(8/21/08)

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HORNBY, D.J.

SUMMARY OF FIRST CIRCUIT AUTHORITY AND LOCAL RULES CONCERNING OPENING STATEMENTS AND CLOSING ARGUMENTS

For the guidance of the Bar, Judge Hornby and his law clerks have compiled the following principles over the years from First Circuit opinions and Local Rules of the District of Maine.

This does not represent an opinion of the Court as to the proper outcome of any particular issue that may arise during trial. It is open to counsel to seek to persuade the presiding judge that a particular principle may not be applicable or correct. But counsel should do so in advance and out of the presence of the jury, because these principles represent the current understanding.

GENERALLY, A LAWYER MAY NOT:

1. Give an argumentative opening statement. D. Me. Local R. 39(a).

2. Express his or her personal opinion. See United States v. Grabiec, 96 F.3d 549, 550 (1st Cir. 1996); Polansky v. CNA Ins. Co., 852 F.2d 626, 627-28 (1st Cir. 1988); Marchant v. Dayton Tire & Rubber Co., 836 F.2d 695, 703 (1st Cir. 1988); United States v. Cresta, 825 F.2d 538, 555 (1st Cir. 1987).

3. Misstate the evidence. Gonzalez-Marin v. Equitable Life Assurance Soc'y of the United States, 845 F.2d 1140, 1147 (1st Cir. 1988); United States v. Santana-Camacho, 833 F.2d 371, 372-75 (1st Cir. 1987).

4. Make irrelevant references designed to inflame the passions and prejudices of the jury, or use arguments that would lead the jury to decide the case on considerations other than the evidence. Arrieta-Agressot v. United States, 3 F.3d 525, 527 (1st Cir. 1993); United States v. Machor, 879 F.2d 945, 954-56 (1st Cir. 1989); United States v. Doe, 860 F.2d 488, 492-94 (1st Cir. 1988) (citing ABA Standard for Criminal Justice 4-7.8); Polansky, 852 F.2d at 630 (citing Fed. R. Evid. 403 advisory committee's note); United States v. Giry, 818 F.2d 120, 132-34 (1st Cir. 1987); Warner v. Rossignol, 538 F.2d 910, 911-13 (1st Cir. 1976).

5. Engage in wild speculation. United States v. de Leon Davis, 914 F.2d 340, 344-45 (1st Cir. 1990).

6. Use the "golden rule" argument—asking the jurors to put themselves in the position of one of the parties to determine the proper verdict. United States v.

Moreno, 947 F.2d 7, 8 (1st Cir. 1991); Forrestal v. Magendantz, 848 F.2d 303, 308-10 (1st Cir. 1988). But a lawyer may ask the jurors to put themselves in the position of an eyewitness in order to test the plausibility of a witness's testimony. United States v. Kirvan, 997 F.2d 963, 964 (1st Cir. 1993).

7. Assert that the opposing party has "concocted 'stories' with the connivance of his lawyer." Wilson v. Town of Mendon, 294 F.3d 1, 16 (1st Cir. 2002).

CIVIL CASES SPECIFICALLY

A LAWYER MAY NOT:

1. Disclose the *ad damnum* to the jury. Wilson v. Bradlees of New England, Inc., 250 F.3d 10, 23 n.25 (1st Cir. 2001) ("reversible error" to allow lawyer to argue *ad damnum* to jury); Davis v. Browning-Ferris Indus., Inc., 898 F.2d 836, 837-38 (1st Cir. 1990).

2. Request a dollar amount for pain and suffering. Waldorf v. Shuta, 896 F.2d 723, 743-44 (3d Cir. 1990), cited with approval in Davis, 898 F.2d at 837. This also seems to be what the First Circuit meant in Wilson, 250 F.3d at 23 n.25, where it stated: "It would have been reversible error for the court to have allowed . . . argument [of an *ad damnum* to the jury]." Review of the plaintiff's brief shows that the plaintiff wanted to follow New Hampshire's state practice which, like Maine state practice, permits a lawyer to suggest a specific sum in closing. Rodriguez v. Webb, 680 A.2d 604, 607-08 (N.H. 1996). This is what the First Circuit rejected as "merit[ing] no discussion." Wilson, 250 F.3d at 23 n.25.

3. Ask the jury to put themselves in the shoes of a plaintiff to determine damages. Forrestal, 848 F.2d at 308-10.

4. Refer to insurance coverage when this is not at issue. Polansky, 852 F.2d at 630 (citing City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 758 (6th Cir. 1980)); see also Roy v. Star Chopper Co., Inc., 584 F.2d 1124, 1135 (1st Cir. 1978).

5. Appeal to the emotions of the jury by contrasting the financial positions of the parties. Gonzalez-Marin, 845 F.2d at 1147-48.

6. Make purely emotional appeals to the jury designed only to stain character, for example, by saying that a defendant "does not care" about the plaintiff. Smith v. Kmart Corp., 177 F.3d 19, 26 (1st Cir. 1999).

7. Ask for damages as punishment in a nonpunitive damage case. Id. at 27.

8. Ask the jury for an additional sanction for pretrial discovery conduct where the court has already determined what the sanction will be. Id.

CRIMINAL CASES SPECIFICALLY

A PROSECUTOR MAY NOT:

1. Directly accuse a defendant of lying. United States v. Rodriguez-DeJesus, 202 F.3d 482, 486 (1st Cir. 2000); United States v. Nickens, 955 F.2d 112, 121 (1st Cir. 1992); United States v. Rodriguez-Estrada, 877 F.2d 153, 158-59 (1st Cir. 1989); see also United States v. Garcia, 818 F.2d 136, 143-44 (1st Cir. 1987).

2. "[I]nject personal beliefs about the evidence into a closing argument," Nickens, 955 F.2d at 121; see also United States v. Auch, 187 F.3d 125, 131 (1st Cir. 1999) ("'[T]he only way I can even imagine ever acquitting this man of the charges is if you totally disbelieve [the government's cooperating witness].'") (emphasis added); Cresta, 825 F.2d at 555, or describe her personal belief in the defendant's guilt, United States v. Smith, 982 F.2d 681, 683-84 (1st Cir. 1993). "'We're not trying to prosecute anyone that is innocent' . . . . should not have been said because it arguably invited the jury to rely upon the prosecutor's implied expression of personal belief in [defendant's] guilt." United States v. Adams, 305 F.3d 30, 37 (1st Cir. 2002); United States v. Andújar-Basco, 488 F.3d 549 (1st Cir. 2007) (improper to say "I feel comfortable and the United States feels comfortable that they have proven beyond a reasonable doubt" or "I have proven it, absolutely. We have met our burden." Id. at 560-61) (internal citations omitted) (government concedes error, but court was "troubled that such improper arguments persist," id. at 561 n.5.)

3. Use "pejorative language and inflammatory rhetoric," Rodriguez-Estrada, 877 F.2d at 159, or overuse "a potentially inflammatory phrase . . . in some exaggerated circumstances." United States v. Sanchez-Berrios, 424 F.3d 65, 73-74 (1st Cir. 2005) (finding the usage in "manner and frequency" "not excessive"); United States v. Carpenter, 494 F.3d 13, 23 (1st Cir. 2007) (repeatedly using gambling metaphor pejoratively in closing).

4. Vouch for the credibility of a witness by:

(a) "plac[ing] the prestige of her office behind the government's case by, say, imparting her personal belief in a witness's veracity or implying that the jury should credit the prosecutor's evidence simply because the government can be trusted." United States v. Perez-Ruiz, 353 F.3d 1, 9 (1st Cir. 2003); accord United States v. Cormier, 468 F.3d 63 (1st Cir. 2006).

(b) invoking the credibility of the government. United States v. Page, 521 F.3d 101, 107 (1st Cir. 2008) ("A prosecutor impermissibly vouches for a witness only if he places the prestige of his office behind the government's case by adverting to his own personal belief and trust in the witness's truthfulness."); United States v. Rosales, 19 F.3d 763,766-67 (1st Cir. 1994); United States v. Grant, 971 F.2d 799, 811 n.22 (1st Cir. 1992) (en banc); United States v. Newton, 891 F.2d 944, 952-53 (1st Cir. 1989);

United States v. Martin, 815 F.2d 818, 821-22 (1st Cir. 1987) (citing United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983)).

(c) indicating that information not presented to the jury supports the witness's testimony. Grant, 971 F.2d at 811 n.22 (citing Martin, 815 F.2d at 821-22).

(d) personally assuring the jury that a witness is telling the truth, or otherwise commenting on the credibility of a witness. See United States v. Joyner, 191 F.3d 47, 54-55 (1st Cir. 1999); Auch, 187 F.3d at 131-32; United States v. Wihbey, 75 F.3d 761, 771-72 (1st Cir. 1996); United States v. Levy-Cordero, 67 F.3d 1002, 1008 (1st Cir. 1995); Grant, 971 F.2d at 811 n.22; United States v. Sutherland, 929 F.2d 765, 775-76 (1st Cir. 1991); Rodriguez-Estrada, 877 F.2d at 158.

(e) stating that prosecution witnesses are bound to tell the truth. United States v. Manning, 23 F.3d 570, 572-73 (1st Cir. 1994).

(f) stating that he or she, the prosecutor, would have acted similarly to how the witness acted. United States v. Palmer, 203 F.3d 55, 58 (1st Cir. 2000).

(g) asking the jury "to believe the police or FBI because of their history, integrity, or public service" because it "invite[s] the jury to rely on the prestige of the government and its agents rather than the jury's own evaluation of the evidence," United States v. Torres-Galindo, 206 F.3d 136, 142 (1st Cir. 2000), or to believe a police officer's testimony "because he was an experienced police officer who could lose his job or go to jail if he lied on the witness stand." United States v. Kornegay, 410 F.3d 89, 96 (1st Cir. 2005). "'They're not here looking for numbers' . . . could be viewed as a form of vouching for the competence and integrity of the police and probably should not have been said." Adams, 305 F.3d at 37.

** Note that in Auch, 187 F.3d at 132, the court criticized a prosecutor for stating that if a government witness were lying to help the government "he would have concocted a [story] more damaging [to the defendant]," and announced that "prosecutors in this circuit should consider themselves well advised to strike such comments from their repertories." Id.; accord United States v. Martinez-Medina, 279 F.3d 105 (1st Cir. 2002). But in Perez-Ruiz, 353 F.3d at 10, a different panel (there was some overlap) declared that these earlier statements "are not good law." Accord United States v. Vázquez-Rivera, 407 F.3d 476, 483-84 (1st Cir. 2005); United States v. Wilkerson, 411 F.3d 1, 8 (1st Cir. 2005) (same). Although there has been no *en banc* decision to resolve the conflict, the Auch statement has apparently lapsed.

5. Comment either directly or indirectly on a person's refusal to testify. Griffin v. California, 380 U.S. 609, 613-615 (1965); United States v. Rodríguez, 215 F.3d 110, 122 (1st Cir. 2000) (improper to suggest defendant could have contradicted a government witness); United States v. Bey, 188 F.3d 1, 9 (1st Cir. 1999); United States v. Roberts, 119 F.3d 1006, 1014-15 (1st Cir. 1997); United States v. Lilly, 983 F.2d 300, 306-07 (1st Cir. 1992); United States v. Hodge-Balwing, 952 F.2d 607, 610 (1st Cir. 1991); United States v. Savarese, 649 F.2d 83, 86-87 (1st Cir. 1981).

6. Refer to the defendant's silence in the face of law enforcement personnel. United States v. Mooney, 315 F.3d 54, 61 n.1 (1st Cir. 2002) (stating, "[w]e must acknowledge our dismay that any prosecutor in this circuit could appraise a jury in an opening statement that a defendant had chosen not to talk to the police. It is difficult to imagine a more fundamental error." The prosecutor had said, "[f]inally, as you assess the codefendants' credibility, consider how their testimony fits with the defendant's own words. You see, after the defendant was arrested on these charges, he chose not to speak to the police, and that was certainly his right. He did give a false name." Id. at 58-59.).

7. State that defense counsel could have called a government agent as a witness, where defense counsel did not argue that the testimony would have been harmful to the government's case but only that the government had not met its burden of proof (such "comments could have the effect of shifting the burden of proof, rather than refuting a requested inference"). United States v. Diaz-Diaz, 433 F.3d 128, 135 (1st Cir. 2005); United States v. Jiménez-Torres, 435 F.3d 3, 11 (1st Cir. 2006).

8. State that a defendant is "running" or "hiding" when a defendant does not testify. United States v. Hardy, 37 F.3d 753, 757-58 (1st Cir. 1994).

9. Invite the jury to see if the defendant's lawyer can explain something in closing argument. Wihbey, 75 F.3d at 768-70; United States v. Akinola, 985 F.2d 1105, 1111-12 (1st Cir. 1993); Skandier, 758 F.2d at 45-46.

10. State that he or she "welcomes" the burden of proof. Smith, 982 F.2d at 685 (called "overzealous"); United States v. Flaherty, 668 F.2d 566, 596-97 (1st Cir. 1981) (called "troublesome").

11. Offer an erroneous definition of the burden of proof. United States v. Gonzalez-Gonzalez, 136 F.3d 6, 8-9 (1st Cir. 1998) (agreeing with government's concession that prosecutor erred in telling jury that burden is met "[i]f in your mind you think . . . and in your heart, you feel" that the defendant is guilty).

12. Refer to facts not in evidence, United States v. D'Amico, 496 F.3d 95, 105 (1st Cir. 2007), vacated on other grounds, 128 S. Ct. 1239 (2008) (not "a minor mistake"; "create[s] a real risk of affecting to a material degree what was otherwise proper argument"); Auch, 187 F.3d at 129 (finding improper the prosecutor's continued references to another crime where the judge had sustained objections to its admissibility); Roberts, 119 F.3d at 1015-16 (finding it improper to tell jury to ignore membership in motorcycle gang where there was no evidence of membership in motorcycle gang; improper, in responding to defense argument that a search would have revealed no incriminating evidence, to assert facts outside record and inaccurate law; proper response is to object to defendant's improper argument); de Leon Davis, 914 F.2d at 344-45; United States v. Johnson, 893 F.2d 451, 454 (1st Cir. 1990), or imply reliance on knowledge or evidence not available to the jury, Manning, 23 F.3d at 573 (implying that partial prints were inculpatory); Smith, 982 F.2d at 685. "[A] clear and

deliberate reference in closing to supposedly favorable evidence that the government says it possesses but did not offer at trial is one of the worst sins a prosecutor can commit; and the effect may be just as bad even though the jury is left to guess at the content." United States v. Potter, 463 F.3d 9, 24 (1st Cir. 2006). In Page, 521 F.3d at 107-08, the government conceded that it was inadvisable to imply that a separate, unrelated criminal act had been committed without the necessary facts in evidence.

13. "[T]ell the jury what witnesses who did not testify would have said had they testified." United States v. Lopez, 380 F.3d 538, 546-47 (1st Cir. 2004) (quoting United States v. Palmer, 37 F.3d 1080, 1087 (5th Cir. 1994)).

14. Ask the jury to render justice to or have sympathy for a victim or witness. United States v. Quesada-Bonilla, 952 F.2d 597, 601-02 (1st Cir. 1991), or do your duty. United States v. Andújar-Basco, 488 F.3d 549 (1st Cir. 2007) (government conceded the remark was error; court noted it was troubled that "such improper arguments persist," id. at 561 n.5); see also United States v. Mandelbaum, 802 F.2d 42, 44 (1st Cir. 1986) ("finding improper the suggestion that a jury has 'a duty to decide one way or the other' because such an appeal 'can only distract a jury from its actual duty: impartiality.'").

15. Cast suspicion on the role of defense counsel in general. United States v. Bennett, 75 F.3d 40, 46 (1st Cir. 1996); United States v. Boldt, 929 F.2d 35, 40 (1st Cir. 1991).

16. Play upon the jury's emotional reaction to crimes that are not charged. United States v. Procopio, 88 F.3d 21, 31 (1st Cir. 1996) (finding it improper to say "[o]ur society doesn't need it" concerning future criminal risk); United States v. Moreno, 991 F.2d 943, 947 (1st Cir. 1993) (finding it improper for government in firearm possession case to say that "the evidence will show that [the police officers] were doing their jobs protecting the community that has been plagued by violence, senseless violence, shootings and killings. That's why they were there and that's why we're here today."); United States v. Robinson, 473 F.3d 387, 397 (1st Cir. 2007) ("The closest the government came to impermissibly prejudicing the jury in its closing argument was when it concluded its rebuttal: 'I would suggest to you, ladies and gentlemen . . . that [Robinson is] guilty of possessing those guns in furtherance of that drug deal in which anything could have happened and probably something would have happened had it been a real drug dealer and not a DEA undercover agent who was getting ripped off by the defendant.'") (but no "miscarriage of justice" in light of the jury instructions). Id.

17. Predict the consequences of the jury's verdict, United States v. Whiting, 28 F.3d 1296, 1302 (1st Cir. 1994) (citing ABA Standards Relating to the Administration of Criminal Justice 3-5.8(d)), or place upon the jury responsibility for extra-judicial consequences of the verdict, Auch, 187 F.3d at 132-33 (finding "particularly troubling" the prosecutor's argument in closing that a not guilty verdict in an armed bank robbery case would be the "biggest day of [the defendant's] life and that he would laugh all the way to the bank"); Arrieta-Agressot v. United States, 3 F.3d at 527 (attempt to enlist jurors in war on drugs).

18. Focus upon the source of the defendant's arguments, rather than their merits. Whiting, 28 F.3d at 1302-03 (finding improper prosecutor's comment that defendant's "very able" lawyers had "floated" "smoke screens").

19. Pledge his or her own character as a basis for inferring the defendant's guilt. United States v. Josleyn, 99 F.3d 1182, 1196-97 (1st Cir. 1996); Whiting, 28 F.3d at 1303.

20. Conjure up images of religion that would appeal to jurors to leave their dispassionate role. United States v. Cartagena-Carrasquillo, 70 F.3d 706, 712-14 (1st Cir. 1995) ("Injection of religion into the case was flatly wrong and contrary to what the public has a right to expect of government prosecutors."); Levy-Cordero, 67 F.3d at 1008 (involving use of hymn in closing).

21. Comment on Rule 404(b) evidence to urge jurors to draw the inference that Rule 404(a) forbids. Procopio, 88 F.3d at 31.

22. Appeal to the jurors' "hearts and minds" and "conscience." Martinez-Medina, 279 F.3d at 118-19 ("The prosecutor told the jury that 'your conscience must have been screaming at you, screaming at you that [the defendants] were guilty.' Later, the prosecutor said that 'if you know in your head and your heart that these defendants are guilty then you must return the only verdict that the evidence commands.' These comments were plainly improper appeals to the jury's emotions and role as the conscience of the community."); United States v. Avilés-Colón, ___ F.3d ___, 2008 WL 2930115, at *16-17 (1st Cir. July 31, 2008) (improper to say in opening: "This case is about drugs and violence that we read about in the newspaper everyday and we hear about on the television when we go home at night; the same violence which occurs in Puerto Rico on a daily basis and which takes the lives of hundreds of young people each year.").

23. Refer to defendants as "animals." Martinez-Medina, 279 F.3d at 119 ("especially inflammatory and improper").

24. Contrast "the jurors' sense of community safety" with the crime charged, thereby interjecting "issues having no bearing on the defendant's guilt or innocence" and encouraging the jury "to act in ways other than as dispassionate arbiters of the facts." Mooney, 315 F.3d 54, 59 (1st Cir. 2002) (stating that it "crossed the bounds of permissible argument" for the prosecutor to say in her opening statement "[w]e are fortunate in the state of Maine . . . to live lives that are relatively free from random acts of violence. We don't have bars on our windows. We don't fear walking at night. And as a rule, our homes and our work places are safe havens from random crime. This case involves a painful exception to that rule, a random act of violence that has forever changed the way that one person looks at the world, and in some respects has rocked the sense of security of an entire Maine community." Id. at 58.).

25. Address the issue of drug trafficking as a "social malaise" or "introduce an element of social standing into the closing—that defendant was more guilty than the others because he had the opportunity to do something with his life, but instead chose drug trafficking." Vázquez-Rivera, 407 F.3d at 485-86 (although not reversible error because of context, "[t]hese statements are of the species of commentary that may inflame the jury's passion.").

26. Say that "a plea of not guilty is 'not a declaration of innocence' but simply means 'government, prove your case.'" United States v. Soto-Beníquez, 356 F.3d 1, 89-90 (1st Cir. 2003).

27. "[I]nvite the jury to make any inference regarding the absence of a witness whose unavailability has arisen because of the invocation of his Fifth Amendment right against self-incrimination." United States v. Shoup, 476 F.3d 38 (1st Cir. 2007) ("'phantom' references [to such a witness] were extremely ill-advised").

A PROSECUTOR MAY:

1. Respond to a defendant's attacks on the credibility of a cooperating witness. Martin, 815 F.2d at 821-23.

2. Comment on the quality of a defendant's alibi and witnesses, United States v. Glantz, 810 F.2d 316, 320-24 (1st Cir. 1987) (citing Savarese, 649 F.2d at 87), and on the plausibility of the defense theory. United States v. Henderson, 320 F.3d 92, 106 (1st Cir. 2003).

3. Comment on gaps in the defendant's evidence under the defendant's theory of the case, or say that the defendant's story is implausible, or focus on defects in the defense's cross-examination of a witness, so long as the prosecutor does not thereby impermissibly comment on the defendant's failure to testify. Wilkerson, 411 F.3d at 8-9 (not plain error to say "there's no real evidence" or "pretty much nothing" to support the defendant's theory of the case); United States v. Balsam, 203 F.3d 72, 87-88 (1st Cir. 2000) (expressing concern, but not reversible error where arguments "expressly focused only on defects in the cross-examination of [a witness] by the defense, without inevitably implying that [defendant] should have taken the stand"); Roberts, 119 F.3d at 1011, 1015-16 (finding reversible error to argue that when defendant does "go forward" to offer evidence, "the defendant has the same responsibility [as the government] and that is to present a compelling case"); United States v. Lewis, 40 F.3d 1325, 1337-38 (1st Cir. 1994); United States v. Donlon, 909 F.2d 650, 656-57 (1st Cir. 1990); Garcia, 818 F.2d at 143-44; Glantz, 810 F.2d at 320-24.

4. "[Identify] for the jury a specific item of evidence and [argue] that the jury should infer from that piece of evidence that the defendant's theory was not worthy of belief." Henderson, 320 F.3d at 105 (prosecutor characterized defendant's claims as absurd").

5. Refer to a defendant's opportunity to testify, but only where it is a fair response to a claim made by defense counsel. United States v. Rouleau, 894 F.2d 13, 16 (1st Cir. 1990) (citing United States v. Robinson, 485 U.S. 25, 33-34 (1988)).

6. Inform the jury of the contents of a witness's plea agreement, including its requirement that the witness tell the truth (where the plea agreement has been admitted into evidence), discuss the details of the plea during closing and comment upon a witness's incentive to testify truthfully. United States v. Hansen, 434 F.3d 92, 101 (1st Cir. 2006); Bey, 188 F.3d at 7-8; United States v. Dockray, 943 F.2d 152, 156 (1st Cir. 1991).

7. Assert reasons (that are in evidence) why a witness ought to be accepted as truthful, Page, 521 F.3d at 107 (permissible to refer to particular facts in the record that "may have provided [a] witness with an incentive to testify truthfully", such as that the witness's testimony implicated a close relative in criminal conduct); Avilés-Colón, 2008 WL 2930115, at *17 (permissible to say in opening "that the government was 'fortunate enough to be able to present to you the testimony of an individual who for a period of time was a member of the "Cataño" gang' and that [defendant's] criminal history did not 'take away from his credibility' . . . . [because] [t]he challenged statements simply refer to the basis for the witness's knowledge while seeking to deflect the anticipated impeachment."); Vázquez-Rivera, 407 F.3d at 483-84 (permissible to refer to safety valve reduction as evidence of truthfulness where witness's veracity attacked) (semble); Henderson, 320 F.3d at 106 (permissible to say that the witness "repeatedly told you that she was told to tell the truth, to tell the truth when she took the stand"); United States v. Figueroa-Encarnacion, 343 F.3d 23, 28-29 (1st Cir. 2003); or call attention to a witness's motive for testifying, Avilés-Colón, 2008 WL 2930115, at *17 (permissible to "explain[ ] a witness's motive for telling the truth"); Auch, 187 F.3d at 131 ("To the extent that the prosecutor's arguments referred to [the witness's] motives to tell the truth, the argument falls within the accepted bounds and was entirely proper."); Dockray, 943 F.2d at 156, or to the witness's biases, Smith, 982 F.2d at 683-84, so long as the prosecutor does not vouch for the witness, United States v. Rodriguez, 215 F.3d 110, 123 (1st Cir. 2000).

8. Ask the jury to "use common sense and place themselves in the witness' shoes to evaluate his testimony." Kornegay, 410 F.3d at 97 n.6. "Inherent in such a common sense evaluation is that each juror will place him or herself in the witness' position to judge the witness' motivations based on the juror's notion of typical human behavior." Id.; Perez-Ruiz, 353 F.3d at 10 (permissible to "merely ask[] the members of the jury to use their common sense in evaluating the witnesses' testimony").

9. Ask the jury to draw reasonable inferences from the evidence. United States v. Brandao, ___ F.3d ___, 2008 WL 3866512, at *5, 7 (1st Cir. Aug. 21, 2008); United States v. Cunan, 152 F.3d 29, 35 (1st Cir. 1998); United States v. Ocampo-Guarin, 968 F.2d 1406, 1411-12 (1st Cir. 1992); United States v. Abreu, 952 F.2d 1458, 1471 (1st Cir. 1992). "This is a narrow path to tread, with some comments being impermissible because they rely on too big an inferential leap, and others being within permissible limits. . . . [P]rosecutors should be wary of crossing that boundary. . . ."

United States v. Hamie, 165 F.3d 80, 84 (1st Cir. 1999) (citations omitted). The prosecutor may suggest which inferences should be drawn, Henderson, 320 F.3d at 106 ("if you ask the wrong questions, you get the wrong answers" and "if you ask the right questions in this case, there's no doubt that [the defendants] will be convicted"), as long as he or she does not improperly insert his or her own credibility, United States v. Mount, 896 F.2d 612, 625-26 (1st Cir. 1990); United States v. Cotter, 425 F.2d 450, 453 (1st Cir. 1970), or his or her own opinion as to the witness's credibility, Smith, 982 F.2d at 683-84, into the argument. The prosecutor may argue that circumstantial evidence is susceptible to no interpretation other than that offered by the government, so long as the prosecutor's comments are directed solely at the evidence and not at the defendant's failure to testify. Akinola, 985 F.2d at 1111-12.

10. If the defendant testifies,

(a) attack the evidentiary foundation upon which the testimony rests. United States v. Brennan, 994 F.2d 918, 926 (1st Cir. 1993) (citing Garcia, 818 F.2d at 143-44; Savarese, 649 F.2d at 87);

(b) call the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly. Portuondo v. Agard, 529 U.S. 61, 73 (2000).

(c) "comment on the implausibility of her testimony or its lack of an evidentiary foundation" or "impugn[ ] the defendant's credibility by commenting on her failure to produce any corroborating evidence." United States v. Boulerice, 325 F.3d 75, 86 (1st Cir. 2003).

(d) comment on the defendant's interest in the case, as it bears upon credibility. Vázquez-Rivera, 407 F.3d at 486.

11. Comment on the defendant's decision to remain silent in a context outside the legal process, such as during the commission of the crime (specifically *not* the failure to testify or to remain silent in the face of law enforcement personnel). United States v. Taylor, 54 F.3d 967, 979 (1st Cir. 1995).

12. Describe accurately testimony that the jury will hear (Opening) or already has heard (Closing). United States v. McKeeve, 131 F.3d 1, 14 (1st Cir. 1997).

13. In closing, explain to the jury that a witness whose testimony was promised in opening did not testify because other admitted evidence provided the information, but must not tell the jury the substance of what the missing witness would have said if the witness had testified. Lopez, 380 F.3d at 546-47.

14. Refer to the defendant's choice of friends in explaining why the government would rely on witnesses with criminal records. Auch, 187 F.3d at 129 n.5.

15. Say that there is "no real question" on specific issues where, in context, the statement is drawing the jury's attention to what the evidence has shown and *not* the defendant's decision not to testify. Bey, 188 F.3d at 8-9.

16. Respond to defense counsel's criticism of the government's failure to have an informant testify by stating that defendant could have called the informant (if true). Adams, 305 F.3d at 38; United States v. Vázquez-Botet, 532 F.3d 37, 59 (1st Cir. 2008) (when defense counsel in closing argued that if prosecutor had called a defendant's secretary to testify, she would have corroborated the defense version of the facts, in rebuttal prosecutor reminded jury that defendants had no duty to put on evidence, but that defendants "would have subpoenaed a given witness had they believed her testimony would exculpate them," court found "this to have been a limited, proportionate, and thus closely tailored, response to [defense counsel's] rather outrageous invitation."). The same is true for production of documents. United States v. Mangual-Garcia, 505 F.3d 1, 12-13 (1st Cir. 2007). On the other hand, if such a comment by the prosecutor was unprovoked, it "could amount to impermissible burden shifting." Adams, 305 F.3d at 38; Henderson, 320 F.3d at 107 (referring to "the invited response rule" and approving in rebuttal the statement "Where is [witness], both counsel ask you? Well, that's a good question. Why don't they tell us? Maybe defense counsel could have interviewed [witness]").

17. When defense counsel suggests in opening that defendant is a "legitimate businessman," respond in closing that defendant is a "successful businessman in the business of crack cocaine." Henderson, 320 F.3d at 107.

18. Ask witnesses what they told "us" or government agents in proffer sessions when used in context to differentiate among witnesses. United States v. Barbour, 393 F.3d 82, 90 (1st Cir. 2004).

19. Argue "that if the jury found that [the defendant] ran up the driveway, they would necessarily have to find that the [police] officers did not tell the truth, because the officers testified that he ran up the alley. This logical response to [the defendant's] theory of the case is not plain error." Wilkerson, 411 F.3d at 8.

20. Call a defense theory a "red herring," id. at 9, or describe the defense "as a 'self serving absurdity'" ("not flattering," but "fair argument"). Sanchez-Berrios, 424 F.3d at 73.

21. Say of law enforcement testimony, "It has the ring of truth." United States v. Isler, 429 F.3d 19, 28 (1st Cir. 2005) (did not constitute "improper vouching"; "arguing why a witness should be believed or asking jurors to use their common sense in assessing witness testimony is not vouching"; court has "upheld . . . rejoinders," "a logical counter to the defense claim of witness fabrication").

22. Qualify an objection to the defense lawyer's opening statement with the words "unless the defendant is going to testify" when the defense lawyer appears to be describing evidence that only the defendant would have. United States v. Rivera-

Hernandez, 497 F.3d 71, 78–79 (1st Cir. 2007) ("the comment was 'at most a glancing brush rather than a blow against the privilege,'" quoting United States v. Procopio, 88 F.3d 21, 30 (1st Cir. 1996)).

23. When the defense lawyer's language, in closing argument, tells the jury: "You are going to live with your decision the rest of your life . . . . Are you really going to rest the rest of your lives with the decision you are about to make on a criminal? On a woman that cannot remember the dates?," respond by referring to the "innocent victim, living in one of our housing projects and having to endure the trafficking by these individuals" and state:

> And when you decide this matter as judges, remember that you will live with the decision of course. You will live with the honest decision that you put a criminal behind bars. Not just left out in the street, another criminal to continue selling drugs next to the kids because you saw they sold regardless of the kids, not even caring for any of those kids, one of them was even giving money to a little child to take God knows where. So when you live with your conscience you will live with your knowledge as judges of the fact you did justice. . . .

United States v. Skerret-Ortega, 529 F.3d 33, 39 (1st Cir. 2008). The court distinguished what is allowed to a prosecutor in rebuttal, responding to the provocative defense statements, from what a prosecutor can do in the original closing argument. Id.

24. Make a statement that, while "not literally true in the abstract," will be understood by the jury more narrowly "in context." Brandao, 2008 WL 3866512, at *17.

PROBLEMATIC STATEMENTS FOR A PROSECUTOR:

1. Say of witnesses, "they were the only people who laid it out for you" because the statement could be interpreted as impermissibly commenting on a defendant's failure to testify or call witnesses. Barbour, 393 F.3d at 90.

2. Say of a tape recording, "this allowed you to listen to this defendant," because the statement could be interpreted as a reminder to the jury that the defendant did not testify. Id. at 90-91; United States v. Panico, 435 F.3d 47, 50 (1st Cir. 2006) (referring to the defendant as a "witness" because of his tape-recorded utterances; "a rhetorical device, possibly ill-chosen").

3. Say that a witness "didn't stretch the truth here." The statement "comes closer to that line of imparting [the prosecutor's] personal belief in the witness's veracity," but was not plain error. Wilkerson, 411 F.3d at 8.

4. Say that the government's evidence is "not contradicted." United States v. Stroman, 500 F.3d 61, 64–66 (1st Cir. 2007) ("a risk," but finding the tactic legitimate in the particular circumstances). Stroman reaffirmed the test of United States v. Lilly, 983 F.3d 300, 307 (1st Cir. 1992):

> whether, in the circumstances of the particular case, the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.

Previously, the First Circuit seemed to prohibit such usage ("uncontradicted" or "unrefuted") outright. See United States v. Skandier, 758 F.2d 43, 44-45 (1st Cir. 1985).

A DEFENSE LAWYER MAY NOT:

1. Invite the jury to make any inference regarding the absence of a witness who refused to testify based upon his/her Fifth Amendment right: "Neither side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him." United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973); see also United States v. Shoup, 476 F.3d 38, 44 (1st Cir. 2007) (quoting Johnson).

2. Argue "that the jury should equate 'reasonable doubt' with 'an abiding conviction to a moral certainty.'" United States v. Ademaj, 170 F.3d 58, 66 (1st Cir. 1999).

A DEFENSE LAWYER MAY:

1. Comment about his/her own client's testimony even where a co-defendant has not testified, if the testimony benefits the non-testifying co-defendant and if the comment is sensitive to the co-defendant's right not to testify. Figueroa-Encarnacion, 343 F.3d at 33-34.