

## Improper Prosecutorial Argument

Keith Hilzendeger  
Assistant Federal Public Defender  
Pittsburgh, Pennsylvania  
June 1 & 2, 2016

---

---

---

---

---

---

---

---



“The overwhelming majority of prosecutors are decent, ethical, honorable lawyers who understand the awesome power they wield, and the responsibility that goes with it. But the temptation is always there: It’s the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor’s job is simply to win.”

*United States v. Kojayan* (1993)

---

---

---

---

---

---

---

---

### FOUR PRINCIPLES

1. A prosecutor must not exploit the power and authority of the government as a reason for conviction.
2. A prosecutor must not rely on facts of which she alone is aware as a basis for conviction.
3. A prosecutor must not manipulate the jury’s emotional responses in arguing for a conviction.
4. A prosecutor must accurately state the facts and the law in her presentation to the jury.

---

---

---

---

---

---

---

---

### GROUND RULES

- No vouching.
- No references to facts not in evidence.
- No misstating the facts or the law.
- No forcing a witness (including the defendant) to accuse another witness of lying.
- No improper comments on the defendant's rights.
- No denigrating the defense theory, defense counsel, or the defendant himself.
- No appeals to the jury's emotions or conscience.
- But the prosecutor can respond when the defense crosses these lines.

---

---

---

---

---

---

---

---

### VOUCHING

- "Officer Nemcik is not a racist. He's a good, honest officer who puts his life on the line every day... for the good people in society."
- "What incentive is there for us to come in and try a person if he's not the person that did the offense?"
- "They say he was framed. You saw them testify. They wouldn't risk their careers."
- "There is a need to apologize to NOPD officers who do their jobs every day. They don't deserve to be accused of lying."
- "Why would they jeopardize their careers and lie?"

---

---

---

---

---

---

---

---

### "I THINK" / "I SUBMIT"

- "I think, based on the evidence presented, that you will convict."
- "We know [the defendant] possessed the backpack. We know inside the backpack were 81 rocks [of crack cocaine] wrapped for sale and 18 packets of cocaine powder also wrapped for sale."
- Is "I submit" categorically OK?

---

---

---

---

---

---

---

---

### ARGUING FACTS NOT IN EVIDENCE

- Private Santiago's luggage
- "Let me tell you why Teddy Rogers isn't in the indictment. Because he's incarcerated in the state looking at up to life in prison."
- "If Mr. Tillman is not executed, he would be free to commit more crimes in 15 years."
- "Tommy Burns [a cooperating witness] has convicted 23 other people."
- Did the expert actually testify about what the prosecutor said he did? (The expert didn't, so the prosecutor essentially was testifying.)

---

---

---

---

---

---

---

---

### DEFENDANT COMMENTING ON TRUTHFULNESS OF WITNESSES

- "So Agent Hunter is inventing stories about you?"
- P: Cooperating witness voluntarily came from Canada to testify.  
D: Government's witnesses' testimony is "bought and paid for;" "all their witnesses are incredible."  
P: Witness was "highly credible"
- Badgering defendant with "were they lying?" instead of letting him explain inconsistencies

---

---

---

---

---

---

---

---

### COMMENTING ON DEFENDANT'S RIGHTS

- *Hurd v. Terhune*
- "If the defendant wants to speak, let him take the stand."
- If D complains of P's failure to call a witness, P can complain of D's failure to testify
- In a § 1326 case, telling the jury that there is a "presumption of alienage" when a person is born outside the United States and that the defendant must establish derivative citizenship"
- Telling the jury that "the presumption of innocence is going to vanish when you start deliberating. And that's when the presumption of guilt is going to take over you."

---

---

---

---

---

---

---

---

### “DO YOUR DUTY” / “SEND A MESSAGE”

- “Send a message to the Latin Kings”
- “It’s your duty to do justice, and justice means a death sentence.”
- “If you have reasonable doubt, it’s your duty to acquit.”
- “Put an end to this fraud scheme”
- “Would you want your kid working for the defendant?”
- “We’re not finished until this verdict is returned,” in a case that’s the final defendant in a series

---

---

---

---

---

---

---

---

### INSULTING THE DEFENDANT

- “You’re proud of your collection of child pornography, aren’t you?”
- Calling a tax protestor’s ideas “wrong,” “absurd,” “preposterous,” and “dumb”
- Defendant was a “cute little puppy who grew into a vicious dog”
- Defense theory was “throwing garbage against the wall and hope it sticks”
- “I’m used to defense counsel making arguments with a straight face that I find incredible.”

---

---

---

---

---

---

---

---

### APPEALS TO EMOTION

- “Picture if you will the last words of Juan Trigueros...”
- “Show the defendant the same mercy that he showed” to his victim
- “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, ‘This is a drug deal?’”
- “Convicting [the defendant] is gonna make you comfortable knowing there’s not convicted felons on the street with loaded handguns.”

---

---

---

---

---

---

---

---

### WHAT KIND OF CURATIVE?

- “Why would we prosecute him unless he’s guilty?” + standard instruction
- “But he [an informant] was so honest;” objection; “He seemed to be so credible”
- “But when the defendant gets on the stand and lies over and over, he puts his credibility on the line.”
- “If you don’t convict, then you think the cop was lying.”
- Specific instruction to carefully weigh testimony of snitches who got 5K1.1 agreements
- “What a person does or says, or fails to do or say, may indicate his state of mind.”  
“You cannot hold it against the defendant for not saying something.”

---

---

---

---

---

---

---

---