(6/15/17)

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 U.S., 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. Alvarado-Santos v. Dep't of Health, 619 F.3d 126, 136 (1st Cir. 2010) ("inflammatory arguments to the jury based on the Dominican nationality of some individual defendants"); 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. "[A]llowing counsel to do so was error under First Circuit precedent." Bartlett v. Mutual Pharm. Co., Inc., 678 F.3d 30, 42 n.7 (1st Cir. 2012) (but no reversal where opposing counsel assented). "We forbid counsel from asking jurors to consider the amount of a party's *ad damnum* in crafting a damage award, and we have cited approvingly a case outside this circuit for the point that lawyers cannot state in summation the number they think jurors should award for pain and suffering. Building on this foundation, we held in an unpublished opinion that Davis precludes counsel from requesting a pain-and-suffering dollar amount in closing." Bielunas v. F/V Misty Dawn, Inc., 621 F.3d 72, 79 (1st Cir. 2010) (citations omitted) (but finding no plain error where no objection was made). 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; Granfield v. CSX Transp., Inc., 597 F.3d 474, 491 (1st Cir. 2010) ("There can be little doubt that suggesting to the jury that it put itself in the shoes of a plaintiff is improper. The walking in plaintiff's shoes argument, or as it is sometimes called, the Golden Rule argument, has been 'universally condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence.'" (citations omitted)).

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. Rodríguez-DeJesús, 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].'"); 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) (citations omitted) (government conceded error, but court was "troubled that such improper arguments persist," id. at 561 n.5.); United States v. Castro-Davis, 612 F.3d 53, 66-67 (1st Cir. 2010) (disapproving "I think her testimony was very clear that . . .," and "It seems to me, and I submit to you, that [witness] is right on the money).

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. Sánchez-Berríos, 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 prosecution'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, 73-74 (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)); improper to say "Ladies and Gentlemen, if you have any issues with the way this investigation was run, blame me. I'm in charge. I'm responsible. . . . And when you're done blaming me . . . . let's go back to the evidence," United States v. Rojas, 758 F.3d 61, 64 (1st Cir. 2014), because "[t]here is no question that the prosecutor in this case improperly used his own personal credibility, and therefore that of the government, to vouch for the prosecution's investigation and witnesses. . . . the prosecutor in effect testified that he ran the investigation, and that any flaws in it were therefore not probative on the question of the witnessess' credibility. In other words, he employed his own standing and credibility to buttress the one part of his case upon which the defense focused its attack." Id.

(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; United States v. Gomes, 642 F.3d 43, 45 (1st Cir. 2011) (government concedes improper vouching in closing that says detective "gave you honest, candid, truthful testimony"); "). United States v. Rodríguez-Adorno, 695 F.3d 32, 40-41 (1st Cir. 2012) (disapproving the rhetorical questions (and answer) "Was [the passenger] credible? Was he honest? Of course, he was.").

(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); United States v. Santana-Pérez, 619 F.3d 117, 123 (1st Cir. 2010) ("troubling" to say or imply that "Coast Guard witnesses should be believed 'simply because they are Coast Guard officers'"), 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 repertoires." Id.; accord United States v. Martínez-Medina, 279 F.3d 105, 119-20 (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.

(h) The First Circuit recently summarized some of the improper vouching precedents:

> [S]everal forms of credibility argument plainly cross over into improper vouching. The first form occurs when the prosecutor tells the jury that the prosecutor takes personal responsibility or ownership of the case and thus directly places the government's credibility at issue. See, e.g., United States v. Rojas, 758 F.3d 61, 64 (1st Cir. 2014) ("[I]f you have any issues with the way this investigation was run, blame me. I'm in charge. I'm responsible."); United States v. Josleyn, 99 F.3d 1182, 1197 (1st Cir. 1996) ("I'm a married person with a family, and I go home at night with a sound conscience. I have worked very hard on this case. . . . And we are very proud of what we have done. We have done nothing to be ashamed of."). The second form of prohibited vouching occurs when the prosecutor "impart[s] her personal belief in a witness's veracity," Pérez-Ruiz, 353 F.3d at 9, or in the defendant's guilt, see United States v. Andújar-Basco, 488 F.3d 549, 560-61 (1st Cir. 2007) ("I feel comfortable and the United States feels comfortable that they have proven beyond a reasonable doubt that this man delivered five kilograms of cocaine."). Bare assertions that a witness was honest or correct are therefore improper. See, e.g., United States v. Rodríguez-Adorno, 695 F.3d 32, 40 (1st Cir. 2012) ("Was [the passenger] credible? Was he honest? Of course, he was." (alteration in original)); United States v. Gomes, 642 F.3d 43, 46 (1st Cir. 2011) (telling a jury that a police detective "gave you honest, candid, truthful testimony" (emphasis removed)); United States v. Castro-Davis, 612 F.3d 53, 67 (1st Cir. 2010) ("I think [the identity witness's] testimony was very clear . . . . It seems to me,

> and I submit to you, that [the witness] is right on the money." (emphasis removed)).

United States v. Vázquez-Larrauri, 778 F.3d 276, 284 (1st Cir. 2015).

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. Taylor, 848 F.3d 476, 490 (1st Cir. 2017) ("A prosecutor's comments about a gap in the evidence can violate a defendant's Fifth Amendment rights if, under the circumstances, it is obvious that only the defendant could have filled the gap."); 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). "[A]lthough it is not proper for a prosecutor to comment on a defendant's failure to testify, it is permissible (though dangerous) for a prosecutor to comment on the defense's failure to cross-examine a witness." United States v. Rodríguez-Vélez, 597 F.3d 32, 44 (1st Cir. 2010); United States v. Hooker, 541 F.2d 300, 307 (1st Cir. 1976) ("Persistent emphasis by the government on certain testimony being 'unimpeached' in circumstances where there is no one 'other than himself whom the defendant (could) call as a witness' might well create a situation where 'the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify'" (citations omitted)).

6. (a) 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 apprise 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.).

(b) In Mooney, the defendant was in custody. In United States v. Zarauskas, 814 F.3d 509, 515 (1st Cir. 2016), the court read the Justices' voting lineup in Salinas v. Texas, 133 S. Ct. 2174 (2013), as "leav[ing] open the question of whether, in line with the Fifth Amendment, a prosecutor may comment on the defendant's pre-custodial silence." The First Circuit then "assum[ed], without deciding, that prosecutorial comment on the defendant's pre-custodial silence violates the Fifth Amendment." Id. Later comments, however, seem to suggest that the Circuit thinks there is a problem with prosecutorial comment on pre-custodial silence. For example, the court said in a footnote: "It would have been preferable for the curative instruction to direct the jury to disregard the reference to [the defendant's] silence, and to remind jurors that [the defendant] was under no obligation to say (or not say) anything at the Café Vivaldi Interview . . . ." Zarauskas, 814 F.3d at 516 n.7. However, it is permissible for a prosecutor to comment on what a defendant did say in a pre-custodial interview and argue that he was "spin[ning] a web of inconsistent statements." Id. at 518.

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, 11-12 (1st Cir. 2006); state that defense counsel "could have brought any one of them [referring to informants] in here any time she wanted to" because the comments "made in the context of a speaking objection before the jury and entailing an incomplete statement of the law, . . . suggested to the jury that the defense had to call any witnesses it felt were missing." United States v. Diaz-Castro, 752 F.3d 101, 112 (1st Cir. 2014).

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); United States v. Skandier, 758 F.2d 43, 45-46 (1st Cir. 1985).

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. Walker-Couvertier, ___ F.3d ___, 2017 WL 2589721, at *5 (1st Cir. June 15, 2017) ("the government crossed the line into forbidden terrain when it cavalierly told the jury that 'boatloads' of other evidence, never introduced, inculpated the defendants"); 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"); United States v. Gentles, 619 F.3d 75, 81 (1st Cir. 2010) (impermissible to refer to confidential informants' willingness "to accept the risk" of testifying, when no evidence the defendant was violent or would retaliate; impermissible to refer to studies of CSI, when no such studies in evidence); 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); United States v. Kinsella, 622 F.3d 75, 85 (1st Cir. 2010) ("prosecutor strayed into a forbidden zone by discussing something not in evidence"); 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. Exhort the jury to "follow [their] oath . . . [and] find the defendant guilty . . . because it is the right thing to do." United States v. Grullon, 545 F.3d 93, 97 (1st Cir. 2008) ("can [improperly] shift the emphasis from whether the evidence establishes guilt to other possible concerns (such as whether the defendant is a dangerous man whose jailing would be a good thing for the community)."); 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, 561 (1st Cir. 2007) (government conceded the remark was error; court noted it was troubled that "such improper arguments persist," id. at 561 n.5); accord United States v. De La Paz-Rentas, 613 F.3d 18, 26 (1st Cir. 2010) ("do justice" is "troubling" because it "can be used to convey the idea to the jury that their job is to convict"); see also United States v. Mandelbaum, 803 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."); United States v. Ayala-García, 574 F.3d 5, 17 (1st Cir. 2009) ("do your job, find the Defendants guilty" is "disturbing"); United States v. Castro-Davis, 612 F.3d 53, 68 (1st Cir. 2010) (improper to say to jury "And you hold them accountable for what they did. . . . You hold them accountable."); United States v. Kinsella, 622 F.3d 75, 85 (1st Cir. 2010) ("*cannot* suggest that jurors have a civic duty to *convict*"; "perilously close to the edge with his courts-not-being-able-to-function comments" (emphasis in original)).

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)); Ayala-García, 574 F.3d at 17-19 (where 31 bullets are found in an AK-47, improper to say that "31 lives were saved"; improper to say that defendant was "armed for a war that goes on every day in public housing projects"); United States v. De La Paz-Rentas, 613 F.3d 18, 25-27 (1st Cir. 2010) (improper to say defendant "sold his badge out. He sold it out. He put a tape over 'Protect and Serve' and he decided he was going to serve his only [sic] interest for a hundred bucks. He sold himself out. He compromised the very principles he was hired to represent for a hundred bucks" and "First of all, ask yourselves what are two . . . police officers doing in the first place at Marshalls? . . . They weren't protecting and serving society. They were protecting and serving themselves. And who protects citizens from them?").

17. "[N]eedlessly arouse the emotions of the jury," or "interject issues having no bearing on the defendant's guilt or innocence," or "appeal to the jury to act in ways other than as dispassionate arbiters of the facts." Ayala-Garcia, 574 F.3d at 16; De La Paz-Rentas, 613 F.3d at 25-27 (improper to say "This is a Heckler & Koch semi-automatic assault rifle. Look at the size of that barrel" or to throw the weapon against the table or to point it at the jury, or to say "It's a fully automatic Glock, ladies and gentlemen. This will shoot in automatic capacity. The evidence presented in court had been that you pull the trigger once and it will empty the magazine—da-da-da-da-da-da-da, or faster"). Likewise it is "prosecutorial misconduct" to "tak[e] a gun from the evidence table and brandish[ ] it before the jury during rebuttal" because it is "obviously inflammatory"; prosecutor "should have broached with the judge the idea of presenting the gun to the jury in this provocative manner, thereby allowing the defense to register its objection. The court would have proscribed or modified the demonstration and the ensuing problems could have easily been avoided." It was "all the more troubling" because it was a different gun from the one in question. United States v. Santos-Rivera, 726 F.3d 17, 27 (1st Cir. 2013).

18. 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, 3 F.3d at 527 (attempt to enlist jurors in war on drugs).

19. 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").

20. 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.

21. Conjure up images of religion that would appeal to jurors to leave their dispassionate role. United States v. Cartagena-Carrasquillo, 70 F.3d 706, 713 (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).

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

23. 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, 536 F.3d 1, 24-25 (1st Cir. 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.").

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

25. 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 workplaces are safe havens from random crime. This case involves a painful exception to that rule, a random act of violence that has forever changed the way that one person looks at the world, and in some respects has rocked the sense of security of an entire Maine community." Id. at 58.).

26. 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 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.").

27. 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, 42 (1st Cir. 2003).

28. "[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, 44 (1st Cir. 2007) ("'phantom' references [to such a witness] were extremely ill-advised").

29. Tell the jury that the government "went at great length here not just to bring a regional investigator, not to bring someone local, but to make sure we got the right person," United States v. Landry, 631 F.3d 597, 605-06 (1st Cir. 2011) ("improper bolstering of the credibility of the Government's expert witnesses"), or that it provided the testimony "[a]t considerable expense," id. ("statements regarding the time and expense in procuring these expert witnesses were plainly irrelevant").

30. "[P]ropound inferences that [the prosecutor] knows to be false, or has a very strong reason to doubt." United States v. Kasenge, 660 F.3d 537, 542 (1st Cir. 2011), characterizing a holding in United States v. Udechukwu, 11 F.3d 1101, 1106 (1st Cir. 1993).

31. "Coach[ ] witnesses through, say, head-nodding and eye movements." It "is different than vouching—but using gestures for that purpose is equally improper." United States v. Sepúlveda-Hernández, 752 F.3d 22, 31 (1st Cir. 2014).

32. Correct an interpreter's translation. United States v. Báez-Martínez, 786 F.3d 121, 125 (1st Cir. 2015) ("the prosecutor's spontaneous correction of the interpreter may well have constituted error").

33. Ask "the jurors to consider, when making their decision, whether they would want the defendant driving along the highway beside them" because it "implicitly—if not explicitly—invited the jury to mull considerations which are irrelevant to determining the defendant's guilt or innocence based solely on the trial evidence" and "raised the specter of a threat to public safety—and the jurors' own personal security—if the jury voted to acquit." United States v. Torres-Colón, 790 F.3d 26, 34 (1st Cir. 2015) (but here harmless error).

34. "[Urge] the jury to convict [the defendant] on the basis of [a non-testifying co-defendant's] confession, a line of argument that Bruton and its progeny plainly prohibit." United States v. Martinez, 640 F. App'x 18, 29 (1st Cir. 2016).

35. Mischaracterize the law on an affirmative defense, United States v. Amaro-Santiago, 824 F.3d 154, 159 (1st Cir. 2016) ("problematic" and "troubling" but not warranting reversal because of specific and thorough curative instruction).

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. "When commenting on the plausibility of a defense theory, the government's focus must be on the evidence itself and what the evidence shows or does not show, rather than on the defendant and what he or she has shown or failed to show." United States v. Glover, 558 F.3d 71, 78 (1st Cir. 2009); accord United States v. Salley, 651 F.3d 159, 165 (1st Cir. 2011); 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), *abrogated on other grounds by* United States v. Salerno, 505 U.S. 317 (1992); 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)); United States v. Ayewoh, 627 F.3d 914, 924-26 (1st Cir. 2010) (where defendant's theory of the case as presented by witness and lawyer was that "friend of a friend" was responsible, but defendant did not testify, prosecutor could say in closing: "We still don't know who this friend of a friend is," "We have no name," and "[Y]ou haven't heard evidence of [the defendant calling the friend]," as a "fair response" under Robinson).

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, 101-02 (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, United States v. Walker-Couvertier, ___ F.3d ___, 2017 WL2589721, at *6 (1st Cir. June 15, 2017) ("the prosecutor did not mention his personal beliefs about the witnesses' veracity, nor did he imply that the witnesses should be trusted simply because they testified on the government's behalf. Instead he referred to trial testimony in an effort to give the jurors a reason why they should credit the witnesses' testimony."); 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); United States v. Kasenge, 660 F.3d 537, 542 (1st Cir. 2011) (permissible to ask "that the jury draw inferences of credibility"); United States v. Santana-Pérez, 619 F.3d 117, 123 (1st Cir. 2010) (permissible to say "'[t]here's matters of credibility in this case,' and rhetorically ask[ ] which version of the events the jury would choose to believe"); Avilés-Colón, 536 F.3d at 25 (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, 536 F.3d at 25 (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. Rodríguez, 215 F.3d 110, 123 (1st Cir. 2000); United States v. Castro-Davis, 612 F.3d 53, 68 (1st Cir. 2010) (permissible to say "'not a single shred of evidence' and 'not a single reason' that [a witness] would lie," and "that defendants did not attempt to cross-examine [the witness]"). The First Circuit has recently summarized some of its precedents on what is permissible:

> It is generally permissible for the government to offer specific "reasons why a witness ought to be accepted as truthful by the jury." United States v. Rodríguez, 215 F.3d 110, 123 (1st Cir. 2000) (not improper for prosecutor to argue that cooperating witness was credible because his testimony put him and his family in danger). One such reason is that the witness testified pursuant to a plea agreement that required the witness to testify truthfully to receive the benefit of the bargain. See, e.g., United States v. Hansen, 434 F.3d 92, 101-02 (1st Cir. 2006) (not improper for prosecutor to remind jury that witness testified that he agreed to tell the truth in a plea agreement); United States v. Henderson, 320 F.3d 92, 106 (1st Cir. 2003) (same). Another proper credibility argument is that a witness would have told a better, more consistent story if the witness had been lying, see, e.g., Pérez-Ruiz, 353 F.3d at 9-10 ("If they were all going to get up and make up a story, wouldn't it have been a better story?"), at least as long as the argument does not assert that the lack of consistency was viewed as a sign of credibility by the government itself, see Vizcarrondo-Casanova, 763 F.3d at 96 (possibly error, but not clear or obvious error, when prosecutor's statement that "the Government knew that the [witnesses'] versions were going to conflict" could have been understood as "a suggestion that the government itself concluded that the stories were credible.").

United States v. Vázquez-Larrauri, 778 F.3d 276, 283 (1st Cir. 2015).

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"); United States v. Matías, 707 F.3d 1, 6 (1st Cir. 2013) (permissible, in resisting entrapment defense, to pose "two rhetorical questions to the jury: 1) '[W]hen you consider predisposition, if somebody—tomorrow morning you wake up—drops 22 kilograms of cocaine on your front doorstep, would you have any idea how to distribute it?'; and 2) 'Have you ever wrapped money in dryer sheets?'" because not asking the jury to substitute personal experience for the government's burden of proof and not asking jurors to put themselves in victim's shoes).

9. Ask the jury to draw reasonable inferences from the evidence. "It is eminently proper for a prosecutor—like any other lawyer—to attempt to persuade the jury to draw reasonable inferences favorable to her case." United States v. Pires, 642 F.3d 1, 14-15 (1st Cir. 2011); accord United States v. Peña-Santo, 809 F.3d 686, 702 (1st Cir. 2015) (referring to the amount of drugs and asking the jury to infer that they were not for personal use); United States v. Liriano, 761 F.3d 131, 139 (1st Cir. 2014) (asking the jury to infer that "candy" was a code word for drugs without stating that there was evidence proving the meaning of the term); United States v. Brandao, 539 F.3d 44, 63 (1st Cir. 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 but 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, 452-53 (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, 87 (1st Cir. 2003); Matías, 703 F.3d at 5 (calling the defendant's version "'an incredible story . . . it's a clever story, but it's just that, a story, because it doesn't add up' and subsequently arguing that [the defendant] was trying to deceive the jury"; permissible because the defendant put his credibility at issue by testifying).

(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. Gentles, 619 F.3d 75, 84 (1st Cir. 2010) (that confidential informants were working for DEA at time of certain transactions); United States v. McKeeve, 131 F.3d 1, 14 (1st Cir. 1997); United States v. Espinal-Almeida, 699 F.3d 588, 606 (1st Cir. 2012) (permissible to state in opening that a law enforcement officer sitting in the courtroom will testify as to certain events; does not amount to improper vouching; no suggestion to credit or elevate the testimony because witness was government agent; no objection made to his presence in the courtroom).

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; Matías, 2013 WL 203582, at *5 (telling jury that defendant "portrayed himself as 'a family man . . . who pumps tons and tons of marijuana into the community and a few kilograms of cocaine' and then quer[ying] the jury, 'Is that a family man?'"; permissible as fair comment when defendant claimed he feigned interest in drug deal because of his concern for another's family).

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"); United States v. Gomes, 642 F.3d 43, 46 (1st Cir. 2011) (not vouching to ask a witness what basis he had for questioning a detective's testimony).

22. Say that a witness "comes into court and tells you under oath." United States v. Castro-Davis, 612 F.3d 53, 66 (1st Cir. 2010).

23. 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-Hernández, 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 Procopio, 88 F.3d at 30)).

24. 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, 39-40 (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. See also Ayala-García, 574 F.3d at 17-19 (same, but warning "that 'there are limits to the extent that we will permit fighting fire with fire.'" (quoting United States v. Sepúlveda, 15 F.3d 1161, 1189 n.24 (1st Cir. 1993))).

25. Make a statement that, while "not literally true in the abstract," will be understood by the jury more narrowly "in context." Brandao, 539 F.3d at 64.

26. Ask the jury to consider "'what might have happened' if the police had not intervened" if the statement is made in the context of inferring motive where motive is circumstantial evidence of an element of the case. United States v. Meadows, 571 F.3d 131, 145 (1st Cir. 2009).

27. Argue to the jury that the defense could not rebut certain evidence where the prosecutor made no reference to the defendant's failure to testify, United States v. Niemi, 579 F.3d 123, 128-29 (1st Cir. 2009), and "draw the jury's attention to the balance of evidence on contested issues," as long as there is no reference to the defendant's remaining silent in the courtroom, United States v. Stroman, 500 F.3d 61, 65 (1st Cir. 2007); accord United States v. Báez-Martínez, 786 F.3d 121, 127-28 (1st Cir. 2015) (references to "uncontested" testimony, but not "deliberate references to the defendant's silence," nor "any reason to believe that the jury would have treated them as such").

28. Respond to defense counsel's argument that testifying confidential informants "were getting a 'complete pass' for their own wrongdoing," "gave testimony that was 'bought and paid for by the Government,'" and "were 'in bed' with the government" by characterizing it as "public service that they are getting paid for." Gentles, 619 F.3d at 84-85.

29. In a felon-in-possession case, even where drug crimes were not charged, argue to the jury:

> [I]n this case, there's only one reasonable inference, and that's that [the defendant] . . . took possession and control of that gun and put it under the bed. And because of the government's evidence in this case, you know why he did it. The reason that he did that is that he is a drug dealer. . . . It is not in any way hard to understand why a drug dealer would want a gun in his room.

United States. v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011), because "the government was free to invite the jury to infer that [the defendant] dealt in drugs, furnishing a motive for him also to possess a gun to protect them." Id. at 114.

30. Refer to a Mexican connection of a drug conspiracy where there was evidence that the drugs came from Mexico ("difficult to see how reference to the Mexican association was likely to add anything to what generally informed jurors would know in any event, that high level drug trade is typically violent and that a lot of drugs come north from Mexico"). United States v. Lopez Garcia, 672 F.3d 58, 64 (1st Cir. 2012).

31. Describe a defendant's actions as "war" where testimony used that term, and use the phrase "killed like dogs." United States v. Candelario-Santana, 834 F.3d 8, 26 (1st Cir. 2016) (last phrase "may be distasteful but . . . hardly plain error."), cert. denied, 137 S. Ct. 1112, No. 16-7412, Feb. 21, 2017.

32. Following a summary of the evidence of the defendant's travel in a drug conspiracy case, say "Who travels like this? Why does one travel like this? You know who and you know why"; and in reference to a photograph of the defendant at trial, say "[W]e have the defendant holding a pot, and you all know what pots are used for. Not pressure washing," because both statements "simply asked the jury to draw reasonable inferences from evidence presented at trial and their own experiences, which is entirely permissible." United States v. Jones, 674 F.3d 88, 93 (1st Cir. 2012) (citation omitted).

33. In responding to the defense closing argument that the government's witnesses were inherently unreliable, say "The defendant chose the witnesses in this case, not the Government" and in responding to the argument that the prosecution presented no hard evidence, say "This is a drug case; there are no drugs. We don't need drugs; we need evidence." Id.

34. Describe the defendant as "acting as the bagman dropping off bags of cash" where the evidence showed that the defendant brought the cash in a Ziploc bag more than once. United States v. Russell, 728 F.3d 23, 40 (1st Cir. 2013), vacated on other grounds, 134 S. Ct. 1872 (2014).

35. State the government's theory of the case in its closing (but not make unfair statements). United States v. Carpenter, 736 F.3d 619, 627 (1st Cir. 2013).

36. In response to a defense closing that "focused on the government's three main witnesses . . . and what those three witnesses had to gain by testifying," state: "But every witness that came and testified before you was a witness against the [d]efendant." United States v. Vázquez-Larrauri, 778 F.3d 276, 285-86 (1st Cir. 2015) (rejecting argument that statement amounted to a comment on the defendant's failure to testify).

37. In rebuttal, remark "that it was 'time for [the defendant] to be held accountable by you,'" in response to defense counsel's argument "shifting blame to [others]." United States v. Foley, 783 F.3d 7, 22 (1st Cir. 2015).

38. In response to defense counsel's argument that the government "ha[d] a problem in this case . . . . They are very concerned that they had to rely so much on [two government witnesses] to prove their charges," say "Do you know how many times the government doesn't have evidence like you saw in this case?," referring to a video linking the defendant to the crime. United States v. González-Pérez, 778 F.3d 3, 19-20 (1st Cir. 2015).

39. State that certain "facts are not in dispute because the defendant admitted to them." United States v. Gemma, 818 F.3d 23, 37 (1st Cir. 2016) ("The comments merely highlighted the defendant's own admissions, and the government tied the evidence that it said was undisputed to admissions that [the defendant] made. No reasonable jury would have understood these remarks as a comment on the defendant's failure to testify." Id.)

40. "[P]oint out to the jury that defense counsel had not made certain arguments" where, "[t]aken in context, no reasonable juror could interpret the prosecutor's statements as even veiled commentary on [the defendant's] decision not to testify." United States v. Walker-Couvertier, ___ F.3d ___, 2017 WL 2589721, at *7 (1st Cir. 2017).

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. "Specifically refer[ ] to defense counsel's failure to address aspects of the prosecution's case" ("at least arguable . . . that the prosecutor exceeded the bounds of propriety" and "referring to 'how-does-counsel-explain' argument as 'an impermissible shift of [the] burden of proof'"). United States v. Berroa, 856 F.3d 141, 162 (1st Cir. 2017).

3. 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").

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

5. Say that the government's evidence is "not contradicted." Stroman, 500 F.3d at 64–66 ("a risk," but finding the tactic legitimate in the particular circumstances).

Stroman reaffirmed the test of United States v. Lilly, 983 F.2d 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 Skandier, 758 F.2d at 44-45.

6. Say that "'There's been no suggestion that [the defendant] didn't know'" an element of the offense. Although the statement does not shift the burden of proof, it could ("debatably") be viewed as a comment on the defendant's failure to testify. Salley, 651 F.3d at 165-67 (but not clear error where no objection at the time, no suggestion the prosecutor intended to comment on the failure to testify, and harmless in light of "tremendous" evidence of guilt).

7. Entreat the jury to "speak the truth" and convict the defendant, because it "might seem close to . . . cases where courts found improper exhortations to the jury 'to do its duty' and find the defendant guilty." Jones, 674 F.3d at 93. The First Circuit did not reverse, but said that it was "not endorsing the flourish used here," and observed that it is proper to ask the jury "to deliver an honest verdict." Id.

8. Use himself/herself as an exemplar ("attempting to illustrate his point [on credibility] by suggesting that whether the jurors trusted a person [to watch their children] had nothing to do with that person's credibility and everything to do with how well the jurors knew the person") ("A practice which we discourage."). United States v. Rodriguez, 675 F.3d 48, 65 & n.19 (1st Cir. 2012).

9. Describe a defense as "insulting." Matías, 2013 WL 203582, at *5 (allowed in context where not "shorthand for 'insulting to the jury's intelligence'" but "in some circumstances [has] the potential to cause impermissible consideration of issues beyond the evidence").

10. Say:

> And let me tell you something about all this to-do about inconsistent statements. That actually shows they were credible. The Government could have put—they could have put all the cooperators in a room and say: Let's get this story straight. Work it out. You guys, all five of you, get in that room and you come out with a story that's consistent. I don't want you leaving that room until the story's consistent so the jury knows you're telling the truth.
>
> Of course, the Government knew that the versions were going to conflict. Because that's life. You know, you don't tell a story three years later and have the story miraculously just be the same story unless they've been influenced. Unless, again, they've been put in a room to get their stories straight. And you get in there, you tell the truth. You get in there, you make sure you tell this fabricated story that we have planned.

United States v. Vizcarrondo-Casanova, 763 F.3d 89, 96 (1st Cir. 2014) ("prosecutor unwisely put his toe up to the line," but error "was not 'clear and obvious.'").

11. Use the wording "I submit to you that she was [telling the truth]." The First Circuit has pointed out the ambiguity in the word "submit." In the context of the argument and on "plain error" review, the court concluded it "was likely not vouching, and in any case was not clearly or obviously vouching." United States v. Vázquez-Larrauri, 778 F.3d 276, 285 (1st Cir. 2015).

12. Say that "defense counsel was trying to confuse the jury." United States v. González-Pérez, 778 F.3d 3, 20 (1st Cir. 2015) ("perhaps impolitic" but in the circumstances "did not render the trial unfair").

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 Shoup, 476 F.3d at 44 (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).

3. Urge the jury that the defendants are "simply poor and vulnerable" and to "go after the real drug traffickers." United States v. González-Pérez, 778 F.3d 3, 18 (1st Cir. 2015) ("Neither the court nor counsel should encourage jurors to exercise their power to nullify.").

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.