggestion that reliance on the government's burden of proof is some sort of "trial trick" when the facts don't favor the defendant.[92.5] Similarly, characterizing as "despicable" the defense of

(characterization of the defendants' testimony as lies, conjobs, made-up testimony, and concocted stories was strong but supported by the evidence); Commonwealth v. Timoney, 80 Mass.App.Ct. 1108 (2011) (in light of evidence and instruction to the jury, the prosecutor did not improperly indicate during closing argument that the defendant had set out on a "sexual conquest," was "done" with the victim after intercourse, and that a duffel bag retrieved from his residence was a "trophy bag").

[89] Commonwealth v. Cosme, 410 Mass. 746 (1991) (characterizations of defense experts in insanity case as a "dog and pony show" and a "wizard" and "little head specialist" were tasteless and improper, but so manifestly sarcastic and hyperbolic that jury would have discounted them); Commonwealth v. Beauchemin, 410 Mass. 181, 184–85 (1991) (unfair to allege that defense testimony was "rehearsed" when voir dire conducted at court request); Commonwealth v. Shipps, 399 Mass. 820, 838–40 (1987) (comment that expert appeared to have only a high school background in chemistry); Commonwealth v. O'Brien, 377 Mass. 772, 777–79 (1979) (reference to defense expert as a "hired gun" was inappropriate); Commonwealth v. Shelley, 374 Mass. 466, 469–73 (1978) (unfounded contentions that experts for defense were receiving large fees, were the equivalent to prostitutes and mercenaries, and that the techniques used were well-meaning blot tests, mice and goblins, required reversal of conviction). *But see* Commonwealth v. Dixon, 425 Mass. 223, 230–35 (1997) (prosecution comment that "these people" come from a world with a different moral code was proper where based on evidence concerning marijuana use, unwed pregnancy, and unemployment); Commonwealth v. Benson, 419 Mass. 114, 119–21 (1994) (prosecutor could assert that defense expert a "hired gun" where defense did the same to prosecution expert); Commonwealth v. Grimshaw, 412 Mass. 505, 506–11 (1992), S.C., 31 Mass. App. Ct. 917 (1991) (characterization of expert as "a classic example of a hired gun" was improper but isolated).

[90] Commonwealth v. Weaver, 400 Mass. 612, 615–16 (1987). *See also* Commonwealth v. Stote, 433 Mass. 19, 28-29 (2000)(characterizing defense evidence as "ridiculous" and insulting the intelligence of the jurors was unnecessary); Commonwealth v. Awad, 47 Mass. App. Ct. 139, 141–146 (1999) (improper for prosecutor to disparage the motives of defense counsel or lawyers in general by purporting to quote Shakespeare ("first we kill all the lawyers")); Commonwealth v. Deveau, 34 Mass. App. Ct. 9, 10–14 (1993) (improper to assert that trauma caused to child victims through cross-examination was the defendant's "having them again" through his lawyer). Contrast Commonwealth v. Roberts, 433 Mass. 45, 55-56 (2000)(prosecutor could comment on defense tactic to degrade prostitute witnesses and their lifestyles where it was the major focus of cross-examination).

[91] Commonwealth v. Weaver, 400 Mass. 612, 616 (1987).

[92] Commonwealth v. Hawley, 380 Mass. 70, 82–90 (1980) (inference completely unwarranted that because counsel witnessed the affidavits of the defendants, he was an active participant in their alleged perjury). *Compare* Commonwealth v. Bradshaw, 385 Mass. 244, 271–77 (1982) (prosecution claim that witnesses refused to lie, based on evidence that they may have told a different story to defense counsel, did not imply that counsel tried to suborn perjury).

[92.5] Commonwealth v. Fletcher, 52 Mass. App. Ct. 166, 172-174 (2001).

accusing others of committing the crime smacks more of an *ad hominem* attack, and is an improper disparagement of the defense counsel.[92.7]

§ 35.3E. RHETORICAL QUESTIONS AND STATEMENTS THAT SHIFT THE BURDEN OF PROOF

"As a general rule, . . . rhetorical questions should not be used in closing argument where they could be perceived by the jury as shifting the Commonwealth's burden of proof to the defendant."[93] Rhetorical statements that suggest that the defendant has failed to rebut the evidence[94] or that suggest that the jury must find the defendant to be truly innocent in order to acquit are also disfavored.[95]

§ 35.3F. APPEAL TO SYMPATHY, PREJUDICE, OR THE JURY'S SENSE OF DUTY

A prosecutor must not characterize the evidence in a manner solely intended to evoke sympathy toward the victim of a crime.[96] Although a prosecutor may state that

[92.7] Commonwealth v. Gentile, 437 Mass. 569, 580-581 (2002).

[93] Commonwealth v. Bregoli, 431 Mass. 265, 275–277 (2000) (rhetorical question has danger of shifting burden of proof); Commonwealth v. Habarak, 402 Mass. 105, 110–11 (1989) (in reference to the sawed-off shotgun in the defendant's possession at his arrest, it was improper to ask, "Why does a person do that?"); Commonwealth v. Hawley, 380 Mass. 70, 82–90 (1980) (improper to ask, "Did the defendant back up his allegations with any credible evidence?"); Commonwealth v. Storey, 378 Mass. 312, 323–25 (1979) (inappropriate to ask, "Have you heard one word from the defendant as to what took place down at the police station?" even if, in context, directed to general weakness in defendant's case). *Contrast* Commonwealth v. O'Brien, 78 Mass. App. Ct. 1104 (2010) (prosecutor's use of rhetorical questions in closing did not impermissibly shift the burden of proof onto the defendant because they were a response to defense counsel's closing statement, and prosecutor asked the jury to evaluate the victim's demeanor on the stand and to give weight to their own perceptions about the victim); Commonwealth v. Grant, 418 Mass. 76, 82–83 (1994) (rhetorical question, "What was in the defendant's mind as he pulled back the trigger?" not a comment on his failure to testify but directed toward reasonable inference); Commonwealth v. Costa, 414 Mass. 618, 628–29 (1993) (no error where offending passages "amount to little more than enthusiastic rhetoric, strong advocacy, and excusable hyperbole"); Commonwealth v. Achorn, 25 Mass. App. Ct. 247, 248–52 (1988) (when considered in context of factually based argument on witness's demeanor on stand, circumstance in which she testified, manner in which she testified, and content of testimony, prosecutor's remark "Would a five-year-old lie?" was a proper rhetorical question).

[94] *See, e.g.*, Commonwealth v. Amirault, 404 Mass. 221, 236–40 (1989) ("The defendant was unable to point to one single thing in the whole world that would account for why all these children and parents have turned against him"); Commonwealth v. Storey, 378 Mass. 312, 323–25 (1979) (statement that if the bullet from the victim's body could have been traced to the defendant's gun, there would not have even been a trial, would have been better left unsaid). *Contrast* Commonwealth v. Corriveau, 396 Mass. 319, 335–39 (1985) (comment that the defendant's mistake was that he didn't know that you can't wash all traces of blood off your hands was proper based on testimony concerning benzidine test).

[95] Commonwealth v. Thomas, 401 Mass. 109, 112–17 (1987) (improper burden shifting to state that the jury should acquit the defendant "if you find that he is truly innocent" or to suggest what needs to happen "in order to find the defendant not guilty").

[96] Commonwealth v. Grinkley, 75 Mass. App. Ct. 798, 807-811 (2009) (prosecutor engaged in numerous emotional appeals to the jury during child rape trial: she suggested that DNA statistical evidence was inculpatory, when in fact it was irrelevant and should not have

"the public has rights as does the defendant,"[97] she may not focus on the specific rights of the victim that were violated because of the crime.[98] It also is inappropriate to refer

been admitted; improper to ask jury to consider how hard it had been for the victims and parents to testify, which was suggesting that the jurors put themselves in the children's position; improper to dwell on the "horrific" exam at the hospital in preparing the rape kit. Harmless error where overwhelming evidence). *See also*, Commonwealth v. Gentile, 437 Mass. 569, 580 (2002)(error to argue that victim "didn't deserve to die this way"); Commonwealth v. Torres, 437 Mass. 460, 464-466 (2002) (remarks concerning victim's rights are improper, as are exhortations to "answer the call for justice" and assertions that "he's guilty as charged"); Commonwealth v. Santiago, 425 Mass. 491, 495–503 (1997) (references to the victim's character and personal characteristics, including her young age and pregnancy, were not relevant and undermined the integrity of the jury's verdict); Commonwealth v. Gordon, 422 Mass. 816, 827–31 (1996) (reference to victim's spouse and children was error; evidence should not be admitted "that appears to be more related to evoking sympathy than to proving the elements of the alleged crime"); Commonwealth v. Rosa, 73 Mass. App. Ct. 540, 545 (2009) (repeated references to victim's status as a firefighter was an improper appeal to jury's sympathy); Commonwealth v. Lorette, 37 Mass. App. Ct. 736 (1994), *aff'd*, 422 Mass. 1014 (1996) ("When the question is *whether* the defendant committed the crime, luxuriating in the ghastliness of the crime and the suffering of the victim's family does not help to answer the question."); Commonwealth v. Spence, 38 Mass. App. Ct. 88, 90 (1995) (error to comment on the prevalence of child abuse); Commonwealth v. Porter, 24 Mass. App. Ct. 694, 698 (1987) (argument exceeded proper limits when the prosecutor asked how any juror could face the victim, knowing what the victim went through, if they acquitted the defendant despite the strength of the evidence of guilt); Commonwealth v. Smith, 387 Mass. 900, 909–10 (1983) (where no evidence that victim was alive when the fire was set, prosecution argument based on suffering from burns constituted an inflammatory appeal for sympathy that was contrary to the evidence); Commonwealth v. Hoppin, 387 Mass. 25, 30–32 (1982) (display of rawhide similar to that described by victim 'was apt to stir the jury's emotions and evoke an image of sexual violence" and was both clearly improper and highly prejudicial to the defendant). *Contrast* Commonwealth v. Phillips, 452 Mass. 617, 629-631 (2008) (statement by prosecutor that no one deserved to die the way the victim did, who was tortured, stabbed, and thrown from the second floor, "was a fair attempt to humanize the victim, who repeatedly had been depicted by D's trial counsel as a drug dealer living in a drug warehouse"); Commonwealth v. Kent K., A Juvenile, 427 Mass. 754, 759–62 (1998) (repeated references to nine-year-old victim's age and fact that killing occurred on his birthday and Halloween, while improper, did not mandate reversal where prosecutor had not elicited such facts merely for sympathy, extreme atrocity or cruelty was an issue, and comments rebutted defense argument that victim's family was more concerned about identifying perpetrator at hospital); Commonwealth v. Pina, 79 Mass. App. Ct. 1104 (2011) (reference in closing argument to the victim as a victim of 'identity theft' or 'identity fraud,' when taken in context, was an appropriate description of what the evidence would prove, and therefore did not improperly appeal to the sympathies of the jury).

[97] Commonwealth v. McColl, 375 Mass. 316, 323 (1978). *But see* Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 234 (1992) (comment that "unfortunately, there are far too many criminal cases these days," was better left unsaid).

[98] Commonwealth v. McLaughlin, 431 Mass. 506, 510–512 (2000); Commonwealth v. Lodge, 431 Mass. 461, 470–473 (2000); Commonwealth v. Rock, 429 Mass. 609, 615–617 (1999); Commonwealth v. Hamilton, 426 Mass. 67, 75 (1997) (victim's right to exist); Commonwealth v. Barros, 425 Mass. 572, 581–82 (1997) (same); Commonwealth v. Walker, 421 Mass. 90, 103–04 (1995) (improper to argue that robbery victim also lost "her feelings of safety and security" and right to work in downtown area); Commonwealth v. Elam, 412 Mass. 583, 587 (1992) (comparison of victim's neighborhood to war-torn country improper despite number of random shootings in area); Commonwealth v. Palmariello, 392 Mass. 126, 135–36 (1984) (improper to appeal to jury "not [to] lose sight of the fact that . . . [the victim] also had constitutional rights. She had a right to life. She was deprived of that right. She had a right to

to the place where a homicide victim is buried.[99] The prosecutor may not ask the jurors to put themselves in the place of the victim or a related witness.[100] Finally, the prosecutor may not appeal for sympathy toward the victim's family because of the impact of the crime on them.[101]

A prosecutor, on the other hand, is permitted to comment in graphic terms on the severity of the injuries suffered by the victim if his comments are grounded in the evidence, despite the natural result of engendering sympathy for the victim.[102] This

make her peace with her God. She was deprived of that right"); Commonwealth v. Hoffer, 375 Mass. 369, 377–80 (1978) (improper resort to sympathy to ask jury to "consider the right of [the victim] to live, a right that we hold most dearly. Consider the right that his family had to enjoy his association"); Commonwealth v. Burns, 49 Mass. App. Ct. 677, 686 (2000) ("We admonish such prosecutors to show more faith in the intelligence of jurors, who can be trusted to empathize with victims and understand that criminals should be punished without having those simple ideas belabored.").

[99] Commonwealth v. Toro, 395 Mass. 354, 359–60 (1985); Commonwealth v. Palmariello, 392 Mass. 126, 135 (1984) (improper to remind jury that the victim "is in Holy Cross Cemetery beneath six feet of dirt"). *Contrast* Commonwealth v. Quigley, 391 Mass. 461, 464 (1984) (pointing out "the grim irony" that victim was buried in same cemetery where beaten to death was not impermissibly emotional and was based entirely on evidence).

[100] Commonwealth v. Woods, 414 Mass. 343, 357–59 (1993) (identification of victims' parents in courtroom not error where defendants' similarly identified); Commonwealth v. Mathews, 31 Mass. App. Ct. 564, 572–73 (1991); Commonwealth v. McLeod, 30 Mass. App. Ct. 536, 537–39 (1991); Commonwealth v. Sevieri, 21 Mass. App. Ct. 745, 754–55 (1986); Commonwealth v. Sanchez, 405 Mass. 369, 375–77 (1989); Commonwealth v. Pontes, 402 Mass. 311, 315–18 (1989); Commonwealth v. Thomas, 400 Mass. 676, 682–84 (1987). *Contrast* Commonwealth v. Bruno, 396 Mass. 622, 624 (1986) (in operating to endanger case, prosecutor properly argued that jury should consider "all of the other people [the defendant] could have hurt or killed" because the threat to the public was a relevant consideration).

[101] Commonwealth v. Gordon, 422 Mass. 816, 827–31 (1996) (references to victim's relatives "appears to be more related to evoking sympathy than to proving the elements of the alleged crime"); Commonwealth v. Worcester, 44 Mass. App. Ct. 258, 263–68 (1998) (improper to refer to suffering of victim's family due to his death); Commonwealth v. Depradine, 42 Mass. App. Ct. 401, 408–10 (1997) (grief of family); Commonwealth v. McLeod, 30 Mass. App. Ct. 536, 538–39 (1991) ("When the question is *whether* the defendant committed the crime, luxuriating in the ghastliness of the crime and the suffering of the victim's family does not help to answer the question.").

[102] Commonwealth v. Young, 461 Mass. 198, 204-207 (2012) (statement by prosecutor during closing argument that defendant had sliced up victim "like an animal" was a permissible rhetorical tool that was relevant to charged offense and was not designed to evoke an emotional response from the jury). *See also* Commonwealth v. Johnson, 429 Mass. 748–749 (1999) (description of twenty stab wounds as a "bloody massacre"); Commonwealth v. Tavares, 27 Mass. App. Ct. 637, 642–44 (1989); Commonwealth v. Thomas, 400 Mass. 676, 682–84 (1987) (prosecutor's choice of terms to describe injuries inflicted on the victim, to wit, brutalized, beaten, degraded, bruised, and humiliated, all were supported by the evidence and were inherent in the "obvious and brutal nature of the crime committed"); Commonwealth v. Johnson, 374 Mass. 453, 459–60 (1978) ("the fact that as a result of hearing such evidence and such an argument by a prosecutor the jurors may have sympathy for the victim is understandable but unavoidable. Any other conclusion would only serve to shield the accused from prosecution in direct proportion to the amount and extent of the force or brutality with which the crime was committed").

rhetorical device frequently appears in murder cases where extreme atrocity and cruelty is alleged and the jury is being asked to act as the "conscience of the community."[103]

Reference by a prosecutor to the race,[104] national origin,[105] religion,[106] or sexual preference[107] of the defendant in order to inflame jurors or appeal to their prejudices constitutes misconduct and goes beyond permissible limits. This approach is "especially incompatible with the concept of a fair trial because of the likelihood that such references will 'sweep jurors beyond a fair and calm consideration of the

[103] *See, e.g.*, Commonwealth v. Allison, 434 Mass. 670, 686 (2001) (not improper for prosecutor to state that the facts of the murder case were supported by the victim's body, and that "the victim's body testified." The condition of the body is often the best evidence of the extreme atrocity or cruel nature of the crime, and thus it is not improper to remind the jury to consider the victim's body as evidence); Commonwealth v. Vizcarrondo, 431 Mass. 360, 363 (2000) (references to infant's age and size were relevant to extreme atrocity); Commonwealth v. Fitzmeyer, 414 Mass. 540, 546–47 (1993) (proper to argue that jury is "community's collective conscience"); Commonwealth v. Lawrence, 404 Mass. 378, 391–93 (1989) (when jury had to assess whether killing occurred with extreme atrocity and cruelty it "did speak as representative of the community's conscience"); Commonwealth v. Jones, 400 Mass. 544, 548 (1987) (prosecutor could refer to condition of victim's body, which was badly "burned, bruised, beaten, part of face missing. and head appeared to have been crushed, as demonstrating extreme atrocity or cruelty in the commission of the murder"); Commonwealth v. Corriveau, 396 Mass. 319, 335–39 (1985) (proper to ask jury to think how long she was alive, bleeding, drowning," as was "think of the suffering, of the pain of the acts he caused"). *Contrast* Commonwealth v. Smith, 413 Mass. 275, 282 n.6 (1992) (improper to urge jury that as "conscience of the community" it had a duty to convict in the case).

[104] Commonwealth v. Kines, 37 Mass. App. Ct. 540 (1994) (reversible error to suggest that the defendant may have contempt for "white" police officers, despite curative instruction). *Cf.* Commonwealth v. Hoa Sang Duong, 52 Mass. App. Ct. 861, 868-869 (2001) (description of Asian youths as "gang of four" and reference to few such youths being in Lexington was not, in context, an appeal to racial or ethnic prejudice); Commonwealth v. Core, 370 Mass. 369, 376–77 (1976) (no error to preclude defense counsel comment on "racial aspects of the case" in the absence of evidence that racial bias or prejudice had played any part in the incident).

[105] Commonwealth v. Lara, 39 Mass. App. Ct. 546, 549–52 (1996) (repeated references to defendant as "Dominican" and to organization, "Spanish We Deliver," tainted defendant's trial); Commonwealth v. Gallego, 27 Mass. App. Ct. 714 (1989) (reversible error to appeal to prejudice by linking the defendant, a Colombian, to a "tightly knit organization of Colombians" in absence of such evidence); Commonwealth v. Graziano, 368 Mass. 325 (1975) (reference to the Mafia designed to prejudice Italian defendant). *Contrast* Commonwealth v. Omonira, 59 Mass. App. Ct. 200 (2003) (prosecutor's cross examination and ultimately argument regarding Nigerian defendant's "foreigness" and potential deportation allowed to show potential bias of witnesses); Commonwealth v. Lopez, 26 Mass. App. Ct. 618, 622–24 (1988) (use of word *macho* regarding the defendant was not an appeal to prejudice against Hispanics where the defendant first used the word during direct examination, and prosecutor obviously using word in closing to portray the defendant, and not victim, as the aggressor).

[106] Commonwealth v. Mahdi, 388 Mass. 679, 693 (1983) (improper to refer in closing to the defendant's Muslim religious beliefs where there was nothing to support as argument that defendant committed the crime because of either "racial hatred or religious fanaticism").

[107] Commonwealth v. Clary, 388 Mass. 583, 589–94 (1983) (prosecutor's reference to the defendant as lesbian was overreaching and calculated to appeal to prejudice against the defendant; insufficient basis in evidence from spontaneous exclamation of victim that "those two lessies stabbed me"). *Contrast* Commonwealth v. Healy, 393 Mass. 367, 385–88 (1984) (defendant's homosexuality and homosexual relationship with a defense witness were established in evidence and in fact formed part of the defense, so fair comment for prosecutor).

evidence.'"[108] Similarly, a prosecutor may not distract the jury by speculative references to the consequences of the crime.[109]

It is improper for the prosecutor to ask the jury to "do its duty" when such argument suggests that if the jurors voted to acquit, "they would not be doing their job as jurors."[110] The prosecutor should neither suggest that the Commonwealth expects a guilty verdict, nor argue that the jury has an obligation to return a particular verdict.[110.5] It also is inappropriate to urge the jury to convict the defendant in order to end a child rape victims' nightmares, because this was "the equivalent of an exhortation that the jury had a duty to the victims to render verdicts of guilty."[111] Finally, it is improper for

[108] Commonwealth v. Mahdi, 388 Mass. 679, 693 (1983), (quoting Commonwealth v. Graziano, 368 Mass. 325 (1975), and Commonwealth v. Perry, 254 Mass. 520, 531 (1926)).

[109] Commonwealth v. Westerman, 414 Mass. 688, 700–01 (1993) (improper to refer in drug case to potential for distribution to children, but proper to comment on general effect of drugs on community given defendant's involvement with organized crime).

[110] *See, e.g.*, Commonwealth v. Gentile-, 437 Mass. 569, 580 (2002)(error to state that burden of proof "is the price we pay for living in a free, democratic society"); Commonwealth v. Roberts, 433 Mass. 45, 53-54 (2000)(improper reference to need to maintain an orderly society governed by law); Commonwealth v. Deloney, 59 Mass. App. Ct. 47, 53 (2003) (improper for prosecutor to end her closing by remarking, "Now is the time for justice. Find him guilty," as this suggested that the jury had a duty to convict, or that a proper performance of their function requires a guilty verdict. However, in context, not reversible error); Commonwealth v. Hollie, 47 Mass. App. Ct. 538, 541 (1999) (regarding attack on blind victim, improper to ask "each and every one of you to do something about it"); Commonwealth v. Awad, 47 Mass. App. Ct. 139, 146 (1999) ("An appeal that enlists the jurors on the side of the government as 'members of the community' to protect innocent victims from violent crime has no place in trial advocacy"); Commonwealth v. Ward, 28 Mass. App. Ct. 292 (1990) (". . . the harping on the brutality of the urban scene and the duty to come to the aid of law-abiding folk was an inferential summons to the jury to seize the occasion to help extirpate street crime"); Commonwealth v. Smith, 413 Mass. 275, 282 n.6 (1992) (improper to urge jury that as "conscience of the community" it had a duty to convict in the case); Commonwealth v. Porter, 24 Mass. App. Ct. 694, 696–99 (1987); Commonwealth v. Andrade, 422 Mass. 236, 244 n.9 (1996) (improper to assert that case cried out for justice and exhort jury "to do justice"); Commonwealth v. Mello, 420 Mass. 375, 379–81 (1995) (error to urge jury to say to all who would commit crime of arson that "we've had enough and we're going to do something about it"); Commonwealth v. Fruchtman, 418 Mass. 8, 18–19 (1994) (when defendant told victim she wouldn't be believed, error to entreat jury, "Don't let that threat come true."); Commonwealth v. Davis, 38 Mass. App. Ct. 932, 934 (1995) (error to quote Edmund Burke that, "The only thing that it takes for evil to triumph is for a few good men and good women to do nothing."). It is permitted, however, to "impress upon the jury their duty to act with courage as well as impartiality" (Commonwealth v. LaCorte, 373 Mass. 700, 707 (1977)), or tell the jury that the duty and burden will pass on to them to decide the case in a "responsible manner." Commonwealth v. Moore, 408 Mass. 117, 128–29 (1990). The prosecutor may not indicate, however, that the jury should return a "proper verdict," with the understanding that a proper verdict would be a guilty verdict. *Moore, supra* (citing Commonwealth v. Cobb, 26 Mass. App. Ct. 283, 286 n.5 (1988)).

[110.5] Commonwealth v. Jordan, 49 Mass. App. Ct. 802, 816-817 (2000).

[111] Commonwealth v. Sanchez, 405 Mass. 369, 375–77 (1989) ("Such a reference to the jury's duty," although without an explicit statement that its exercise will result in a verdict of guilty, should be held to "pass the line of permissible advocacy," quoting Commonwealth v. Cobb, 26 Mass. App. Ct. 283, 286 (1988) (improper reference to victim's putting trust in judicial system, and if jury does its duty, it will "come back with the proper verdict in this case"). *See also* Commonwealth v. Daye, 435 Mass. 463, 477 (2001) (inappropriate for prosecutor to ask the jury, "How could you look yourselves in the mirror?" if they believed the defendant's alibi

counsel to relate personal experiences that attempt to analogize counsel's experiences with those of a victim or witness.[111.5]

§ 35.3G. PERSONAL OPINION OF THE CREDIBILITY OF WITNESSES OR THE STRENGTH OF THE EVIDENCE

It is highly improper for the prosecutor to inject his or her own credibility into a trial by vouching for witnesses.[112] Improper vouching may occur implicitly as well as explicitly. Thus, a prosecutor's argument that "it was a 'tragedy' that the victim 'had to take the witness stand, sobbing and hysterical, and [had] to explain her whole humiliation in public,'" and that the jury could "rectify" the tragedy by its verdict, implicitly "convey[ed] to the jury his personal opinion as to both the truth of the

witnesses instead of the Commonwealth's alleged eyewitness.); Commonwealth v. Mathews, 31 Mass. App. Ct. 564, 572–73 (1991) (improper to tell jurors that they were "the conscience of the community," and to suggest that the jury would have to answer to the victim for their verdict); Commonwealth v. McLeod, 30 Mass. App. Ct. 536, 537–39 (1991) (comment that it was a tragedy that victim had to testify and that jury could rectify that tragedy; this inferentially "attacked defendant for asserting his right to trial" and "call[ed] on jury to punish him for exercising that right"). *Contrast* Commonwealth v. Dossantos, 79 Mass.App.Ct. 1122 (2011) (prosecutor did not imply that the jury had a duty to convict the defendant when he recounted the contents of a 911 call admitted in evidence during closing, stating that "[i]f that's safe operation, then maybe we shouldn't be here.").

[111.5] Santos v. Chrysler Corp., 430 Mass. 198, 211–214 (1999) (anecdotes about counsel's son telling him, "Love you, Dad," an experience which the plaintiff will no longer have); Commonwealth v. Pagano, 47 Mass. App. Ct. 55, 60–64 (1999) (prosecutor's experience as an altar boy).

[112] Commonwealth v. Pearce, 427 Mass. 642, 643–46 (1998) (improper to assert, "I tell you, ladies and gentlemen, she was credible"); Commonwealth v. Kelly, 417 Mass. 266 (1994) (reversible error to assert that police would not lie, as it would jeopardize their pensions, when no such evidence); Commonwealth v. Sapoznik, 28 Mass. App. Ct. 236, 246–47 (1990) (improper vouching to suggest that, because magistrate found probable cause and issued search warrant—a fact irrelevant to merits of case—police testimony was credible); Commonwealth v. Olszewski, 401 Mass. 749, 760 (1988) (improper to characterize a witness as "one of the classiest people I have seen, [who] testified honestly and excellently," and another witness as "the kind of person, if you had a sister, you would like to have come home with her," or to disparage a defense witness from personal knowledge that "he never had anything to do with forensic chemistry for over ten years"); Commonwealth v. Cifizzari, 397 Mass. 560, 578–79 (1986) (improper to claim concerning an expert that "He's just telling the truth — the right front tooth was retrouded and that's the truth"); Commonwealth v. Bourgeois, 391 Mass. 869, 878–79 (1984) ("I would assume any witness we put on here — we vouch for their credibility"). *Contrast* Commonwealth v. Francis, 432 Mass. 353, 356-357 (2000)(not vouching to state that cooperating witness was now living a "straight and narrow life"); Commonwealth v. Pisa, 430 Mass. 266, 269–270 (1999) (proper to note a witness's "courage" in testifying when others did not); Santos v. Chrysler Corp., 430 Mass. 198, 211–214 (1999) (same); Commonwealth v. Croken, 432 Mass. 266, 268 (2000)(improper to assert that victims acted "courageously" by testifying to sexual abuse); Commonwealth v. Stewart, 411 Mass. 345, 356–58 (1991) (noting that Commonwealth witnesses did not have a stake in the outcome of the case was not improper vouching for them); Commonwealth v. Smith, 412 Mass. 823, 837 (1992) (not improper for prosecutor to argue that primary Commonwealth witness not completely truthful about his role in crime).

victim's testimony and the guilt of the defendant."[112.5] Likewise it is improper for the prosecutor to comment upon the sufficiency of the evidence by injecting personal opinion.[113] Because the prosecutor represents the government, jurors are apt to give her assertions "much weight against the accused when they should properly carry none."[114] This is especially true when the Commonwealth's witnesses are testifying pursuant to plea bargains in return for "truthful" testimony.[114.5] Statements that suggest that

[112.5] Commonwealth v. McLeod, 30 Mass. App. Ct. 536, 539 (1991); Commonwealth v. Sylvia, 456 Mass. 182, 193-195 (2010) (prosecutor's comment on murder defendant's appearance, stating that "I know that [the defendant] doesn't quite look the same today, I know that his hair," was improper, as defendant should not have injected his personal observations or beliefs, or have implied intimate independent knowledge, by employing the words "I know" in his closing argument.); Commonwealth v. Mayne, 38 Mass. App. Ct. 282, 285–87 (1995) (improper to characterize prosecution witness as a "hero" for coming forward). So, too, nonverbal conduct of an agent of the district attorney, such as a victim-witness advocate who consoles the victim or family member in the presence of the jury, improperly appears to endorse the victim's credibility. *See* Commonwealth v. Harris, 409 Mass. 461, 470 (1991). To counter the effects of implicit vouching, defendant may be entitled to a cautionary instruction "specifically and forcefully tell[ing] the jury to study. . . with particular care" the credibility of witnesses testifying under immunity or a plea agreement. Commonwealth v. Gagliardi, 29 Mass. App. Ct. 225, 240–42 (1990) (quoting *Ciampa, supra,* 406 Mass. at 266).

[113] Commonwealth v. Tuitt, 393 Mass. 801, 810–12 (1985) (Court "strongly disapproves of remarks by prosecutor that, "The evidence is overwhelming" because it wrongly injects the prosecutor's belief in the strength of her case); Commonwealth v. Daigle, 379 Mass. 541, 549–50 (1980) (same); Commonwealth v. Hogan, 375 Mass. 406, 407–08 (1978) (inappropriate choice of language to assert that, "I don't believe this jury is going to buy the proposition"); Commonwealth v. Earltop, 372 Mass. 199, 203–04 (1977) ("There is no doubt that the prosecutor's expression of personal belief in the defendant's guilt was improper"). *Contrast* Commonwealth v. Jenkins, 458 Mass. 791, 796-798 (2011) (use of the words "mountain of evidence" by prosecutor in closing argument to describe the case against murder defendant was not an improper expression of personal belief; evidence against defendant could fairly be described as a "mountain"); Commonwealth v. Quigley, 391 Mass. 461, 464 (1984) (suggestion by prosecutor that he had met his burden of proof by producing evidence of guilt beyond a reasonable doubt was "within permissible bounds").

[114] Commonwealth v. Griffith, 45 Mass. App. Ct. 784, 788 (1998) (improper to assert a "take it from me" approach in summation, and assert that, "By no means are these men not telling the truth. They have nothing to gain"); Commonwealth v. Shelley, 374 Mass. 466, 472 (1978). *Accord* Commonwealth v. Thomas, 401 Mass. 109, 112–17 (1987) (to permit counsel's credibility to be injected in the trial would afford him a privilege not even accorded to witnesses who testify under oath and subject to cross-examination, and is particularly inappropriate when that counsel has the advantage of the "official backing" of the government).

[114.5] Commonwealth v. Lindsey, 48 Mass. App. Ct. 641 (1999); *Compare* Commonwealth v. Ciampa, 406 Mass. 257, 258–66 (1989) (new trial required where prosecutor permitted to introduce plea agreement without redaction of statement that, inter alia, agreement was contingent upon truthfulness of witness's denial that he was the shooter, and without proper cautionary instructions to jury; the opinion sets out limits on admissibility of, and prosecutor's ability to argue inferences from, plea agreement's requirement of truthful testimony) *with* Commonwealth v. Sullivan, 410 Mass. 521, 525 (1991) (trial judge should have reduced the number of times the agreement referred to witness's obligation to tell the truth, but no reversal under "miscarriage of justice" standard). *See also* Commonwealth v. Hardy, 431 Mass. 387, 395-398 (2000) (highly improper for the prosecutor to personalize the process of granting immunity, particularly by invoking the authority of the S.J.C. and stating that the Court told the witness to testify truthfully or he would be held in contempt or prosecuted for perjury); Commonwealth v. Dyous, 436 Mass. 719, 727 (2002) (improper for prosecutor to mention the

deficiencies in the Commonwealth's case should be attributed to the prosecutor personally also are improper because they suggest that the jury will be criticizing the prosecutor's work if they return an acquittal.[115]

Both counsel may preface their contentions with the phrase "I submit" or "I suggest" as a rhetorical device to urge the jury to accept the inference advanced by the party without running afoul of the rule prohibiting expression of personal opinion.[116] Moreover, it is not improper "to make a factually based argument that, due to the demeanor, disclosed circumstances, and appearance of a witness, a particular witness should be believed or disbelieved."[117]

It is not overreaching for the prosecutor to contend that she has presented the "credible" witnesses in the case because this does no more than state an obvious proposition of advocacy where there are opposing parties.[118] It also is not an expression of personal belief in the witness to characterize the witness through the use of dramatic language.[119] Finally, a prosecutor may contrast the defendant's stake in the outcome

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name of the justice (as well as the name of the court) who had granted immunity to the witness); Commonwealth v. Meuse, 423 Mass. 831 (1996), S.C., 38 Mass. App. Ct. 772 (1995) (improper to assert that the Commonwealth has an "army of police" to confirm that an informant with plea agreement was telling the truth). *But see* Commonwealth v. Allison, 434 Mass. 670, 685 (2001) (not improper to state that the witness "was not given immunity for perjury").

[115] Commonwealth v. Glass, 401 Mass. 799 (1988) (statement that if jury acquits the defendant, "then I haven't done my job," should not have been made). *See also* Commonwealth v. Thomas, 401 Mass. 109, 112–17 (1987) (grossly improper to say that "if you disbelieve [the Commonwealth witnesses], then I am, indeed, a bad person, because I have aided in a conspiracy to convict an innocent person").

[116] Commonwealth v. Silva, 401 Mass. 318, 328–29 (1987) (use of these phrases is not "tantamount to testimonial interpretation").

[117] Commonwealth v. Donovan, 422 Mass. 349, 356–57 (1996) (proper to assert that codefendant who pleaded guilty and became witness more credible because he took responsibility for conduct, whereas defendant did not); Commonwealth v. Kozec, 399 Mass. 514, 521 (1987) (proper to assert that because of the victim's poor physical condition, he has no motive to lie). *See also* Commonwealth v. Hamel, 78 Mass.App.Ct. 1114 (2010) (prosecutor did not improperly vouch for the victim's credibility during his closing statement by arguing that the victim's motivation for testifying suggested that she was credible because this was a permissible argument); Commonwealth v. Weeks, 77 Mass.App.Ct. 1 (2010) (in closing argument, the prosecutor did not inject his own personal beliefs about the credibility of witness by asking the jury to consider whether they thought she was credible and whether they thought she was lying); Commonwealth v. Sanchez, 405 Mass. 369, 375–77 (1989) (prosecutor properly can assert that the witnesses are credible based on their demeanor, motives, and the consistency of their stories); Commonwealth v. Drayton, 386 Mass. 39 (1982) (prosecutor took care "to tie each statement to specific testimony and exhibits"). *Cf.* Commonwealth v. LaFontaine, 32 Mass. App. Ct. 529, 536–38 (1992) (prosecutor's comment about Commonwealth witnesses that "I don't like drug dealers," was within limits of zealous advocacy). *But see* Commonwealth v. Johnson, 412 Mass. 318, 321–24 (1992) (prosecutor close to injecting personal credibility concerning alleged prior inconsistent statement made by witness to prosecutor in out-of-court interview; counsel should only interview witnesses in presence of third parties).

[118] Commonwealth v. Marangiello, 410 Mass. 452, 462–65 (1991) (prosecutor not vouching for witnesses by stating they were truthful where based on their demeanor, motives, and consistency); Commonwealth v. Class, 401 Mass. 799, 806 (1988) (there was no inference that the prosecutor knew something that the jury did not regarding the witnesses).

[119] *See, e.g.,* Commonwealth v. Pisa, 430 Mass. 266, 269-270 (1999) (prosecutor could cite witness's "courage" in testifying against the defendant, who was a known drug dealer, where fifteen to twenty-five other witnesses failed to cooperate in the investigation; also proper

with the absence of bias or motive to fabricate on the part of the Commonwealth's witnesses.[120]

§ 35.3H. MISSTATE THE LAW

Prosecutors risk reversal when misstating the law that jurors must apply in the case, and most judges will discourage counsel from summarizing in closing argument any aspect of the charge that will follow.[121] A misstatement of the law by the prosecutor may be the basis for reversal when the error is not corrected with particularity by the judge in her final instructions.[122]

§ 35.3I. REFERENCE TO APPELLATE RIGHTS OR CONSEQUENCES OF THE VERDICT

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to characterize the neighborhood where the murder took place as a high crime area saturated with drug activity, where potential witnesses were afraid to cooperate with the police; both arguments were based on evidence at the trial); Commonwealth v. Lapointe, 402 Mass. 321, 330–31 (1989) (asserting that it took "courage and character" for the witness to testify); Commonwealth v. Pontes, 402 Mass. 311, 315–18 (1989) (characterization of alleged rape victim as "this child" or "this girl who was adrift" was a plausible one, albeit somewhat dramatically stated, that was based on her demeanor, appearance, and testimony before the jury); Commonwealth v. Sheppard, 404 Mass. 774, 779 (1989) (not improper to state that the alleged victim had "stayed with the case" and had "been through the wringer"); Commonwealth v. Achorn, 25 Mass. App. Ct. 247, 248–52 (1988) (prosecutor's claim that a five-year-old child wouldn't make up allegations of sexual abuse was proper when considered in context of entire argument, which was based on the witness's appearance and testimony at the trial); Commonwealth v. Cobb, 26 Mass. App. Ct. 283, 286–88 (1988) (reference to "courage" of young woman to testify about her past life "was rather excessive, but did have a relation to credibility"). *See also* Commonwealth v. Campbell, *378* Mass. 680, 703–04 (1979) (not improper to refer to a "united inmate front" regarding credibility of defense witnesses and dearth of Commonwealth witnesses).

[120] Commonwealth v. Gurney, 413 Mass. 97, 104–05 (1992) (not improper to argue that civilian witnesses and police had no bias against defendant, whereas defendant did have personal interest in outcome of case); Commonwealth v. Krepon, 32 Mass. App. Ct. 945 (1992) (prosecutor could compare defendant's stake in outcome with child complainant's lack of motive to lie).

[121] *See. e.g.*, Commonwealth v. Purdy, 459 Mass. 442, 454 (2011) (unobjected-to closing argument of prosecutor, incorrectly stating that oral sex or anal intercourse would constitute "sexual intercourse" for purposes of maintaining a house of prostitution, created a substantial risk of a miscarriage of justice); Commonwealth v. Liebman, 379 Mass. 671, 678–79 (1980) (no error to prevent defense counsel from offering a definition of reasonable doubt in the closing as the "judge has considerable latitude in his choice of methods to prevent, as well as to correct, improper argument of counsel"). A prosecutor should not argue the definition of reasonable doubt. Commonwealth v. Snow, 30 Mass. App. Ct. 443, 447 (1991).

[122] Commonwealth v. Hardy, 431 Mass. 387, 395–398 (2000) (highly improper to personalize the grant of immunity by a single justice by asserting that the justice personally dealt with the witness); Commonwealth v. Killelea. 370 Mass. 638, 648 (1976) (reversal required where the prosecutor misstated the law regarding the consequences of an acquittal by reason of mental illness and the judge's curative instruction did not go "far enough in emphasizing the particulars in which the prosecutor's argument was grossly improper"). *Contrast* Commonwealth v. Atkins, 386 Mass. 593, 601–02 (1982) (prosecutor's misstatement of law on concept of reasonable doubt cured by judge's charge to jury).

A prosecutor should never refer to the defendant's appellate rights in the event of a conviction or his opportunity to request a new trial if error has been committed, even if the prosecutor is responding to the defense counsel's contention that this was the defendant's "only day in court."[123]

It is improper for the prosecutor to refer to the consequences of a jury's decision to find a defendant not guilty, particularly by remarks suggesting that the jury would bear responsibility for turning the defendant loose again on society.[124] There also should be no reference to the sentencing and parole consequences of a verdict, such as the distinction between first- and second-degree murder.[125] However, the defendant is entitled to an instruction regarding the consequences of an insanity acquittal.[126]

§ 35.3J. REFERENCE TO EVIDENCE NOT ADMITTED AT THE TRIAL, MISQUOTE THE EVIDENCE, OR DRAW AN UNREASONABLE INFERENCE FROM THE EVIDENCE

[123] Commonwealth v. Daigle, 379 Mass. 541, 549–50 (1980); Commonwealth v. Walker, 370 Mass. 548, 574–75 (1976) (there should be no comment on the fact that the Commonwealth, unlike the defendant, cannot appeal a jury's decision).

[124] Commonwealth v. Smith, 387 Mass. 900, 910–11 (1983) (improper to argue that if the jury goes against the weight of the evidence and acquits, it will "take [the defendant] out the door with you and turn him loose again on society, because that is what you are saying should happen"). *See also* Commonwealth v. Palmariello, 392 Mass. 126, 132–36 (1984) (improper to suggest that if the jury "conducted a search for doubts as an excuse to acquit a defendant, and the hoodlums in our society may come to believe that murder can be committed without certainty of conviction, human life will become very cheap"); Commonwealth v. Burke, 373 Mass. 569, 574–77 (1977) (it was "highly improper" for the prosecutor to assert that, "You have . . . to decide whether or not someone like [the defendant] is going to go out in the street as again").

This preclusion against comment on the consequences of the verdict applies even in the face of the defense counsel's argument that "this man's liberty might depend" on the verdict. *Burke, supra. Contrast* Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 233–34 (1992) (statement that "killers should not go free because someone can't describe height to the inch" did not constitute comment on the consequences of the verdict).

[125] Commonwealth v. Ferreira, 373 Mass. 116, 123–28 (1977).

[126] The jury must be told that the defendant will not simply be set free, but rather examined to determine if he should be committed to a secure facility for the protection of society. Commonwealth v. Mutina, 366 Mass. 810 (1975). *Cf.* Commonwealth v. McLaughlin, 431 Mass. 506, 510-512 (2000) (egregious errors committed by prosecutor in closing when he ridiculed the emphasis on the defendant's state of mind when the defense in fact was insanity; he should not have asked the jury to consider the rights of the victims, or to do justice for them; he should not have encouraged the jury to ignore the law by stating that the defendant is guilty "because you say so;" instructions led the improprieties to be not prejudicial, and acquittal of some of the charges showed that jurors were not swayed). Commonwealth v. Ruddock, 428 Mass. 288, 293 (1998) ("Of course, a prosecutor should not argue to the jury that, if found not guilty by reason of insanity, a defendant will be released."). However, a court may but is not required to instruct a jury that the defendant may be civilly committed following a simple not guilty verdict. Commonwealth v. Blanchette, 409 Mass. 99, 108–09 (1991).

It is obviously improper for a prosecutor to refer in her summation to evidence that has been excluded by the judge at the trial,[127] and it is equally improper for her to invite the jury to draw an adverse inference "from the exercise of a party's right to have evidence excluded."[128]Similarly, a prosecutor may not argue a lack of evidence where relevant evidence had been excluded at her request.[128.5]

The prosecutor must restrict her summation to the evidence actually introduced at the trial and the reasonable inferences that may be drawn therefrom and may not refer to facts or exhibits not admitted in evidence.[129] It is not appropriate to speculate

[127] Commonwealth v. Wright, 411 Mass. 678, 689–90 (1992) (references to evidence that is excluded or struck can be a serious violation of a defendant's rights unless insignificant or collateral facts); Commonwealth v. Bradshaw. 385 Mass. 244, 274 (1982) ("the rule is clear that no attorney shall refer in closing argument to evidence which has been excluded"); Commonwealth v. Redmond, 370 Mass. 591, 594 (1976) (reference to statements of the defendant that previously had been excluded by the court). Similarly, it is improper for defense counsel to refer to evidence that the court has suppressed on the defendant's motion. Commonwealth v. Watson, 377 Mass. 814, 821–23 (1979) (judge had a duty to correct defense counsel's improper argument concerning the absence of certain identification testimony that had been suppressed by the court). *Cf.* Commonwealth v. Hrycenko, 31 Mass. App. Ct. 425, 432 (1991) (error for judge to send photograph to jury on its request after excluding it at trial). *Contrast* Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 232–33 (1992) (although actual identification suppressed, witness could describe person he saw, and prosecutor could argue the inference that it was the defendant because of the similarity of features).

[128] Commonwealth v. Burke, 373 Mass. 569, 575 (1977).

[128.5] Commonwealth v. Harris, 443 Mass. 714, 729-733 (2005) (reversible error for the prosecutor to comment on the lack of evidence at trial that the alleged sexual assault victim was a prostitute, when prosecutor had successfully excluded three prior convictions of the victim for prostitution or common night walking); Commonwealth v. Carroll, 439 Mass. 547 (2003) (improper for a prosecutor to exclude evidence of co-venturer's motive to have acted alone and the exploit the absence of this evidence by arguing in closing that it was illogical that the co-venturer had beaten the victim because of the absence of motive).

[129] Commonwealth v. Loguidice, 420 Mass. 453 (1995), S.C., 36 Mass. App. Ct. 940 (1994) (prosecution misstatements of evidence warranted a new trial); Commonwealth v. Simmons, 419 Mass. 426, 433–44 (1995) (fact that defendant served in Army did not suggest he knew how to kill or familiar with first aid); Commonwealth v. Amirault, 404 Mass. 221, 236–40 (1989) (statement that a defense expert's theory was "not any kind of recognized or accepted theory" went beyond the reasonable inferences that could be drawn from the evidence); Commonwealth v. Benjamin, 399 Mass. 220, 223–24 (1987) (prosecution reference to the defendant as a "street-smart young man" was unsupported by the evidence introduced at trial); Commonwealth v. Smith, 387 Mass. 900, 907–08 (1983) (ambiguous reference to photos that the jury had not seen); Commonwealth v. Shelley, 374 Mass. 466, 469–73 (1978) (reference to large fees paid to defense experts was not supported by evidence in the record); Commonwealth v. Pavao, 34 Mass. App. Ct. 577 (1993) (prosecutor's assertion that witness said the defendant said he would "kill" the victim was reversible error where testimony was that he would "get" him, and intent was central issue in case); Commonwealth v. Lopez, 31 Mass. App. Ct. 547, 552–53 (1991) (improper to argue that police would be prosecuted for obstruction of justice if they lied).

It also is inappropriate for the prosecutor to relate personal experiences to the jury. *Shelley, supra* (such remarks amount to unsworn testimony that is not subject to cross-examination). *See* Commonwealth v. Daigle, 379 Mass. 541, 549–50 (1980) (prosecutor should not tell jury of the great number of cases that are solved through the use of accomplice testimony). *Contrast* Commonwealth v. Storey, 378 Mass. 312, 323–25 (1979) (prosecutor's motives were proper in explaining to jury why he had said in opening statement that a witness

on conversations between persons,[130] and the prosecutor may not "quote" the defendant's state of mind in an argument on his intent or motive.[131]

Misstatements of the evidence in a summation are, of course, disfavored, but they are rarely cause for reversal.[132]

It is highly improper for a prosecutor to ask the jury to draw an inference from the evidence that the prosecutor knows is contrary to the actual facts.[133] A frequently

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would identify the defendant, where the witness's prior statement concerning the identification was put before the jury at trial).

It is particularly inflammatory to make assertions concerning child witnesses that are not based on the evidence. *See, e.g.*, Commonwealth v. Demars, 42 Mass. App. Ct. 788 (1997), S.C., 426 Mass. 1008 (1998) (reference to a child's braces to rebut contention that the defendant was unaware of her age); Commonwealth v. Santiago, 425 Mass. 491, 500–03 (1997) (use of child as a "shield" during gunfight); Commonwealth v. Loguidice, 420 Mass. 453, S.C., 36 Mass. App. Ct. 940 (1994) (defendant masturbated in front of child).

[130] Commonwealth v. Coren, 437 Mass. 723, 732 (2002) ("prosecutors ... should refrain from presenting hypothetical conversations not fairly inferable from the evidence before the jury"); Commonwealth v. O'Brien, 377 Mass. 772, 777–79 (1979) (it was "plainly wrong" to speculate on an imaginary conversation between prior defense counsel and the defense expert on criminal responsibility); Commonwealth v. McColl, 375 Mass. 316, 323–25 (1978) (improper to hypothesize an imaginary conversation between the defendant and the defense counsel regarding development of an insanity defense); Commonwealth v. Borodine, 371 Mass. 1, 10–11 (1976) ("clearly inappropriate" to say what the witnesses would tell the jurors if they were speaking to them in the lobby). *But see* Commonwealth v. Good, 409 Mass. 612, 625–26 (1991) (counsel may sometimes present an argument through imaginary dialogue; conjecture that defendant "put down his handgun, turned on the television set, and said to himself, 'I just got away with killing [victim]' exceeded proper limits, but not to point of reversible error); Commonwealth v. Clary, 388 Mass. 583, 589–94 (1983) (counsel may present an argument "by dramatizing it in imaginary dialogue or illustrating it by imaginary occasions"; reference here to actual television program was error, however, because prosecutor wanted the jury to believe that the television report was true).

[131] Commonwealth v. Roberts, 378 Mass, 116, 122–24 (1979) (error for prosecutor to relate the thoughts that were going through the defendant's mind during the incident in the absence of direct evidence thereon). *Contrast* Commonwealth v. Haskins, 411 Mass. 120 (1991) (no impropriety in prosecutor's assertion that defendant's motive in befriending child was to abuse him sexually where this was supported by evidence).

[132] *See, e.g.*, Commonwealth v. Thomas, 400 Mass. 676, 682–84 (1987) (misstatement was a "slip of the tongue" later corrected by counsel); Commonwealth v. Haas, 398 Mass. 806, 812–13 (1986) (various misstatements of evidence did not significantly prejudice the defendant); Commonwealth v. Francis, 391 Mass. 369, 371–74 (1984) (technical misstatement of evidence not sufficient to be reversible error). *Cf.* Commonwealth v. Smith, 413 Mass. 275, 282 n.6 (1992) (improper to state that evidence against two defendants was "interchangeable," or that defendant "tussled" with victim, when both statements factually untrue). *But see* Commonwealth v. Coren, 437 Mass. 723, 730-733 (2002)(where misstatements attributed to defendant went to the heart of the case, and there was a timely objection, they were unduly prejudicial and the conviction was reversed); Commonwealth v. Fredette, 56 Mass. App. Ct. 253, 262-265 (2002)(sweeping propositions that victims of sexual abuse commonly delay disclosure and maintain relationships with abusers was devoid of evidentiary support; reversal without trial objection).

[133] Commonwealth v. Collins, 386 Mass. 1, 13–14 (1982) (statement that nothing could be done for a former codefendant who was testifying against the defendant was the presentation of a false situation designed to mislead the jury where the codefendant had been offered a plea to second-degree murder); Commonwealth v. Hooks, 375 Mass. 284, 295–97 (1978) (improper to allege that the severed codefendants were first-degree murderers and that the defendant

disputed area is whether an inference of sexual activity may be drawn from the evidence.[134] It is also serious error for the prosecutor to use impeachment evidence in a substantive manner, thereby asking the jury to accept it as truthful.[135]

§ 35.3K. LIMITATIONS ON PROSECUTOR'S ABILITY TO "FIGHT FIRE WITH FIRE" IN RESPONSE TO DEFENDANT'S SUMMATION

The Supreme Judicial Court has taken an aggressive stance against the concept that a prosecutor has a right to respond to improper defense arguments by "fighting fire with fire."[136] It has limited the application of this theory to situations where the prosecutor can correct an erroneous factual statement by opposing counsel[137] and has urged

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should receive the same treatment when the prosecutor knew that the others had pled to lesser crimes).

[134] *Compare* Commonwealth v. Kozec, 399 Mass. 514, 524 (1987) (unfair to allege that open jar of vaseline in the defendant's purse supported an inference that she was a prostitute prepared for sexual conduct) *and* Commonwealth v. Pearce, 427 Mass. 642, 643–46 (1998) (improper for prosecutor to assert that the child rape complainant had not been sexually active where no evidence on the subject was introduced at the trial) *with* Commonwealth v. Paradise, 405 Mass. 141,152–54 (1989) (sexual aspect to stabbing of 15-year-old girl warranted by her bra being off and the pretense of the defendant in returning to the house); Commonwealth v. Lawrence, 404 Mass. 378, 391–93 (1989) (victim found nude next to defendant's belt and empty condom packet); Commonwealth v. Corriveau, 396 Mass. 319, 335–39 (1985) (even where required finding of acquittal entered on rape charge, prosecutor could allege that sexual activity played a part in incident where the defendant had been kissing the victim, who was found without pants on).

[135] Commonwealth v. Rosa, 412 Mass. 147, 156–60 (1992) (prosecutor's contrast between defendant's testimony and evidence offered solely to impeach another witness was reversible error even with limiting instructions concerning prior inconsistent statements). *Cf.* Commonwealth v. Lodge, 431 Mass. 461, 470–473 (2000) (evidence admitted for a limited purpose to show state of mind should not be argued substantively by the prosecutor); Commonwealth v. Bregoli, 431 Mass. 265, 275–277 (2000) (same).

[136] *See, e.g.*, Commonwealth v. Amirault, 404 Mass. 221, 236 (1989) (prosecutor may not comment on defendant's post-*Miranda* silence even though defense in closing stated police had never questioned defendant); Commonwealth v. Kozec, 399 Mass. 514, 519 & n.9 (1987) (a prosecutor may not "exceed the normally proper limits of argument because defense counsel made an improper, excessive argument"). *But see* Commonwealth v. Pearce, 427 Mass. 642, 646 (1998) (while prosecutor must not "fight fire with fire," the defendant's improper argument suggesting that child victim had been sexually active "undermines his claim that the prosecutor's argument requires reversal").

[137] Commonwealth v. Smith, 387 Mass. 900, 909 (1983) ("The 'fight fire with fire' concept is limited to correcting errors for which defense counsel is responsible, and has no applicability in the absence of such error"). For examples of the proper use of this concept, *see* Commonwealth v. Tavares, 27 Mass. App. Ct. 637, 642–44 (1989) (when defense counsel argued that the police did not follow up on the defendant's claims regarding the incident, the prosecutor could respond that the defendant had given nothing to the police to check out); Commonwealth v. Preziosi, 399 Mass. 748, 752–53 (1987) (rebutting the defendant's claim that he voluntarily let the police take his photo while in custody by noting that the defendant knew he had no choice); Commonwealth v. Pendergast, 385 Mass. 625, 633–34 (1982) ("within the prosecutor's right of retaliatory reply" to clarify result of defendant's psychiatric examination, which was that he was mentally ill but which did not address criminal responsibility).

prosecutors to seek redress from the trial judge instead of resorting to a retaliatory reply to an improper defense argument.[138]

§ 35.3L. IMPROPER USE OF PROPS, DEMONSTRATIONS, AND BOOKS

The use of an item as a prop during closing argument is highly improper because counsel may not display objects that have not been introduced into evidence at the trial.[139] Courtroom demonstrations are permitted when they are firmly grounded in the evidence and its reasonable inferences,[140] although the court has cautioned that it does "not wish to encourage such histrionics (better left to the stage)."[141] It is unacceptable for counsel for either party to sit in the witness chair during closing argument because it may tend to blur the distinction between the roles of the trial participants.[141.5] Finally, it has been termed the better practice not to let counsel read from books to the jury.[142]

§ 35.4 RESPONSES TO A PROSECUTOR'S IMPROPER CLOSING ARGUMENT

The Supreme Judicial Court has emphasized repeatedly that it will not tolerate misconduct by prosecutors during closing argument.[143] Nonetheless, it is incumbent on defense counsel to preserve the issue for appellate review by registering an objection to

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[138] Commonwealth v. Bradshaw, 385 Mass. 244, 277 (1982). *See* Commonwealth v. Haas, 373 Mass. 545, 561 (1977) (recognizing that "final arguments cannot be freewheeling, extemporaneous verbal slugfests." Proper procedure requires the prosecutor to object to the defendant's closing, raise any factual misstatement of the defendant, and request corrections from the judge).

[139] Commonwealth v. Hoppin, 387 Mass. 25, 30 (1982) (piece of rawhide used during summation in trial where victim had claimed to be bound during the rape with a similar leather thong). *Accord*, Commonwealth v. DeMars, 42 Mass. App. Ct. 788 (1997), S.C., 426 Mass. 1008 (1998) (offering exhibits in front of the jury which had been excluded earlier at the sidebar was grossly improper).

[140] Commonwealth v. Payne, 80 Mass.App.Ct. 1112 (2011) (physical demonstration by prosecutor of movements of the defendant was not improper because prosecutor only demonstrated what the defendant testified to doing); Commonwealth v. Shea, 401 Mass. 731, 737 (1988) (demonstration by tapping on the jury rail the shoes seized from the defendant in order to compare it to the sound heard by the witness was proper).

[141] Commonwealth v. Quigley, 391 Mass. 461, 464 (1984) (demonstration of how the defendant knelt to beat the victim). *See also* Commonwealth v. Rosario, 430 Mass. 505, 515–516 (1999) (improper to throw photograph and teeth impressions onto table in front of defendant); Commonwealth v. Beauchamp, 424 Mass. 682, 690–91 (1997) (counsel should not encourage jurors to "try to do the same thing to the jury wall upstairs"); Commonwealth v. Barros, 425 Mass. 572, 581–82 (1997) (improper for prosecutor to kick a trash can and the jury box to demonstrate the kicking of the victim).

[141.5] Commonwealth v. Bradford, 52 Mass. App. Ct. 220, 223-224 (2001).

[142] Commonwealth v. Brown, 121 Mass. 69 (1876).

[143] *See, e.g.*, Commonwealth v. Smith, 387 Mass. 900, 903 (1983) ("Lawyers shall not and must not misstate principles of law nor may their summations infringe or denigrate constitutional rights"); Commonwealth v. Earltop, 372 Mass. 199, 205 (1977) (Hennessey, C.J., concurring); Commonwealth v. Haas, 373 Mass. 545, 557 (1977).

an improper summation and seeking curative instructions from the court concerning the inappropriate argument by the prosecutor.

§ 35.4A. OBJECTIONS

1. Importance of an Objection by Counsel

In every case where the defendant claims on appeal that the prosecutor engaged in improper argument during the trial, the appellate court has noted whether or not the defense counsel had lodged an objection to the remarks in question. "Although not dispositive of the issue, the absence of any [objection or request for curative instructions] from experienced defense counsel is some indication that the tone, manner and substance of the now challenged aspects of the prosecutor's argument were not unfairly prejudicial."[144] The failure to note an objection also compels a stricter standard of appellate review and requires counsel to show that the error created a substantial risk of a miscarriage of justice.[145]

Counsel need not achieve perfection in identifying the impropriety or in offering an alternative provided that the objection alerts the judge to the basis of counsel's complaint and gives the court an opportunity to correct the error.[146]

2. Timing of the Objection

It is not necessary for defense counsel to immediately interrupt the prosecutor's summation with an objection on each occasion that the prosecutor engages in improper

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[144] Commonwealth v. Toro, 395 Mass. 354, 359–60 (1985). *Accord* Commonwealth v. Sanchez, 405 Mass. 369, 375–77 (1989); Commonwealth v. Cobb, 26 Mass. App. Ct. 283, 286–88 (1988) ("whether objection was taken at the time to the prosecutor's arguments rightly appears to be of large, if not necessarily conclusive, importance upon appellate review"). See, e.g., Commonwealth v. Arroyo, 49 Mass. App. Ct. 672, 675-676 (2000)(defendant objected to several aspects of closing, but not to comment on defendant's failure to testify).

The failure to note an objection to an improper argument by the prosecutor has been termed "a flagrant failure of defense counsel in his function." Commonwealth v. Shelley, 374 Mass. 466, 471 (1978). The court has stated, however, that there also is a "duty" on the part of the trial judge to correct improper arguments (Commonwealth v. Watson, 377 Mass. 814, 823 (1979)), and that "the better practice is for the judge to intervene on his own motion." Commonwealth v. Hawley, 380 Mass. 70, 85 (1980) (quoting from Commonwealth v. Gouveia, 371 Mass. 566, 571 (1976)).

[145] Commonwealth v. Cosme, 410 Mass. 746, 750 (1991); Commonwealth v. Cobb, 26 Mass. App. Ct. 283, 287 (1988). The court has declined to reach the issue of whether review of an improper closing argument under the "substantial risk of a miscarriage of justice" standard is separate and distinct from review under the "harmless beyond a reasonable doubt" standard. Commonwealth v. Thomas, 401 Mass. 109, 112–17 (1987).

[146] *See, e.g.,* Commonwealth v. Cancel, 394 Mass. 567, 573–76 (1985) (even if counsel's objection here "was hardly a model of clarity either in expressing the problem or in suggesting a remedy, it sufficiently appraised the judge of the grounds on which it was based, and was therefore sufficient to preserve the issue for review"). A textbook example of exemplary defense counsel conduct is provided in Commonwealth v. Young, 399 Mass. 527, 528–29 (1987), where counsel lodged an objection, which was overruled, during the summation, renewed the objection following the summation, moved for a mistrial, and requested a specific curative instruction, which was rejected. The appellate court quoted the defense counsel's statements at length in finding that there was reversible error.

argument. Generally, it will be sufficient if the matter is brought to the judge's attention at the close of the argument.[147] Waiting until the end of the judge's charge to bring the matter to her attention, however, will render the objection untimely and deny the defendant a review of the error except under the more stringent standard noted above.[148]

3. Overruling of Objection May Add to Prejudicial Impact

The overruling of defense counsel's objection to an improper summation exacerbates the prosecution error because it awards a "judicial imprimatur" to the line of argument,[149] or gives the prosecutor the "green light" to "go ahead."[149.5] This often will be the decisive factor on appellate review.[150]

§ 35.4B. REQUEST FOR MISTRIAL OR CURATIVE INSTRUCTIONS

In addition to objecting to an improper line of argument, counsel may also move for a mistrial if the prosecution error is particularly egregious.[151] The judge will

[147] Commonwealth v. Rosa, 412 Mass. 147, 159 n.12 (1992); Commonwealth v. Person, 400 Mass. 136, 138–43 (1987) (objection at the conclusion of the prosecutor's argument is sufficient to preserve the defendant's rights); Commonwealth v. Cancel, 394 Mass. 567, 573–76 (1985).

[148] Commonwealth v. Shea, 401 Mass. 731, 736–39 (1988); Commonwealth v. Johnson, 374 Mass. 453, 458 (1978).

[149] Commonwealth v. Young, 399 Mass. 527, 531 (1987) ("when the judge overruled the objection, the jury were impliedly advised that the judge regarded the argument as proper"); Commonwealth v. Cobb, 374 Mass. 514, 516–22 (1978); Commonwealth v. Rodriguez, 49 Mass. App. Ct. 370 (2000) (it was reversible error for the prosecutor to argue that the jury could draw an adverse inference from the defendant's failure to call a named witness when the judge had ruled that the prosecutor could not make that argument; overruling of defense counsel's objection would have led the jury to consider the argument to be "judicially endorsed," and corrective instructions were delayed, encompassed in a lengthy and complicated charge, and were more standard than curative); Commonwealth v. Mathews, 31 Mass. App. Ct. 564, 572–73 (1991) (judge's overruling of objection "communicated to the jurors her approval of the [improper] argument," thereby exacerbating the error). *Contrast* Commonwealth v. Sherick, 401 Mass. 302, 305 (1987) (the improper remarks of the prosecutor "did not receive any judicial 'endorsement' such as a jury may infer when a judge overrules an objection").

[149.5] Commonwealth v. Sevieri, 21 Mass. App. Ct. 745, 754 (1986).

[150] *See, e.g.*, Commonwealth v. Moorer, 431 Mass. 544, 548 (2000) (judge sustained prosecutor's objection to defendant's proper line of argument concerning racial bias of witness); Commonwealth v. Loguidice, 420 Mass. 453 (1995), S.C., 36 Mass. App. Ct. 940 (1994) (where proper objection overruled, "an appellate court should proceed with caution in considering whether it is likely that an error made no difference in the jury's result"); Commonwealth v. Rodriguez, 49 Mass. App. Ct. 370 (2000) (overruling of objection would have led jury to believe that improper argument was "judicially endorsed"); Commonwealth v. Cobb, 26 Mass. App. Ct. 283, 288 n.7 (1988) (contrasting four cases where there was no objection and the convictions were affirmed, with a fifth case in which an objection was overruled and the conviction was reversed; the trial judge's ruling "may have put added weight on the [prosecutor's] remarks").

[151] *See, e.g.*, Commonwealth v. Redmond, 370 Mass. 591, 595–96 (1976) (four motions for mistrial made by defendant in course of prosecutor's summation; court concludes that "the cumulative effect" of the various improprieties "may have been significant prejudice," and a new trial was ordered).

have little inclination to grant such a motion at that late stage of the trial and usually will attempt to correct the error by means of curative instructions to the jury. Counsel should be prepared to request specific instructions that might ameliorate the damage but also should note the futility of curative remarks by the court when the prosecutor's point has had its impact before the jury.[152]

Specific and forceful curative instructions by the court usually will be deemed to cure even the most improper prosecution arguments.[153] On the other hand, curative instructions that do not directly address the impropriety or reliance on the court's general instructions on closing argument may not be sufficient to neutralize the prejudicial effect of the prosecutor's closing argument.[154] The failure of the judge to deal adequately with the errors in her charge makes it "incumbent upon defense counsel to renew the objection after the charge."[155]

§ 35.4C. CONSIDERATIONS ON APPELLATE REVIEW

In analyzing a claim that errors by the prosecution in summation entitle the defendant to a new trial, the court generally will focus on four factors:[156] (1) Did the

[152] Commonwealth v. Redmond, 370 Mass. 591, 596 (1976) (due to prosecutor's improprieties, "the cat was to some extent out of the bag;" in such circumstances, the court has "a duty to be skeptical as to the effectiveness of limiting instructions"); Commonwealth v. Gallego, 27 Mass. App. Ct. 714, 719–20 (1989) ("indeed one may doubt that explicit warnings from the judge could suffice where, in respect to the meat of the case, irrelevance and prejudice had been exploited in the closing speech"). Counsel's failure to request curative instructions, even if acknowledged to be a tactical decision designed to avoid reemphasis of the objectionable comments, may lead the reviewing court to conclude that the defendant has forsaken the opportunity to cure the error. *See, e.g.,* Commonwealth v. McGowan, 400 Mass. 385, 391 (1987); Commonwealth v. Paradiso, 24 Mass. App. Ct. 142, 148–50 (1987).

[153] *See, e.g.,* Commonwealth v. Amirault, 404 Mass. 221, 236–40 (1989) (improper references by the prosecutor to the defendant's silence after arrest and to facts not in evidence, as well as comments that shifted the burden of proof to the defendant, all were corrected by specific instructions by the court to disregard the remarks and appropriate instructions of law thereafter). The fact that the curative instructions were not delivered until the day after the summations was not an impediment to their efficacy. *Amirault, supra,* 404 Mass. at 237–38.

[154] *See, e.g.,* Commonwealth v. McLeod, 30 Mass. App. Ct. 536, 540 (1991); Commonwealth v. Gallego, 27 Mass. App. Ct. 714, 719–20 (1989) (judge's instructions "were entirely bland" without special stress on the impropriety); Commonwealth v. Person, 400 Mass. 136, 143 (1987); Commonwealth v. Hawley, 380 Mass. 70, 85–86 (1980).

[155] Commonwealth v. Clary, 388 Mass. 583, 594 n.3 (1983). *See also* Commonwealth v. Benjamin, 399 Mass. 220, 223–24 (1987) ("the defendant's failure to request additional instructions suggests that his objection was resolved to his satisfaction"). *But see* Commonwealth v. Kelly, 417 Mass. 266, 270 n.6 (1994) (where curative instructions not given despite request at end of summation, counsel need not renew request at close of jury charge).

[156] This analysis is based on Commonwealth v. Kozec, 399 Mass. 514, 518 (1987), and Commonwealth v. Cobb, 26 Mass. App. Ct. 283, 287 (1988). *See also* Commonwealth v. Santiago, 425 Mass. 491, 500–03 (1997) (where counsel was particularly vigilant in objecting to the errors, judge did not take aggressive approach to correct them, appeals to sympathy did not address relevant issue, and prosecutor's case was not strong, new trial was warranted); Commonwealth v. Worcester, 44 Mass. App. Ct. 258, 263–68 (1998) (errors demeaned defendant, went to crucial issue, were objected to but went uncorrected, and may have made difference in verdict); Commonwealth v. West, 44 Mass. App. Ct. 150 (1998) (cumulative affect required new trial); Commonwealth v. Mahdi, 388 Mass. 679, 696 (1983). *Contrast*

defendant seasonably object to the prosecutor's argument? (2) Was the error limited to collateral issues or did it go to the heart of the defendant's case? (3) Did the judge adequately address the error through curative instructions? (4) Did the error possibly make a difference in the outcome of the trial? The court has stated that these factors must be considered on a case-by-case basis and that "no bright line rules can be found or could be written" that will determine whether reversible error has occurred.[157] The reality is that although the court frequently will criticize prosecution misconduct during closing argument, "even grossly improper statements by a prosecutor will not require a new trial when the evidence of guilt is overwhelming."[157.5]

Jurors are expected to take most extravagant claims of counsel "with a grain of salt,"[158] but when the impropriety applies to a central issue in the case or impacts on the defendant's core defense, the court is much more likely to order a new trial.[159] Finally, a judge's ruling that precludes the defendant from pursuing a permissible line of argument will usually constitute reversible error if the defendant has preserved his rights by a timely objection.[160]

§ 35.5 EFFECTIVE ADVOCACY TECHNIQUES FOR THE CLOSING ARGUMENT

An effective summation can be decisive in a close case, and counsel should be aware of good advocacy techniques that can enhance any closing argument. Counsel should prepare an outline of the closing argument should prior to the start of the trial. This outline will guide counsel regarding the critical evidence that must be developed through cross-examination and identify the evidence that can only be established by calling defense witnesses or the defendant. It also ensures that counsel begins the trial with a cogent theory of the defense, introduced during the opening statement and reflected in her strategic decisions throughout the trial.

Counsel should avoid embracing multiple defense theories, as these tend to create suspicion among the jurors as to validity of the defense. Contradictory theories — such as asserting that the defendant has been misidentified as being present, but if he was there he was acting in self-defense — should be avoided in almost every instance. This does not mean that the defense cannot be multifaceted, in the sense that counsel

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Commonwealth v. Rogers, 43 Mass. App. Ct. 782 (1997) (any errors in prosecutor's summation were cured by judge's "particularly strong, forceful, specific instructions to the jury").

[157] Commonwealth v. Kozec, 399 Mass. 514, 518 (1987). The court further stated that "[o]nce a properly raised objection to the prosecutor's argument is found to be valid, the entire record, including the balance of the prosecutor's argument, becomes relevant in determining whether the error was prejudicial to the point of requiring a reversal of the conviction." *Kozec, supra*, 399 Mass. at 523. Commonwealth v. Rodriguez, 49 Mass. App. Ct. 370 (2000) (overruling of objection would have led jury to believe that improper argument was "judicially endorsed");

[157.5] Commonwealth v. Torres, 437 Mass. 460, 466 (2002). See also Commonwealth v. McCravy, 430 Mass. 758, 765 (2000); Darden v. Wainwright, 477 U.S. 168, 182 (1986).

[158] Commonwealth v. Bradshaw, 385 Mass. 244 (1982).

[159] *See, e.g.,* Commonwealth v. Person, 400 Mass. 136, 142 (1987) (comment on defendant's pretrial silence); Commonwealth v. Shelley, 374 Mass. 466, 471 (1978) (comments on legitimacy of insanity defense).

[160] *See, e.g.,* Commonwealth v. Gilmore, 399 Mass. 741, 744–46 (1987).

can show that numerous reasonable doubts are present in the case, but rather that the defense should be presenting a single, simple theory to the jury of why the defendant is not guilty.

The summation should be organized in a logical progression, and a typical outline might include the following: opening remarks, the issues framed in the context of the defense theory of the case, suggestions as to methods that the jury can use to resolve these issues, a critical review of the prosecution's evidence contrasted with the persuasiveness of the defense case, and closing comments that end with eloquence. Proper preparation should include a review of the elements of the crimes charged and the relevant jury instructions, so that counsel may tailor her arguments to the areas of law and facts on which the jury will be focused.

Counsel should not waste the opening moments of the summation by presenting boilerplate statements concerning the closing argument that will be repeated in the judge's charge to the jury, nor should counsel remind jurors that the forthcoming argument is not evidence. A direct and forceful summary of the defense position, perhaps delivered with reference to an appropriate analogy or theme, provides a better start for the summation.

A common mistake is to simply repeat the testimony that was favorable to the defense without offering the jury a rationale as to why the testimony was more credible or accurate. Counsel should analyze the testimony with reference to human motivations, foibles, and frailties and seek to attach significance to a particular answer given by a witness during the trial, or the way an answer was given. The demeanor of a witness can be critical to the jury's assessment, and focusing on a reaction, turn of phrase, or subtle moment of the trial can reap dividends if counsel shows how that evidence provided a rare insight concerning the witness.

When the credibility of a Commonwealth witness is a major issue, defense counsel should highlight the absence of corroboration of the witness; conversely, if the defense presents an important witness, corroboration should be the touchstone wherever possible. Counsel should always make use of the exhibits during the summation in order to show why they support her argument. These items will be studied like Rosetta stones during the deliberations, and they must be imbued with the defense explanation of their significance.

Expressing personal opinion during the summation is, of course, prohibited, but there are effective substitutes. The phrases “I submit” or “I suggest” or “I contend” have received appellate approval,[161] and when delivered in a dramatic manner can have an impact indistinguishable from the forbidden language of “I believe” or “I think.” Rhetorical questions are also an excellent device for raising reasonable doubts about the prosecution case. Counsel can present the issue, then marshal the evidence, and end with a rhetorical question that the jurors will answer in their minds, presumably in a manner favorable to the defense.[162]

[161] Commonwealth v. Silva, 401 Mass. 318, 328–29 (1987); Commonwealth v. Ianelli, 17 Mass. App. Ct. 1011 (1984).

[162] For example, in an identification case, counsel may argue as follows: “One critical issue in this trial is whether the witness had an adequate opportunity to see the assailant. You have heard evidence that the incident occurred late one rainy night, that the witness's view was partially obscured, and that the robbery was over in about thirty seconds. Is this the type of opportunity that provides a person with the chance to make a reliable identification? Has the prosecution proven beyond a reasonable doubt that this witness could not and did not make a mistake?”

Counsel should not ignore the strong evidence in the prosecution's favor but rather must attempt to offer the jury a reason why the evidence can be rejected or at least be doubted in some regard. Notwithstanding the need to "take the sting" out of strong Commonwealth evidence, counsel should avoid a recital of all inculpatory evidence, as the prosecutor will immediately follow with the same. Evidence in the prosecution's case that lends credence to the defense theory should always be spotlighted, and counsel should also comment on what was not done by the police in the course of their investigation.[163]

Counsel should not be afraid to sacrifice completeness in return for greater impact by foregoing notes and avoiding reading a scripted summation whenever possible. The closing argument is the final opportunity for counsel to persuade the jury, and she should not hesitate to use the dramatic techniques of oratory to make her points. Changes in volume and pace, use of movement and gestures, and above all else a sincerity of delivery that respectfully addresses the jurors as individuals are the mainstays of an effective lawyer's style. By incorporating these techniques, counsel can ensure that the defendant will receive the best defense at trial and have the greatest chance for acquittal by the jury.

[163] *See, e.g.*, Commonwealth v. Gilmore, 399 Mass. 741, 744 (1987), and cases cited.