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PROSECUTOR CONDUCT:
HOW TO AVOID REVERSIBLE ERROR

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INTRODUCTION

The issue of prosecutorial misconduct has been a troublesome problem for the courts and prosecutors over the years. Most prosecutors perform their duties in an ethical and professional manner. Nevertheless, instances of prosecutorial misconduct, especially in the areas of cross-examination and comments made during summations and openings, continue to appear in appeals and have resulted in harsh criticism from the appellate courts as well as reversals of otherwise valid convictions. The Supreme Court and the Appellate Division have been quite vocal during oral argument about its displeasure with what is seen as the continuing problem of prosecutorial excesses. Nor have the courts been reluctant to write critical opinions reversing convictions on misconduct grounds.

In State v. Frost, 158 N.J. 76 (1999), the Supreme Court stressed that, "prosecutors should confine their summations to a review of, and an argument on, the evidence, and not indulge in improper expressions of personal or official opinion as to the guilt of the defendant, or [otherwise engage] in collateral improprieties of any type, lest they imperil otherwise sound convictions." State v. Frost, 158 N.J. at 88. The Court also emphasized that not only are the convictions in jeopardy but so are the prosecutors because they risk personal sanctions such as reprimands or referrals to the appropriate district ethics

committee. State v. Frost, 158 N.J. at 89. The courts are carefully reviewing claims of prosecutorial misconduct and there are serious repercussions where the claims are found to be justified.

This memorandum focuses on problem areas and gives examples of the types of comments which have been held to be improper by the appellate courts. Over the years the appellate courts have restricted remarks on certain subjects that previously were available for comment and permissible argument. The courts have changed the standards for acceptable advocacy and it is important to be aware of the changes and the perimeters set by the court. This memorandum sets forth the relevant decisions in this area and is intended as a guide for trial prosecutors in order to avoid censure, reversal of convictions and possible disciplinary action.

THE PROSECUTOR'S DUTY

> The duty of the prosecutor is to seek justice, not merely to convict. [ABA Standards 3-1.1]

Prosecutors occupy a unique position in the criminal justice system. As a representative of the State, his or her obligation to play fair is as compelling as his or her responsibility to protect the public. State v. Marks, 201 N.J. Super. 514, 535 (App. Div. 1985), certif. denied, 102 N.J. 393 (1986). The primary duty of the prosecutor is not to obtain convictions, but

to see that justice is done. State v. Ramseur, 106 N.J. 123, 320 (1987); State v. Farrell, 61 N.J. 99, 104 (1972); State v. Roman, 382 N.J. Super. 44 (App. Div. 2005), certif. granted, 188 N.J. 219 (2006), app. dis., 189 N.J. 420 (2007); State v. Marks, supra. Thus, it is as much his or her duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use only legitimate means to bring about a just one. State v. Ramseur, supra, 106 N.J. at 320, (quoting Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935)).

However, this duty does not preclude a prosecutor from making a vigorous and forceful presentation of the State's case. State v. Mahoney, 188 N.J. 359, 376 (2006), cert. denied, 127 S.Ct. 507, 166 L.Ed.2d 368 (2006); State v. Ramseur, supra; State v. Bucanis, 26 N.J. 45, 56, cert. denied, 357 U.S. 910 (1958). But, while a prosecutor may strike hard blows, he or she is not at liberty to strike foul ones. Berger v. United States, 295 U.S. at 88; 55 S.Ct. at 633; State v. Marks, 201 N.J. Super. at 535. Prosecutors may fight hard, but they must also fight fair. State v. Wakefield, 190 N.J. 397, 437 (2007); State v. Pennington, 119 N.J. 547, 577 (1990).

GRAND JURY PROCEEDINGS

While a prosecutor can assist the grand jury, he or she may not participate in its deliberations, express views on questions of fact, comment on the weight or sufficiency of the evidence or

in any way influence or direct the grand jury in its findings. State v. Hart, 139 N.J. Super. 565, 567-68 (App. Div. 1976). The grand jury must act independently of any outside source. Id. at 568.

In State v. Hart, 139 N.J. Super. 565, after the State presented its evidence to the grand jury, the defendant, who had been invited by the prosecutor to appear, testified to his version of the charges. Id. at 568. The grand jury then deliberated and voted not to indict defendant. Id. Immediately following the vote, and while the assistant prosecutor was in the grand jury room, some of the jurors sought his views on the grand jury's decision. Id. The prosecutor told them that he thought their decision was wrong and that the explanation given by the defendant was a "complete lie." Id.

The assignment judge subsequently heard about the incident and instructed the grand jury that the prosecutor's opinions were not binding on it and that it should act independently. State v. Hart, 139 N.J. Super. at 569. The grand jury decided to reconsider the matter and returned an indictment against the defendant. Id.

The Appellate Division found that the prosecutor's actions impinged on the independence of the grand jury and improperly influenced its decision to return the indictment. Id. The court determined that once a "no bill" was voted, the prosecutor should

have refused to answer the inquiry of any of the grand jurors. Id. The court dismissed the indictment but ruled that since the statute of limitations had not run, the case could be presented to a new grand jury. Id.

There is no impropriety in a prosecutor assisting in the investigation and examination of witnesses, in advising the grand jury as to the admissibility of evidence and the proper mode of procedure and in explaining the testimony with reference to the law of the case. State v. Francis, 191 N.J. 571, 587 (2007); State v. Hart, supra, 139 N.J. Super. at 567. A prosecutor may explain the significance of evidence before the grand jury to aid its understanding of a complex or unfamiliar matter, provided the prosecutor does not express his or her own views on questions of fact. State v. Childs, 242 N.J. Super. 121, 129 (App. Div.), certif. denied, 127 N.J. 321 (1990).

It is appropriate for the State to interrogate witnesses on subjects relevant to a continuing grand jury investigation, even when the evidence received may also relate to a pending indictment. State v. Johnson, 287 N.J. Super. 247, 259 (App. Div.), certif. denied, 144 N.J. 587 (1996). However, a prosecutor may not use the grand jury solely to prepare and preserve the testimony of a witness for the trial of a pending indictment. State v. Johnson, 287 N.J. Super. at 259-60.

A prosecutor may screen questions that the grand jurors wish

to ask of a witness so long as the prosecutor does not infringe upon the independence of the grand jury. State v. White, 326 N.J. Super. 304, 305 (App. Div.), certif. denied, 163 N.J. 397 (2000).

GRAND JURORS WITH INTEREST OR BIAS

As an officer of the court, the prosecuting attorney has a responsibility to bring to the attention of the presiding judge any evidence of partiality or bias that would affect the impartial deliberations of any of the grand jurors. R. 3:6-3(a); State v. Murphy, 110 N.J. 20, 33 (1988). Upon such disclosure, the court should determine whether any partiality or bias exists and whether it justifies excusal of the grand juror from the particular case being considered or from the panel. State v. Murphy, 110 N.J. at 33.

In the Murphy case, a state grand jury was investigating a state wide insurance scam and one grand juror informed the prosecutor that she worked for Allstate Insurance, one of the victims. Id. at 24. The prosecutor questioned the juror who indicated she would not be prejudiced. Id. After hearing the testimony of the first witness, the Allstate juror said she no longer wanted to sit as a grand juror and she was excused by the prosecutor, without any consultation with the assignment judge. Id. at 24-25.

At the next session, another grand juror informed the

prosecutor that he was "concerned" because he was employed by State Farm Insurance, another victim. State v. Murphy, 110 N.J. at 25. The prosecutor did not consult with the court but instructed the grand jury foreman to investigate the potential bias. The foreman conducted the investigation in front of the other jurors, who subsequently took a vote and decided the State Farm juror should stay. Id. at 25-26.

Following the return of the indictment, the defendant moved to dismiss it on the grounds of bias and misconduct, which was denied. State v. Murphy, 110 N.J. at 26-27. The case eventually went to the Supreme Court which found that the prosecutor "demonstrated extraordinarily poor judgment in not advising the assignment judge that two of the grand jurors had connections with insurance companies that were allegedly victimized by defendant." Id. at 36. The Court did not reverse the conviction in that case because of the lack of established practice in this area and set forth the procedures to be followed in future cases. The Court went on to hold that "we shall require that violation of such procedures by a prosecuting attorney, in the face of evidence of grand juror bias or partiality, will result in dismissal of an indictment prior to trial." Id.

In State v. Land, 376 N.J. Super. 289 (App. Div.), certif. denied, 184 N.J. 210 (2005), the grand jury was investigating an insurance fraud claim against Liberty Mutual Insurance. The

prosecutor questioned four potential grand jurors on the record, but individually out of the presence of the remaining state grand jurors, concerning their relationship with Liberty Mutual. Id. at 290. The prosecutor contacted the designated "Brook Murphy" judge and described the questions and responses by the four grand jurors. Id. at 291. The judge determined that one juror should be excused but found that the others could remain on the grand jury. Id.

The trial court dismissed the indictment on the grounds that the two of the three jurors who were allowed to remain should have been excused and that it was the judge's responsibility, and not the prosecutor's, to question the jurors. Id. The Appellate Division reversed and reinstated the indictment. Id. at 290.

The Appellate Division held that Rule 3:6-3(a) does not require the assignment judge to personally interrogate every potential grand juror who may have a bias in a particular case. State v. Land, 376 N.J. Super. at 292. Rather, the assignment judge exercises discretion in making such inquiries. Id. The Court found that it was proper for the prosecutor to question the potential grand jurors and then present the information to the assignment judge or designated "Brook Murphy" judge. Id. at 292-93.

DUTY TO PRESENT EXCULPATORY EVIDENCE

Prosecutors have a limited duty to present evidence to a grand jury when the evidence directly negates defendant's guilt and is clearly exculpatory. State v. Hogan, 144 N.J. 216, 236-39 (1996). This limited prosecutorial duty to disclose exculpatory evidence to the grand jury is only to be applied in exceptional cases, in which the prosecutor is informed of evidence that both directly negates the guilt of the accused and is clearly exculpatory. Id. at 237.

The first requirement, that the evidence directly negates defendant's guilt, requires that the evidence must squarely refute an element of a crime. State v. Hogan, 144 N.J. at 237. For example, the State is not required to inform the grand jury of evidence that defendant did not have a motive to commit the crime. Id. Similarly, the prosecutor need not impeach the credibility of the grand jury witnesses by informing the grand jury of their criminal records. Id.

The second requirement, that the evidence must be clearly exculpatory, requires an evaluation of the quality and reliability of the evidence. State v. Hogan, 144 N.J. at 237. The exculpatory value of the evidence must be examined in the context of the nature and source of the evidence, and the strength of the State's case. Id. An accused's self-serving statement denying involvement in the crime ordinarily would not

be sufficiently credible to be "clearly exculpatory," and need to be revealed to the grand jury. Id. at 238. Nor is the alleged exculpatory evidence of one eyewitness "clearly exculpatory" if it is contradicted by the incriminating testimony of a number of other witnesses. Id. at 238.

Examples of possible evidence that is "clearly exculpatory" would be the credible testimony of an unbiased alibi witness or physical evidence of unquestioned reliability demonstrating that defendant did not commit the crime. State v. Hogan, 144 N.J. at 238. In such situations, the grand jury should be informed of this "clearly exculpatory" evidence. Id.

In State v. Hogan, supra, 144 N.J. at 239-40, the Supreme Court determined that the unreliable recantation of the robbery victim, induced by fear of defendant's family and which she later retracted to the prosecutor and in testifying before the Parole Board, was not "clearly exculpatory" evidence that had to be presented to the grand jury.

Prosecutors similarly have a limited duty to instruct the grand jury on possible exculpatory defenses when the facts known to the prosecutor clearly indicate or clearly establish the appropriateness of such an instruction. State v. Hogan, 336 N.J. Super. 319, 343 (App. Div.), certif. denied, 167 N.J. 635 (2001).

INDICTMENT IS NOT EVIDENCE OF GUILT

A prosecutor cannot argue that a defendant is guilty simply because he was indicted by a grand jury. State v. Green, 313 N.J. Super. 385, 391 (App. Div. 1998). An indictment is not evidence of guilt and it is improper for a prosecutor to refer to a defendant's testimony and argue:

> But was he telling the truth up there? Why should you believe him? Why should you believe his cohort? The Grand Jury believed they were involved. They returned an indictment. [State v. Patel, Docket No. A-6463-89T3].

Nor should a prosecutor argue that the grand jury had found "enough probable cause to have a true bill against defendant regarding these charges," thus implying that the grand jury's indictment was a consideration which should influence them to convict. State v. Green, 313 N.J. Super. at 390-91.

CANNOT ASK QUESTIONS WITH NO FACTUAL BASIS

> It is unprofessional for a prosecutor to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking. [ABA Standards, 3-5.7(d)].

In State v. Koedatich, 112 N.J. 225, 320-323 (1988), cert. denied, 488 U.S. 1017 (1989), the Supreme Court held it was improper for the prosecutor to ask questions in cross-examining defendant's brother that had no factual basis, and from which untrue inferences could be drawn, thus diverting the jury's

attention from the relevant facts.

It is also improper for the prosecutor to offer an explanation on why he did not call particular witnesses, when there is no information in the record to support his "explanation." For example, in State v. Coyle, 119 N.J. 194, 220-21 (1990), the prosecutor stated in summation that he did not call the victim's children as witnesses because "they are too young" and because he feared their minds had been "poisoned" by their mother. The Supreme Court found that these remarks were improper because there was no offer of proof by the State showing that the minds of the children had been influenced or "poisoned."

COMMENTS ON DEFENDANT'S FIFTH AMENDMENT RIGHTS

Two of the most basic constitutional rights guaranteed to a defendant by the Fifth Amendment are his right to remain silent and his right not to testify in a criminal case. They are also the most commonly infringed rights in the area of prosecutorial misconduct, and the problems usually occur during cross-examination or as a result of comments made by a prosecutor during his or her opening or summation. The following are examples of problem areas involving defendant’s constitutional rights.

DEFENDANT’S RIGHT NOT TO TESTIFY

A prosecutor may not comment, directly or by inference, on a defendant's decision not to testify in a case. Our courts have

held that a defendant's Fifth Amendment rights may be infringed by prosecutorial comments that refer to the fact that the State's proofs were uncontradicted or that there was no defense. State v. Dent, 51 N.J. 428 (1968); State v. Sinclair, 49 N.J. 525 (1967). The following are examples of comments which the appellate courts found to be improper.

> Whenever [the investigator] gets to - how about these sexual incidents, whoa, I want an attorney ... as soon as he's asked about sexual incidents, I want an attorney. Now there's nothing wrong with that. He's got that right. But ask the question. Did he ever deny it? [State v. Schumann, 218 N.J. Super. 501, 509-10 (App. Div. 1987), mod. other grounds 111 N.J. 470 (1988).
>
> * * *
>
> We're dealing with hidden acts. We're dealing with private acts done in a bedroom, done in an alleyway. So we're left with really only two people that have intimate knowledge of what happened, the victim and the assailant. [State v. Bowens, 219 N.J. Super. 290, 302 (App. Div. 1987).

NO BURDEN ON DEFENDANT TO PRODUCE EVIDENCE

The "no defense" remarks are also improper because they imply that the defendant has a burden to present evidence. Defendant has no obligation to establish his or her innocence, to offer evidence or to testify. Any comment by the prosecutor which implies or states differently may be reversible error. In

State v. Jones, 364 N.J. Super. 376 (App. Div. 2003), the defense attacked the State's case because no fingerprints were recovered from the weapon used by the assailant. The prosecutor responded in summation by saying:

> And you know what, this shouldn't be too hard to believe [the failure to look for fingerprints], you look for fingerprints when you don't have a suspect. But when you have the evidence you have against this guy, including a positive identification, made unequivocally within 15 minutes after he committed this event, that's not the time to look for fingerprints. And while the defense never had any burden of proof, when they put a case, stop and ask yourself why isn't it they dusted the guns for prints to disprove that his fingerprints were on there? Maybe the defendant knows something we don't know, that it is his gun. [State v. Jones, 364 N.J. Super. at 382].

The Appellate Division held these comments to be reversible error, especially since the defense objection was overruled by the trial court, the remarks were not withdrawn or stricken from the record and no curative instruction was given to the jury. Id. at 384.

DEFENDANT'S PRE & POST-ARREST SILENCE

Prosecutors find it difficult to resist impeaching a defendant with his post-arrest silence despite long-standing case law that prohibits such conduct. See Griffin v. California, 380

U.S. 609 (1965); Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Deatore, 70 N.J. 100 (1976). Making reference at trial to what a defendant did not say to the police is commenting on his silence. State v. Muhammad, 182 N.J. 551, 565 (2005). A suspect has a right to remain silent while in police custody or under official interrogation in accordance with the state law privilege against self-incrimination. State v. Muhammad, 182 N.J. at 567-69. A defendant's right of silence is of constitutional dimension and no inculpatory inference may be permissively drawn from a defendant's decision to remain silent following arrest. State v. Lyle, 73 N.J. 403, 416 (1977); State v. Deatore, 70 N.J. at 115.

No direct testimony or cross-examination is permitted to erode this right. If a defendant exercises the right to remain silent, then the State may not impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest. Doyle v. Ohio, 426 U.S. at 611, 96 S.Ct. at 2241, 49 L.Ed.2d at 94; State v. Brown, 190 N.J. 144, 153 (2007).

The first case to address post-arrest silence in a significant way was State v. Deatore, 70 N.J. 100 (1976), and the question there was one of alibi. Defendant did not give a statement to the police at the time of his arrest and at trial he

testified that he was with a female companion at the time of the crime. The State cross-examined defendant on his post-arrest silence and failure to inform the police about his alibi.

The Supreme Court held that "a defendant is under no obligation to volunteer to the authorities ... the exculpatory story he later tells at his trial and cannot be penalized directly or indirectly if he does not." State v. Deatore, 70 N.J. at 115. In other words, where a defendant relates an exculpatory story at trial, the prosecutor may not question defendant or comment upon his silence or failure to volunteer information at or near the time of arrest.

The issue of post-arrest silence arose again a year later in State v. Lyle, 73 N.J. 403 (1977), where defendant claimed that he shot the victim in self-defense when the victim attacked him with a screwdriver. Defendant was arrested at the murder scene and while he admitted shooting the victim, he did not tell the police about the screwdriver until after he was transported to police headquarters.

The prosecutor cross-examined defendant on his failure to inform the police at the scene about the victim's attack with the screwdriver and commented upon the post-arrest silence in summation. The Supreme Court found that it was manifestly improper to use defendant's silence to attack his self-defense theory as a fabrication and constituted reversible error.

In State v. Brown, 118 N.J. 595 (1990), the Supreme Court addressed a situation involving pre-arrest silence. In Brown, the defendant and codefendant Emm participated in a motor vehicle race until Brown's vehicle struck a third vehicle, killing its driver. Id. at 600. Emm, a voluntary fireman, then drove to the fire department, and returned to the accident scene to give assistance. Id. at 602. Emm did not disclose to the investigating police officers at the scene that he was involved in the incident. Id. at 602-03. Two days later, Emm reported to the police that he had been driving the third car that witnesses and observed and mentioned. Id. at 603.

Brown and Emm were charged with death by auto and tried together. The trial court believed that Brown had a constitutional right to confront Emm and impeach his credibility by inquiring into Emm's pre-arrest silence. State v. Brown, 118 N.J. at 609. The trial court allowed the State and defendant Brown to question Emm about his pre-arrest silence but prohibited the State and Brown from commenting on Emm's pre-arrest silence in summation. Id. at 610. See State v. Brown, 190 N.J. at 155.

Our Supreme Court relied on the United States Supreme Court decision in Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), in determining that it was proper to admit Emm's pre-arrest silence. State v. Brown, 118 N.J. at 610-11. In Jenkins, the defendant waited two weeks before reporting to

the police that had stabbed the victim in self-defense. Id. at 610. At trial, the prosecutor attempted to impeach defendant's credibility by suggesting that the defendant would have spoken sooner had his defense been true. Jenkins, 447 U.S. at 235, 100 S.Ct. at 2127, 65 L.Ed.2d at 92.

The United States Supreme Court held that the Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility. Jenkins, 447 U.S. at 238, 100 S.Ct. at 2127, 65 L.Ed.2d at 92. Nevertheless, the Court noted that state courts need not follow its decision to allow impeachment through the use of pre-arrest silence and that each jurisdiction remained free to formulate evidentiary rules defining situations in which silence is viewed as more probative than prejudicial. Jenkins, 447 U.S. at 240, 100 S.Ct. 2130, 65 L.Ed.2d at 96; State v. Brown, 190 N.J. at 155; State v. Brown, 118 N.J. at 611.

Our Supreme Court found, in general conformity with Jenkins, that there is no legal constraint one way or the other - either to speak or not to speak - prior to arrest, and the probative worth of such pre-arrest silence should be considered objectively. Brown, 118 N.J. at 613. The Court concluded that evidence regarding pre-arrest silence is admissible if, when viewed objectively and neutrally in light of all the circumstances, it generates an inference of consciousness of

guilt that bears on the credibility of the defendant when measured against defendant's apparent exculpatory testimony. Id. at 615.

The Court determined that the probative worth of Emm's failure to mention to the police that he had witnessed the events, whether that entailed a consciousness of guilt, a desire not to become involved, a feeling that it was simply unnecessary, or a belief that he had fulfilled whatever duty he had, was a matter, ultimately, for the jury in assessing Emm's testimony. Id. at 615. See State v. Brown, 190 N.J. at 156.

In State v. Muhammad, supra, 182 N.J. 551, the Supreme Court reinterpreted its decisions in Deatore and Lyle when it applied the post-arrest silence standard to hold that it was improper for the prosecutor to make reference to defendant's pre-arrest silence at trial. The Court in Muhammad blurred the distinction between pre-arrest and post-arrest silence and found that the New Jersey law does not allow a prosecutor to use at trial a defendant's silence when that silence arises "at or near" the time of arrest, during official interrogation or while in police custody. Muhammad, 182 N.J. at 569. See State v. Elkwisni, 190 N.J. 169, 177 (2007). The Court explained that "barring the use of silence 'at or near' the time of arrest avoids the often murky inquiry into pinpointing the precise moment a suspect is placed in custody or under arrest." Id.

The facts in Muhammad indicate that the defendant, who was recently terminated from his employment as a police officer, ordered a woman into his car on the grounds that he was arresting her for prostitution. Id. at 559. He sexually assaulted the woman and then tried to get her to leave the car. She insisted on being taken jail on the alleged prostitution charge and eventually he brought her to the Paterson Police Headquarters. Id. at 559-560.

Defendant spoke first when they entered the police station and he identified himself to the desk sergeant as a Passaic police officer. He told the desk sergeant that the woman had been harassing his siblings. Id. at 560. The woman interrupted defendant and told the sergeant that defendant had raped her. Defendant continued to explain he visited his brother that evening and he ordered the woman into his car for the purpose of scaring the woman into leaving his family members alone. At that point the woman produced the used condom defendant discarded after the sexual assault and defendant became nervous and attempted to leave. Id. at 560-61. Defendant was charged with kidnapping and sexual assault. Id. at 558.

Defendant did not testify at trial but argued in opening and in summation that the woman was a prostitute with whom he had consensual sex. Muhammad, 182 N.J. at 562. The prosecutor through the questioning of witnesses and in opening and closing

remarks, repeatedly referred to defendant's failure to make any mention at police headquarters of the consensual sex activity with the victim or that she was allegedly a prostitute. Id. at 562.

The Supreme Court found that it was improper for the prosecutor to repeatedly elicit testimony and make comments on defendant's silence both "at or near" the time of his arrest and when he was in police custody. Muhammad, 182 N.J. at 573. The Court held that defendant was not obligated to give the police the exculpatory story his attorney presented at trial, and the State was not permitted to use his silence to convict him. Id.

While the State cannot use defendant's silence against him, the Court did hold, however, that the State could argue that defendant's statement to the police about the alleged harassment of his siblings, was inconsistent with the "consensual sex with a prostitute" defense he offered at trial. Id. at 566 n. 3. In this regard, the Court held that the State could argue to the jury that "defendant's claim to the police that he picked up the woman for harassment stood in stark contrast to his attorney's trial argument of a consensual sexual encounter." Id. at 566. See, State v. Elkwisni, 190 N.J. 169, 179 (2007).

In State v. Black, 380 N.J. Super. 581 (App. Div. 2005), certif. denied, 186 N.J. 244 (2006), the Appellate Division found in a child homicide case, that comments made by the prosecutor on

summation violated defendant's right to silence. The prosecutor stated "that the only person in this courtroom who could tell us exactly how little Ziaya was murdered is the man sitting right here [indicating defendant]." Id. at 592. The prosecutor also made reference to the 9-1-1 call made by defendant in which he stated that defendant never provided any information about the cause of the child's injury to the dispatcher or emergency personnel and that "defendant never provides any insight into what happened." Id.

The Court found that the prosecutor's statements were reversible error in that they compromised defendant's right to remain silent and also had the capacity to transfer the burden of proof from the State to defendant. Black, 380 N.J. Super. at 593. The defendant in Black, like the defendant in Deatore, testified at trial. Id. Nevertheless, since defendant did not make a statement at or near the time of his arrest which was inconsistent with his trial testimony, the prosecutor was not free to comment on the defendant's silence. Id. at 593-94.

There are limited circumstances where a defendant may be questioned on his failure to reveal exculpatory evidence. In State v. Jenkins, 299 N.J. Super. 61 (App. Div. 1997), the defendant was arrested as he was trying to break into a restaurant. At trial, he claimed that he was being chased by an unknown assailant and was trying to open the restaurant door with

a hammer because he was in "fear of his life." He testified that he tried to explain to the police at the scene what happened but they ignored him, and after he was taken into custody, no police officer ever asked him for his version of the events. In addition, defense counsel argued in summation that defendant was never permitted to explain to the State what occurred on the night of his arrest.

In response, the prosecutor argued on summation that:

> Do you think it's odd that a person who is arrested in the back dark secluded closed premises of a restaurant with a hammer in his hand eight months ago and the only reason he's there is because he is afraid, he's been chased, there's someone stalking him and startled all 200 pounds of him, all six feet of him. He ... never once talks to the Prosecutor's Office. He never once tries to explain until he's here in front of you.

The Appellate Division found that defendant "opened the door" through his testimony and summation to this otherwise protected area, thus justifying the prosecutor's comments. In fact, the court determined that "in light of the [defendant's] testimony and summation, the prosecutor had a right, if not a duty, in the presentation of the State's case to comment on defendant's post-arrest silence and to offer the State's version as to why defendant was silent." State v. Jenkins, supra, 299 N.J. Super. at 69.

The Supreme Court recently addressed the silence issue again in a trio of cases where it explained the parameters of the prosecutors' right to cross-examine a defendant on pre-arrest silence or on inconsistencies or omissions in prior statements. See State v. Brown, 190 N.J. 144 (2007), State v. Elkwisni, 190 N.J. 169 (2007), State v. Tucker, 190 N.J. 183 (2007). The Court retreated somewhat from the broad brush painted in Muhammad and reiterated that pre-arrest silence is treated differently than post-arrest silence. State v. Elkwisni, 190 N.J. at 178.

The facts in State v. Brown, 190 N.J. 144 (2007), indicated that defendant was playing cards with the victim and another man when he asked to borrow some money from the victim. Id. at 148. The victim denied having any money and defendant hit him in the face with a beer bottle. Id. Defendant slashed the victim several times with the broken bottle, severing a portion of the victim's ear. Id. at 148. Defendant then reached inside the victim's pocket, took some money and fled. Id. at 149.

Defendant was arrested ten months later and charged with aggravated assault, robbery and weapons offenses. State v. Brown, 190 N.J. at 148. Defendant testified at trial and claimed that he was not the aggressor but was merely defending himself when the victim pulled out a knife. Id. He testified that the victim was losing money in the card game and was upset when defendant refused to lend him money. Id. at 150. Defendant

claimed that when the victim approached him with a knife, he reacted in self-defense by striking the victim once with a beer bottle. Id. Defendant denied taking any money from the victim. Id.

The prosecutor challenged defendant's self-defense testimony during cross-examination and questioned defendant on his pre-arrest conduct. Defendant admitted that a week after the fight, he learned that the slashing incident was reported in the newspaper. Brown, 190 N.J. at 150. The prosecutor cross-examined defendant on whether he ever contacted the police to explain that the victim was the aggressor and that he was only defending himself. Id. at 150-51.

The Supreme Court upheld the prosecutor's impeachment of defendant with his pre-arrest silence. The Court held when there is no governmental compulsion associated with defendant's pre-arrest conduct or silence, when the defendant testifies at trial, and when the objective circumstances demonstrate that a reasonable person in defendant's position would have acted differently, the State may attempt to impeach defendant on that pre-arrest conduct or silence. Brown, 190 N.J. at 158-59.

The Court in Brown distinguished its prior decision in Muhammad on the grounds that the prosecutor elicited testimony and commented on Muhammad's silence "at or near" the time of his arrest and after the desk sergeant prevented him from leaving the

police station, effectively placing him in police custody. Brown, 190 N.J. at 154. In addition, Muhammad did not testify at trial. Id.

The impeaching evidence of defendant's pre-arrest silence is not admissible in the State's case in chief but only after defendant testifies. Id. at 160. Once a defendant testifies and the objective circumstances are such that a reasonable person in defendant's position would have acted differently; then it is permissible for the State to cross-examine him and offer rebuttal testimony to impeach defendant's pre-arrest conduct or silence. Id. The Court further held that when circumstances warrant the admission of such evidence, the trial court should instruct the jury that the evidence of defendant's pre-arrest conduct or silence is admitted for the limited purpose of impeaching defendant's credibility and that it cannot be used as evidence of defendant's guilt. Id. at 159.

In State v. Tucker, 190 N.J. 183 (2007), the Court held that the State's comments on inconsistencies and omissions in defendant's several statements to the police did not violate his right to remain silent. Id. at 187-89. In reaching this conclusion, our Supreme Court relied on the opinion of the United States Supreme Court in Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980), which held that the prohibition against the use of defendant's silence after Miranda

warnings are given does not apply to cross-examination that merely inquiries into prior inconsistent statements. State v. Tucker, 190 N.J. at 189, quoting, Anderson v. Charles, 447 U.S. at 408, 100 S.Ct. at 2182, 65 L.Ed.2d at 226.

Our Supreme Court held that the right to remain silent is not violated when the State cross-examines a defendant on the differences between a post-Miranda statement and testimony at trial. Tucker, 190 N.J. at 189. The Court recognized that when a defendant agrees to give a statement, he or she has not remained silent but has spoken. Id. Thus, the Court concluded that it is not an infringement of defendant's right to remain silent for the State to point out differences in defendant's testimony at trial and his or her statements that were freely given. Id.

The Court extended this ruling a little further in Tucker because in that case the defendant did not testify and the inconsistencies were in different statements given by defendant to the police. Id. at 190. The Court found no "meaningful distinction" between inconsistencies in a prior statement and defendant's testimony and inconsistencies in several statements that were freely given and admitted into evidence. Id. In both situations the defendant has waived the right to remain silent and spoken freely. Id. For this reason, the Court held that whether the asserted inconsistencies are between two or more

statements or between a statement and testimony at trial, the State may seek to impeach the validity of those statements. Id.

Decided the same day as Brown and Tucker was State v. Elkwisni, 190 N.J. 169 (2007), where the Supreme Court held that a prosecutor can cross-examine a defendant concerning inconsistencies and omissions between his or her post-Miranda statement to the police and testimony at trial. Id. at 172. At issue in Elkwisni was whether defendant was a voluntary participant in a robbery, assault and kidnapping or whether he acted under duress from the codefendant. Id. at 174. The State's evidence demonstrated that defendant and the codefendant entered a convenience store and demanded money from the employee. The codefendant had a pistol and used it to hit the victim. Defendant kicked the victim when he fell to the floor. Id. at 172. The two then dragged the victim out of sight and defendant demanded the keys to the store and locked the front door. Id.

Defendant and the codefendant secured the victim's hands and feet with duct tape and following the repeated demands of the codefendant, the victim revealed where he kept the money. Elkwisni, supra, 190 N.J. at 172-73. Defendant was upset with the amount of money he found and told the codefendant to "finish off" the victim. Id. at 173. Fortunately, several people realized that something was wrong in the store and notified the police. Id. The police surrounded the store and defendant and

the codefendant were arrested. Id.

Defendant testified at trial that he did not know when he entered the store that the codefendant intended to commit a robbery. Elkwisni, 190 N.J. at 174. Defendant said that when the codefendant wrestled the gun away from the victim, he then pointed it at him and the victim. Id. Defendant testified that the codefendant forced him to duct tape the victim, lock the door and take money from the cash register. Id. Defendant said that he was still afraid of the codefendant when the police arrived and that is why he did not immediately tell the police that he was coerced by the codefendant to participate in the crime. Id. Defendant said that once the codefendant was secured in another police car, he told the police that the codefendant pointed a gun at his head and stuffed money in his pocket. Id. at 174-75.

The Supreme Court found no error in the prosecutor's questioning of defendant's exculpatory testimony at trial or in the presentation of rebuttal testimony to discredit defendant's testimony. Elkwisni, 190 N.J. at 178-81. Once defendant testified concerning statements he made to the police after his arrest about the coercion and intimidation he experienced in the store, the State could fairly cross-examine defendant concerning those statements and offer rebuttal testimony. Elkwisni, 190 N.J. at 179. If a defendant testifies that he made statements to the police at or near the time of his arrest, the State must be

permitted to cross-examine him regarding whether or not these alleged statements were actually made. Id. at 178-79.

However, the Court held it was error for the State to question defendant on his silence at the time the police arrived and placed him under arrest. Elkwisni, 190 N.J. at 180. The Court found that in the absence of testimony by defendant that he told the police what happened immediately upon arrest, it was improper for the State to comment on his silence at the time they placed him under arrest and gave him Miranda warnings. Id. at 181.

This portion of the Elkwisni opinion again emphasizes that a defendant's silence at or near his or her arrest cannot be used to impeach his testimony at trial. For example, in State v. Micheliche, 220 N.J. Super. 532, 541-542 (App. Div.), certif. denied, 109 N.J. 40 (1987), the defendant gave a statement to the police in which he admitted his involvement in the death of the victim. At trial, however, he testified that his statement was untrue and was made out of fear that the codefendant would kill him in jail if defendant denied his own involvement in the murder. On cross-examination, defendant conceded that he was no longer afraid of the codefendant and that his fear had subsided some time ago. This prompted the prosecutor to ask defendant whether he ever went to the prosecutor's office to change his story or if he or his attorney ever informed the State of the

"true reason" for the confession. The Appellate Division found that this cross-examination directly impugned defendant's right to remain silent and reversed his convictions.

In State v. Tilghman, 345 N.J. Super. 571 (App. Div. 2001), the Appellate Division reversed defendant's robbery and burglary convictions because of comments made by the prosecutor on his post-arrest silence and request for an attorney. The prosecutor commented on defendant's calm attitude when arrested and stated that an innocent person would have a different reaction if arrested for a crime they did not commit. The prosecutor also referred to defendant's interrogation and commented that when defendant saw that his "alibi didn't work," he told the police officer "I don't want to talk anymore, give me an attorney." Id. at 574-75. The court found that the prosecutor's remarks improperly asked the jury to find defendant guilty because of his post-arrest silence and request for counsel. Id. at 577.

Balancing a defendant's the right to remain silent against the State's right to impeach a defendant with inconsistencies, omissions and different statements is a delicate task and prosecutors should tread carefully in this area.

DEFENDANT'S ALIBI TESTIMONY

The prohibition against comments on post-arrest silence is almost always implicated when the prosecutor tries to attack the credibility of defendant's alibi testimony. It is a dangerous

area for cross-examination or comment and caution is advised.

The close relationship between a defendant's alibi testimony and the issue of post-arrest silence was demonstrated in State v. Deatore, 70 N.J. 100 (1976). Deatore did not give a statement to the police at the time of his arrest and at trial he testified that he was with a female companion at the time of the crime. The State cross-examined defendant on his post-arrest silence and failure to inform the police about his alibi.

The Supreme Court held that "a defendant is under no obligation to volunteer to the authorities ... the exculpatory story he later tells at his trial and cannot be penalized directly or indirectly if he does not." State v. Deatore, 70 N.J. at 115. In other words where a defendant relates an exculpatory story at trial, the prosecutor may not question defendant or comment upon his silence or failure to volunteer information at or near the time of arrest.

In State v. Aceta, 223 N.J. Super. 21 (App. Div. 1988), the Appellate Division found that the trial judge committed reversible error when he allowed the State to cross-examine defendant on his failure to inform the State of his alibi defense until three days before trial. Essentially, the prosecutor was allowed to cross-examine defendant on why he did not mention his alibi defense to the State at his arraignment or any of the pre-trial hearings which occurred during the two years between arrest

and trial. The appellate court determined that the prosecutor's attack upon defendant's failure to have previously disclosed his exculpatory alibi defense was so flagrant a violation of defendant's right to remain silent that a new trial was required.

A similar situation arose in State v. Pierce, 330 N.J. Super. 479 (App. Div. 2000), where defendant was charged with murder on February 20, 1997 and on March 10, 1997, he informed the police that he was at his sister's apartment on the night of the murder. The prosecutor cross-examined defendant on the delay in telling the police about his alibi. The Appellate Division found that the prosecutor's questions violated defendant's right to remain silent and reversed the convictions.

A defendant can be cross-examined on the contents of his notice of alibi. In State v. Irving, 114 N.J. 427 (1989), defendant filed an original notice of alibi containing the names of his co-workers and approximately two months later amended the notice to include the name of his roommate. The trial court permitted the prosecutor to cross-examine defendant on the original alibi notice for credibility purposes.

The Supreme Court held that the questioning on the alibi notice was proper because defendant's trial testimony was inconsistent with the information in his original notice. The court found a clear inconsistency in defendant's testimony in which he made his roommate the key witness to his alibi defense

and the original notice of alibi, which failed to include the roommate's name. State v. Irving, 114 N.J. at 440.

There are limitations on this area. First, the notice of alibi can only be used by the prosecutor if defendant testifies at trial. State v. Irving, 114 N.J. at 439-440; State v. Lumumba, 253 N.J. Super. 375, 396-97 (App. Div. 1992), certif. denied, 103 N.J. 495 (1986); State v. Gross, 216 N.J. Super. 92 (App. Div.), certif. denied, 108 N.J. 194 (1987). Second, the prosecutor must give advance notice to the trial court and defendant that he or she may cross-examine defendant on the information contained in the notice of alibi because the court must determine that the prejudicial effect of the information does not outweigh its probative value. State v. Irving, 114 N.J. at 441.

A related issue has recently arisen involving the notice of alibi rule. In State v. Bradshaw, 195 N.J. 493 (2008), defendant did not file a notice of alibi and at the conclusion of the State's case indicated that he would testify and raise an alibi defense. Id. at 498-99. The State objected on the grounds that defendant never filed a notice of alibi, pursuant to R. 3:12-2. Id. at 498. The trial court precluded defendant from presenting any alibi testimony because his failure to comply with the alibi notice rule, R. 3:12-1, prejudiced the State. Id.

The Appellate Division reversed the trial court and held

that the application of the notice of alibi rule to preclude defendant's own testimony on his whereabouts at the time of the crimes violated his federal and state constitutional rights to testify. State v Bradshaw, 392 N.J. Super. 425, 443-47 (App. Div. 2007). The State's petition for certification was granted by the Supreme Court. State v. Bradshaw, 192 N.J. 481 (2007).

The Supreme Court affirmed the judgment of the Appellate Division but did so for different reasons. The Supreme Court found that it was not necessary to apply constitutional principles regarding a defendant's right to testify to invalidate the notice-of-alibi rule. Bradshaw, 195 N.J. at 507. The Supreme Court determined that the alibi rule and a defendant's right to testify could be constitutionally construed to reconcile the competing concerns. Id.

The alibi rule provides that in the event a defendant fails to give notice of his or her alibi, the court may preclude the witness from testifying, "or make such other order or grant such adjournment, or delay during trial, as the interest of justice demands." R. 3:12-2(b). The Supreme Court interpreted this rule to mean that "only in the rarest of circumstances should the 'interests of justice standard' result in a prohibition of a defendant's own alibi testimony as an appropriate sanction." Bradshaw, 195 N.J. at 507.

The Supreme Court adopted a balancing test for when a

defendant's undisclosed alibi testimony may be precluded at trial. Id. One critical consideration was whether the failure to give notice-of-alibi evidence constituted willful misconduct and was intended to gain a tactical advantage. Id. The Court held that in order to reach a fair determination of the appropriate sanction for the breach of the alibi rule the trial court should consider:

> (1) the prejudice to the State;
>
> (2) the prejudice to the defendant;
>
> (3) whether other less severe sanctions are available to preserve the policy of the notice-of-alibi rule, such as a continuance or mistrial to permit the State to investigate the alibi;
>
> (4) whether the defendant's failure to give notice was willful and intended to gain a tactical advantage.
>
> [Bradshaw, 195 N.J. at 507-08].

Unless the trial court finds that the balancing of the factors favor preclusion, the interest of justice standard requires a less severe sanction. Bradshaw, 195 N.J. at 508. The Court further stated that in cases where there is evidence of an attorney's willful violation of the notice-of-alibi rule to gain an advantage, the trial court and counsel should consider a referral of the matter to the Office of Attorney Ethics. Id.

PRETRIAL SILENCE OF ALIBI WITNESSES

A defense alibi witness may be cross-examined about his or her pretrial failure to volunteer or disclose alibi information to law enforcement. The non-disclosure or pretrial silence of the alibi witness is the equivalent of a prior inconsistent statement, and the rules of evidence permit cross-examination on this prior inconsistency, provided a proper foundation is laid. State v. Silva, 131 N.J. 438, 447 (1993).

This foundation is established by asking the witness whether: (1) they were aware of the nature of the charges pending against defendant; (2) had reason to know that they had exculpatory information; (3) had a reasonable motive to exonerate defendant, and (4) were familiar with the means to make the information available to law enforcement authorities. State v. Silva, 131 N.J. at 447-48.

A proper foundation will normally be developed during routine cross-examination, and "will either exist or not depending on the circumstances of each case and the alibi witness's answers to the questions." State v. Silva, 131 N.J. at 449. However, once a notice of alibi is provided to the State by defendant's attorney, thereby making the witness available for questioning by prosecution investigators, there is, from date of notice of alibi to trial, no longer an inconsistency from which to infer fabrication and the witness cannot be cross-examined

regarding their silence during that time frame. State v. Silva, 131 N.J. at 442, 450.

TAILORING - DEFENDANT'S PRESENCE WHEN OTHER WITNESSES TESTIFY

The propriety of prosecutorial comments on a defendant's presence during trial has recently been considered by the United States and New Jersey Supreme Courts with divergent results. In Portuondo v. Agard, 529 U.S. 61, 63, 120 S.Ct. 1119, 1122, 146 L.Ed.2d 47, 52 (2000), the United States Supreme Court held that when a defendant testifies at trial it is not unconstitutional for a prosecutor in his or her summation to call the jury's attention to the fact that the defendant had the opportunity to hear the other witnesses testify and to tailor his testimony accordingly. The Court found that the federal constitution did not require the prosecutor to treat defendant differently from other witnesses in commenting on their credibility. Id. at 529 U.S. at 73, 120 S.Ct. at 1127, 146 L.Ed.2d at 58-59.

Despite finding no federal constitutional basis for prohibiting the prosecutor's comments, the United States Supreme Court nevertheless invited the state courts to consider the wisdom of permitting comments on a defendant's ability to tailor his or her testimony. The majority observed that its decision in Portuondo is

> addressed to whether the comment is permissible as a constitutional matter, and not to whether it is always desirable as a matter of

> sound trial practice. The latter question, as well as the desirability of putting prosecutorial comment into proper perspective by judicial instruction, are best left to trial courts, and to the appellate courts which routinely review their work. [Id. at 529 U.S. at 73 n.4, 120 S.Ct. at 1124 n.4, 146 L.Ed.2d at 58 n.4.]

In State v. Daniels, 182 N.J. 80 (2004), our Supreme Court accepted the invitation of the United States Supreme Court "to determine for our judiciary whether prosecutorial accusations of tailoring are 'desirable as a matter of sound trial practice.'" The comments at issue in Daniels were as follows:

> Now as I said the defendant in his testimony is subject to the same kinds of scrutiny as the State's witnesses. But just keep in mind, there is something obvious to you, I'm just stating something that you already know, which is all I do in my summation, the defendant sits with counsel, listens to the entire case and he listens to each one of the States witnesses, he knows what facts he can't get past. The fact that he was in the SUV. The fact that there's a purse in the car. The fact that a robbery happened. But he can chose to craft his version to accommodate those facts. [State v. Daniels, 182 N.J. at 87].

The New Jersey Supreme Court parted company with the United States Supreme Court and declined to follow the Portuondo opinion. Id. at 98. The Court explained that a defendant is not just another witness at trial, but is one who has the

constitutional right to be present at trial, to hear the State's evidence and confront the witnesses against him, to present witnesses and evidence in his defense and to testify on his own behalf. State v. Daniels, 182 N.J. at 97. The Court decided that prosecutorial comment suggesting that a defendant tailored his testimony inverts those rights and undermines the core principle of our criminal justice system -- that defendant is entitled to a fair trial. Id. at 98.

Despite the Court's rejection of Portuondo, it drew a distinction between generic accusations of tailoring and specific instances of tailoring. Id. at 98-100. Generic accusations occur when a prosecutor, with no specific evidentiary basis that defendant has tailored his testimony, attacks defendant's credibility by drawing the jury's attention to defendant's presence at trial and his ability to tailor his testimony from what he had heard at trial. Id. at 98. Generic accusations of tailoring are prohibited. Id.

The Court applied a different analysis when there is a specific accusation of tailoring. Daniels, 182 N.J. at 98-99. If there is evidence of tailoring, beyond the fact that the defendant was simply present at the trial and heard the testimony of other witnesses, a prosecutor may comment, but in limited fashion. Id. The prosecutor's comments must be based on the evidence in the record and reasonable inferences drawn therefrom.

Id. at 99. The prosecutor may not refer explicitly to the fact that the defendant was in the courtroom or that he heard the testimony of other witnesses, and was therefore able to tailor his testimony. Id.

The Court applied the same principles to the cross-examination of a testifying defendant. Questions that raise accusations of generic tailoring are prohibited. Daniels, 182 N.J. at 99. Cross-examination on specific instances of tailoring are permitted in limited circumstances. If there is evidence in the record that a defendant tailored his testimony, the prosecutor may cross-examine the defendant based on that evidence. Id. The prosecutor must have reasonable grounds for posing questions during cross-examination that allege that defendant tailored his testimony. Id. However, at no time during cross-examination may the prosecutor reference the defendant's attendance at trial or the ability to hear the testimony of preceding witnesses. Id.

Any cross-examination or comments during summation about a defendant tailoring his testimony is limited to specific accusations that are supported by reasonable grounds in the record. Even when addressing specific instances of tailoring there are fine lines in this area which the prosecutors cannot cross. Any comment on defendant's constitutional right to be present at trial or on defendant's right to hear all the

testimony before taking the stand would cross the line into unacceptable advocacy. State v. Daniels, 102 N.J. at 98-101. Caution is advised in making comments in this area.

The Supreme Court addressed the issue of the retroactivity of Daniels in State v. Carlos Feal, 194 N.J. 293 (2008). In Feal, there were specific instances of tailoring based on the fact that defendant's testimony at trial was inconsistent with the prior statement he gave to the police. The Appellate Division had a problem with the prosecutor's question on cross-examination that defendant "had an opportunity to observe all the witness [sic] that the State presented come in and testify in this case and tell their story." State v. Feal, Docket No A-0606-03T4, pages 15-16.

The Appellate Division also found that it was improper for the prosecutor to argue in summation that:

> We know seven months after Julia had been killed the defendant gave a formal statement to the police.
>
> We know that in that statement the defendant gave one version of events that occurred.
>
> Now, I submit to you, I don't think that version, I submit that version is not the complete truth, either.
>
> Remember, this is the defendant who had seven months to come up with a story. But I submit to you it's a lot closer probably to what happened that with what we heard here in court.

> We know that now **the defendant, after receiving all his discovery,** all the photographs, the charts, the diagrams, the reports in this case, **after hearing all the witnesses testify,** comes up here and tells you, ladies and gentlemen, a different version than what's in that piece of paper that statement. We know those things. [State v. Feal, Docket No A-0606-03T4, pages 10-11, emphasis added].

The Appellate Division determined that Daniels should be accorded "pipeline retroactivity" and reversed defendant's convictions for murder and possession of a weapon for an unlawful purpose because the prosecutor comments regarding the fact that defendant was in court and able to hear the testimony of the witnesses for the State were improper. State v. Feal, Docket No A-0606-03T4, pages 13-15.

The New Jersey Supreme Court agreed that the Daniels opinion should have pipeline retroactivity and thus should apply only to cases pending on direct appeal at the time of the Daniel's decision. State v. Feal, 194 N.J. at 311-312. However, the Supreme Court disagreed with the Appellate Division on whether the applicability of Daniels required a reversal of defendant's conviction. Feal, 194 N.J. at 312-313. The Court found that the prosecutor's fleeting reference to defendant's presence in the courtroom was not plain error because it could not have led the jury to a result it otherwise would not have reached. Id. at 313. The Court reversed the Appellate Division and reinstated

defendant's murder conviction. Id.

In State v. Roman, 382 N.J. Super. 44 (App. Div. 2005), certif. granted, 188 N.J. 219 (2006), app. dis., 189 N.J. 420 (2007), the Appellate Division applied Daniels retroactively to a case where the trial took place before the Supreme Court decision. Id. at 382 N.J. Super. at 58. Defendant was cross-examined on the differences between his testimony and his prior inconsistent statements. Id. However, the appellate court found that the prosecutor violated Daniels when he stressed that defendant "had the opportunity to listen to every one of the State's witnesses." Id. at 58-59. The court nevertheless found the comment to be harmless error in light of the evidence against defendant and upheld the aggravated manslaughter conviction. Id. at 61-62.

DEFENDANT'S LACK OF FUNDS

It is generally improper to use a defendant's poverty to establish a criminal motive for the crime. State v. Terrell, 359 N.J. Super. 241, 247 (App. Div.), certif. denied, 177 N.J. 577 (2003). Thus, a prosecutor may not suggest that a defendant's need for money motivated his commission of the crime. State v. Mathis, 47 N.J. 455, 469-77 (1966); State v. Sherman, 230 N.J.Super. 10, 17 (App. Div. 1988); State v. Stewart, 162 N.J. Super. 96, 100 (App. Div. 1978). In this regard, a prosecutor cannot cross-examine a defendant on his lack of funds or

unemployment in order to establish a motive for the offense charged and cannot make similar comments during summation. Id. Such comments are prohibited and it is of no consequence whether the offending reference to defendant's lack of money was based on defendant's own testimony, or based on the testimony of other witnesses or based on no testimony at all. State v. Terrell, 359 N.J. Super. at 247.

In State v. Mathis, supra, defendant was charged with murder and the prosecutor cross-examined defendant as to how much money he had at the time of the murder and when he last worked. The trial court interrupted the questioning and would not allow proof of financial need unless the State was in a position to show that things of value were stolen during the crime and that thereafter the defendant was affluent.

The State was unable to offer such proof, but instead argued that defendant's testimony that he worked at his father's home repairing cars went to the credibility of his statement that he never saw the victim who was frequently in that area. The State represented that the purpose of this questioning was to show that defendant's frequent presence at his father's house made it likely he knew the victim. However, on rebuttal, the State presented two neighbors of the father for the purpose of testifying that defendant never worked at his father's house.

The Supreme Court found that the State's real purpose was to

show that "defendant lied when he said he worked for his father, and hence he did not earn money that way, and being otherwise essentially unemployed, he must have been destitute and therefore likely to rob." State v. Mathis, 47 N.J. at 471. The Court acknowledged that a lack of money is logically connected with a crime involving financial gain. The trouble with such an argument is that it would prove too much against too many and would subject a poor person to unfair suspicion. State v. Mathis, 47 N.J. at 471-472. The Court reversed defendant's conviction on the grounds that the State's use of the forbidden theme that defendant had no apparent means of income and hence was likely to commit a crime for dollar gain was improper and prejudicial.

In State v. Stewart, supra, 162 N.J. Super. at 100, the defendant testified that he was walking home because he did not have carfare. The Appellate Division found that it was improper for the prosecutor to use that testimony as a basis to ask defendant on cross-examination whether he robbed the victim because he had no money and needed some "to make it through the next couple of days."

It is also improper to admit testimony of defendant's unemployment to show that money found on his person was probably the result of criminal activity. In State v. Terrell, supra, 359 N.J. Super. 241, defendant was charged with drug offenses and at

the time of his arrest drugs and $965 in cash was found on his person. Id. at 243. The State cross-examined the only defense witness, a close friend of defendant, on whether defendant was employed. Id. at 244-45. Defense counsel objected but the court allowed the question, which elicited a negative response. Id. The prosecutor used this testimony in summation to suggest that the jury should draw an inference from defendant's lack of a job that the money found on his person were the proceeds of drug sales. Id. at 245.

The Appellate Division held that the question and comment violated State v. Mathis, supra, 47 N.J. 455, and reversed defendant's convictions. Terrell, supra, 359 N.J. Super. at 245-48. Importantly, the court recognized that evidence of the money found on defendant's person was admissible and only held "that it was improper to fortify the inferences which might properly be drawn from that fact with the additional element of defendant's lack of employment." Id. at 248.

There are rare situations where defendant's unemployment may be admissible at trial. For example, in State v. Jones, 364 N.J. Super. 376, 386 (App. Div. 2003), the State was permitted to elicit testimony that defendant told the police when he was arrested that he was unemployed because the information was relevant to the case and was not used to show poverty as a motive for the crime. In Jones, that testimony was relevant because

defendant was dressed in the uniform of a security guard when he was arrested and if he was not employed as a security guard, he would have no reason to wear such a uniform. Id.

CROSS-EXAMINATION ON TRUTHFULNESS OF OTHER WITNESS

A prosecutor should not cross-examine the defendant, or any other witness, on the truthfulness of the testimony of another witness in the case. State v. T.C., 347 N.J. Super. 219, 237-38 (App. Div. 2002), certif. denied, 177 N.J. 222 (2003); State v. Green, 318 N.J. Super. 361, 378 (App. Div. 1999), aff'd o.b. 163 N.J. 140 (2000). The impropriety in such questioning is heightened when the other witnesses referred to in the cross-examination are police officers. Such questions usually take the following form:

> Q. It's your testimony today that you don't know Detective Sergeant X; isn't that true?
>
> A. I never saw X before, never.
>
> Q. So when X testified that he has known you for the past several years, he's lying, he's not telling the truth?
>
> A. He's lying
>
> * * * * *
>
> Q. Isn't it true that you passed in a no-passing zone and forcing vehicles off the road?
>
> A. No, that's another false statement. Never did that.

> Q. So these police officers are lying?
>
> A. Yes they are.
>
> * * * * *
>
> Q. Well isn't it true that you continued on and came to a stop, Detective Sergeant X -- the other two marked units came to a stop and you took off?
>
> A. No, ma'am.
>
> Q. So when Detective Sergeant X testified today, he's not telling the truth; right?
>
> A. No, ma'am, he's not telling the truth.
>
> * * * * *
>
> Q. And down at the station you made a statement to Detective X that you recognized him when he was at the Elks Lodge parking lot; didn't you?
>
> A. Never made that statement, never made that statement at all.
>
> Q. So if that's in his report, and that's what he testified to today, then, once again, he's lying and you're telling the truth?
>
> A. Ma'am, he is lying.
>
> [State v. Green, 318 N.J. Super. at 377].

The Appellate Division determined that this form of questioning is argumentative and highly improper.

Asking one witness to characterize the testimony of another

invades the province of the jurors, who are the judges of credibility. This is not to say that a prosecutor cannot highlight discrepancies between the testimony of a defendant and that of police officers or any other of the State's witnesses and argue therefrom that defendant is less credible than the State's witnesses and should not be believed. State v. T.C., 347 N.J. Super. at 238. It is also appropriate for a prosecutor to argue, based on the evidence, that witnesses lied, or to suggest that witnesses are not credible. State v. Morton, 155 N.J. 383, 457-58 (1998); State v. Abdullah, 373 N.J. Super. 252, 268 (App. Div. 2004), aff'd in part, rev'd in part, 184 N.J. 497 (2005).

CROSS-EXAMINATION OF EXPERT WITNESSES

In State v. Negron, 355 N.J. Super. 556 (App. Div. 2002), the Appellate Division found that the prosecutor's cross-examination of the defense experts, which concentrated on the fees they were charging for their services, and related comments during summation crossed the line of fair advocacy. State v. Negron, 355 N.J. Super. at 576-79. In addition to comments which implied that the defense experts sold their integrity for a fee, the prosecutor stated that defense counsel fabricated evidence, and misstated the facts. Id. at 569-76. The court found that the remarks denied defendant a fair trial and required a reversal of the murder conviction.

The cross-examination of an expert witness with prior

testimony was in issue in State v. O'Brien, 183 N.J. 376 (2005), rev'g on dissent, 377 N.J. Super. 389, 415-17 (App. Div. 2004). The defendant in O'Brien was being retried for the murder of his sister and raised an insanity defense. On his prior appeal, defendant argued that testimony regarding his criminal record was improperly admitted through the testimony of the psychiatric experts. State v. O'Brien, 377 N.J. Super. at 403. The appellate court suggested that the doctors' testimony be guided at the retrial to prevent any reference to the defendant's prior convictions. Id.

It was agreed by all parties at the retrial that any reference to defendant's prior convictions be precluded. Id. When a defense expert testified, he stated that defendant tried to join the Marine Corps but was rejected. The reason for the rejection, and the only reason mentioned by this witness at the first trial, was defendant's prior conviction. Id. at 403-04.

The prosecutor tried to clarify on cross-examination that the reason for the rejection was not mental illness. Id. at 404-07. The expert witness refused to directly answer the question and continue to imply that mental illness was involved. Id. During summation the prosecutor argued that the expert refused to give a straight answer to many of the State's questions. Id. at 407-08. A majority of the Appellate Division held that the prosecutor's questions of the expert and comments on summation

were improper and reversed defendant's murder conviction.

Judge Carchman wrote a dissenting opinion in which he held that the State's cross-examination of the expert was a "classic example of use of prior testimony for impeachment purposes, N.J.R.E. 613, and the prosecutor carefully phrased the inquiry to avoid mention of defendant's prior record." O'Brien, 377 N.J. Super. at 416. Judge Carchman noted that the prosecutor was walking a "fine line" when confronting the expert witness as to his prior testimony and his reasons for concluding that defendant was rejected by the Marines. Id. at 415-16. The inquiry was proper to demonstrate that the expert had earlier opined that the reason for the rejection was not mental illness, but another reason. Id. at 416.

While neither the State nor the expert could reveal to the jury that it was defendant's prior conviction that prevented his enlistment, the State's cross-examination in this area consisted of narrow, direct questions that could have been answered "Yes" or "No." O'Brien, 377 N.J. Super. at 416. Judge Carchman noted that when the expert was specifically asked whether he cited mental illness as a basis for the rejection, the expert "did what experts are adroit at doing and that was not responding to the question but deflecting to the '140 pages' of his prior testimony." Id. Judge Carchman found the question to be proper and not prosecutorial misconduct. Id.

The Supreme Court agreed with Judge Carchman and reversed the portion of the majority opinion with respect to the cross-examination of the defense witness substantially for the reasons expressed in his dissenting opinion. State v. O'Brien, 183 N.J. 376, 378 (2005).

A similar situation occurred in State v. Pennington, 119 N.J. 547, 578-583 (1990), where the prosecutor cross-examined defense expert witnesses on reports and information on which they had not relied. Experts may be required in cross-examination to disclose the underlying facts or data on which their opinion is based. Evid. R. 47. However, a prosecutor cannot, under the guise of cross-examination, use the expert to disclose the details of inadmissible, hearsay information contained in documents not reviewed by the experts. State v. Pennington, 119 N.J. at 578-583.

In State v. Jenewicz, 193 N.J. 440 (2008), the Supreme Court found that it was appropriate for the prosecutor to cross-examine the defense psychiatrist on statements defendant made to him and which the doctor relied upon in forming his opinion about the murder **victim's** mental state. Id. at 465-467. However, the Court found that it was improper for the prosecutor to cross-examine the doctor on his failure to find a basis to raise an insanity or diminished capacity defense on behalf of defendant. State v. Jenewicz, 193 N.J. at 467-468. Defendant did not raise

insanity or diminished capacity defenses at trial and the Court found that the prosecutor's questions exceeded the scope of the expert's direct testimony. Id. at 468. The Court found the psychiatrist's failure to find a mental health defense did not provide a reasonable basis for attacking the credibility of the witness's testimony on another matter. Id.

In State v. Rose, 112 N.J. 454, 515-516 (1988), the Supreme Court criticized the prosecutor for taking "extreme liberties in paraphrasing facts not in evidence" in cross-examining expert witnesses for the defense. The court was also outraged by the fact that the prosecutor had a witness read to the jury, under the guise of cross-examination, a report which included information that the trial court ruled was inadmissible Id. at 516-517. The court found that the prosecutor's sole purpose in requesting the expert to read the statement to the jury was to expose the jury to inadmissible and highly prejudicial evidence. The prosecutor also referred to this inadmissible information during his summation, in violation of ABA Standard 3-5.6(b) which states:

> It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

SUMMATION COMMENTS ON EXPERT WITNESSES

In State v. Smith, 167 N.J. 158 (2001), the Supreme Court held that the prosecutor's closing remarks that the defense experts who charged hefty fees might have shaded their testimony in the hope of future employment constituted prosecutorial misconduct which violated defendant's right to a fair trial. The comments that drew the court's ire were as follows:

> In this case, you have Lieutenant X, who admitted he is associated with the police, on the one hand. You have two individuals on the other hand, who are hired, paid consultants. Now, admittedly, they have to make a living. They charge hefty fees, and you can decide whether those hefty fees would influence their testimony at all; whether it would influence them to shade their testimony at all, whether they hope to get hired by persons in the future in similar situations; and therefore, would want to have certain testimony, so they can collect those fees in the

> future. You'll have to consider that in your judgment. [State v. Smith, 167 N.J. at 174].

Defense counsel objected to the above comments and the trial court sustained the objection and gave a curative instruction to the jury.

The Supreme Court found that the prosecutor's comments were inappropriate and could have improperly swayed the jury. State v. Smith, 167 N.J. at 187-89. There were several reasons for the Court's conclusion. First, there was no aspect of the defense experts' testimony or cross-examination that remotely suggested that the experts fabricated their testimony or that they were motivated to lie. State v. Smith, 167 N.J. at 183. Second, there was no evidence in the record suggesting that defendant's experts had relied on or were relying on defense counsel for employment either in the past or in the future. State v. Smith, 167 N.J. at 183-84.

Third, the prosecutor's comments improperly implied that because the State's expert witness was a police officer and thus not a "paid expert," he was more credible than the defense experts who were paid. State v. Smith, 167 N.J. at 184. Fourth, all the defense expert witnesses were exceptionally qualified and highly reputable. Id. Finally, and most importantly, this was factually a close case where defendant's guilt of the vehicular

homicide depended on whose expert the jury believed. State v. Smith, 167 N.J. at 189.

The Court also questioned the fairness of a jury instruction in criminal cases that merely states that the amount of a defense expert witness' fee is a matter that a jury may consider as possibly affecting the credibility of a witness. The Court believed that such an instruction, in a close case, may tip the scales in favor of the credibility of the State's expert witnesses who, although unpaid, may have an equal or greater interest in the outcome than do the defense witnesses because they often are employed by a law enforcement agency involved in the prosecution. State v. Smith, 167 N.J. at 189. The Court requested that the Supreme Court Committee on Model Jury Charges, Criminal, consider the issue and modify the standard expert witness instruction "to achieve better balance in the trial of criminal cases." Id. The Model Jury Charge on Expert Testimony was revised on November 10, 2003 to exclude any reference to a consideration of the fees paid in determining credibility.

A prosecutor must be careful that his or her comments during summation do not improperly vouch for the credibility of the expert witness. In State v. Sheika, 337 N.J. Super. 228 (App. Div.), certif. denied, 169 N.J. 609 (2001), the prosecutor improperly suggested that the trial court's preliminary finding that the State's expert was qualified to offer an opinion as to

the cause of the victim's death was an endorsement of the expert's testimony. The Appellate Division found that such comments were factually incorrect and highly improper. State v. Sheika, 337 N.J. Super. at 250.

In State v. Nelson, 173 N.J. 417 (2002), the Supreme Court found that it was improper for the prosecutor to make comments that implied that the defense experts considered themselves part of the "defense team" and that their testimony was contrived. Id. 461-63.

> I suggest to you that he [defense expert X] went over the edge as a member of the defense team to help this defendant, to help Leslie Nelson's case. Was he the first defense witness to do that? No. By no means was he the first defense witness to do that. Dr. Y, did you consider yourself a member of the defense team in this case? Yes, I did. You heard that. He is an expert, he is supposed to offer to this jury information, facts, opinions, that will assist you in the very important job that you have to do. Can he do that if he comes before you as a partisan? Can he do that if he comes before you with an agenda? Can he do that if he's wearing the same color jersey as the other people on Leslie Nelson's team?
>
> * * * *
>
> Is [Dr. Y's] testimony that [sic] makes sense, that's reasonable., that's logical, that assists you? Or is it again, an endeavor on his part to go over the line a little

> bit, over the edge a little bit because at no time can Dr. Y forget what color jersey he's wearing on the stand, what team he's on.
>
> * * * * *
>
> Now Dr. A [the State's expert], I suggest to you did not consider himself a member of the prosecution team, did not consider himself a member of any team. Dr. A I suggest to you came in here to give you his honest-to-goodness best judgment and opinions. And a lot of his answers, [defense counsel] was right, a lot of his answers were helpful to the defense. [State v. Nelson, 173 N.J. at 461-62.]

The Supreme Court found these comments to be improper and reversible error. The Court found that the prosecutor's characterization of the defense experts as part of the same team, wearing the same defense jerseys, improperly insinuated that the experts' testimony was contrived and that they had colluded with the defense. Id. at 462. The Court determined that the prosecutor's comments regarding the experts going "over the edge" to help defendant and having an "agenda" clearly "crossed the line that separates forceful from impermissible closing argument." Id.

The Court felt that the impropriety of the comments were highlighted by contrast with the prosecutor's comments that the State's expert was not part of any team. Id. The Court found nothing in the record, outside of the prosecutor's own opinion,

to support the prosecutor's insinuations that the defense experts fabricated their testimony to help defendant, while the State's expert was above reproach. State v. Nelson, 173 N.J. at 462-63.

The Court distinguished Nelson in State v. Jenewicz, 193 N.J. 440 (2008), where it found that the prosecutor's criticism of the expert's testimony, such as critiquing the reliance on defendant's statements and the failure to interview individuals other than defendant, to be entirely appropriate. Jenewicz, 193 N.J. at 471. The Court stated that such "weaknesses in the supporting information obtained by the expert and used in reaching his conclusions are fair game in the crucible of a trial." Id. The Court further stated that it expected "trial advocates to point out such reasons for disbelieving or discounting an expert's testimony." Id.

PROSECUTORIAL INTERFERENCE WITH DEFENSE WITNESSES

In State v. Fort, 101 N.J. 123 (1985), the Supreme Court condemned the prosecutorial practice of placing a provision in a plea agreement barring a codefendant from testifying for another defendant. In Fort, two defendants and two codefendants were arrested in an apartment and charged with various drug offenses. The two codefendants entered into plea agreements and part of the deal was that the codefendants were required not to testify on behalf of the remaining defendants. Id. at 124.

At the time of her plea, one of the codefendants made a

statement that appeared to support the defendants' claim of innocence. Id. at 126. The codefendants indicated to defendants' counsel that they would not violate their plea agreements by testifying for defendants. Id. at 126-27. They were not called as witnesses and defendants were convicted. Id. at 127.

The Supreme Court held that the "no testimony" agreement violated defendants' constitutional rights to due process and to present witnesses in their favor. State v. Fort, 101 N.J. at 131. See e.g., State v. Feaster, 184 N.J. 235, 250-58.

The State may not use threats or intimidating tactics that substantially interfere with a witness's decision to testify for a defendant. State v. Feaster, 184 N.J. at 262. In Feaster, the capital defendant filed a motion for a new trial based on the statement of a State's witness who recanted his trial testimony. Id. at 245-47. Before the witness took the stand at the PCR hearing, the prosecutor told his attorney that there would be "considerations" if the witness testified consistent with his recantation statement. Id. at 240, 245-47. When the witness took the stand he withdrew his certified statement and invoked his Fifth Amendment privilege against self-incrimination. Id. at 240, 245-47.

The Supreme Court found that the prosecutor substantially interfered with the recanting witness's decision to testify in

this capital case and thus denied defendant a witness who might have supported his claim that he was wrongly convicted and sentenced to death. State v. Feaster, 184 N.J. at 240. The Court held that the prosecutor's interference with that witness's decision to testify violated defendant's state constitutional due process and compulsory process rights. Id. at 240, 249, 262.

The Court determined that the appropriate remedy was a remand to the trial court for the purpose of taking the witness's testimony. State v. Feaster, 184 N.J. at 262. The State was given two options, either grant the witness immunity at the PCR hearing, or the trial court must disregard the witness's trial testimony and decide whether the absence of that testimony "would have the probable effect of raising a reasonable doubt as to the defendant's guilt" in the minds of the jurors. Id. at 263-64.

DISPLAYS AND DEMONSTRATIONS DURING SUMMATION

Counsel may display during summation, items of physical evidence that have been admitted into evidence. They may use charts and diagrams as aids. Audio and videotaped statements of defendants and other witnesses are frequently played during the trial for the jury and, when admitted into evidence, may be played during summation. All of these procedures are subject, of course to the trial judge's supervision. State v. Muhammad, 359 N.J. Super. 361, 378-79 (App. Div.), certif. denied, 178 N.J. 36 (2003).

Any display must be relevant, supported by the evidence and not unduly prejudicial. For example, in State v. Robert String, Docket No. A-5607-93 (App. Div. June 20, 1995), certif. denied, 142 N.J. 572 (1995), the prosecutor used the victim's bloody clothes and a photo of the victim's face to create a "bizarre, morbid and macabre mannequin" that was on display during the State's summation. The Appellate Division found that the display was improper and prejudicial and reversed the defendant's manslaughter conviction.

Audio and videotaped statements of defendants and other witnesses are frequently played during the trial for the jury and, when admitted into evidence, may be played during summation, subject to the trial court's supervision. State v. Muhammad, 359 N.J. Super. at 378-79. Many courtrooms are now equipped with videotape as the means of officially recording the proceedings. State v. Muhammad, 359 N.J. Super. at 372, 379-80.

As a result of this technology, an issue arose over the use of video playback during summation. In Muhammad, the prosecutor used video playbacks of portions of the testimony of several witnesses during summation. Id. at 373-78. Defendant argued that the video playback allowed the State to bolster its case by repetition and asked the Appellate Division to adopt a per se rule barring the use of this technique by the State in a criminal trial. Id. at 378.

The Appellate Division held that it is permissible, in the trial court's discretion and subject to certain safeguards, to allow the video playback technique in criminal trials. Muhammad, 359 N.J. Super. at 379-82. An attorney who intends to use video playback during summation must inform the court and all other counsel at the earliest possible time, for example, at the charge conference, and certainly before any party sums up. Id. at 380.

A N.J.R.E. 104(a) type hearing should be conducted in all cases, unless the proponent has identified the excerpts to be played and opposing counsel, with knowledge of those excerpts, expressly waives a hearing with the court's approval. Id.

Trial judges have broad discretion in setting the permissible boundaries of the use of video playback as part of a summation. Muhammad, 359 N.J. Super. at 381. The excerpts may not be unduly long so as to overemphasize one side of the case and their use may only constitute an aid incidental to the argument of counsel. Id. at 380. Trial judges may permit some or all of the proposed video playbacks, or they may reject their use entirely. Id. at 381.

The trial court's determination is guided in each case by balancing the benefit to the proponent against the possible prejudice to the opposing party. Muhammad, 359 N.J. Super. at 381. Rejection may also be based on undue consumption of time,

inability to avoid delay between summations, the potential to confuse or mislead the jury, or any other appropriate consideration, such as the inflammatory nature of the testimony. Id. at 381-82.

It is important that the trial court give cautionary instructions to the jury at the time the video is played and again in the final charge that it is the jury's function to determine the facts based on its recollection of all the evidence and not to place any extra emphasis on the portions of the testimony played back. Id. at 382.

In State v. LiButti, 146 N.J. Super. 565 (App. Div. 1977), the Appellate Division reversed a defendant's conviction for arson on the grounds that the prosecutor conducted an improper and prejudicial demonstration during summation. An unindicted coconspirator testified for the State that defendant started the fire by pouring gasoline and other flammable liquids out of ten five-gallon containers throughout the store which was then set ablaze. Id. at 569.

An expert testified for the defense for the purpose of showing the unlikelihood of the flammable liquid being poured in the manner charged by the State. Id. at 569. The defense's primary attack on the State's case was the amount of time it would take to pour the flammable liquid out of the containers. The defense expert opined that it would take at least three

minutes to empty each container. Id.

During summation, the prosecutor charged that the expert was wrong, and in order to demonstrate the point, he produced a five gallon container, which had not been introduced at trial, and filled it with water. State v. LiButti, 146 N.J. Super. at 570. The prosecutor then timed how long it took for the liquid to be emptied into another receptacle. After this demonstration, which took approximately thirty seconds, the prosecutor argued that the defense expert's opinion was wrong. Id. at 570.

The Appellate Division reversed defendant's conviction and ruled that the demonstration was improper. The court found that the exhibition was performed for the purpose of providing evidential rebuttal of the expert's testimony. As such, it should have been conducted during the course of the trial and the receptacle and liquid should have been authenticated as being a substantial representation of the items used in the commission of the crime. Id. at 572-73.

FAIR COMMENT ON THE EVIDENCE

Prosecutors must confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence. State v. Mahoney, 188 N.J. 359, 376, (2006), cert. denied, 127 S.Ct. 507, 166 L.Ed.2d 368 (2006); State v. R.B., 183 N.J. 308, 330 (2005); State v. Smith, 167 N.J. 158, 178 (2001). If a prosecutor's arguments are based on the facts of the case

and reasonable inferences therefrom, what is said in discussing them, by way of comment, denunciation or appeal will afford no grounds for reversal. Id.

In State v. Mahoney, supra, 188 N.J. 359, defendant was an attorney who was charged with stealing client funds entrusted to him. Id. at 362. One of defendant's principle trial defenses was that because his clients "ultimately received the settlement funds that were due to them - albeit over eleven months after he deposited the settlement check in his escrow account, ten days after the police executed a search warrant on and seized his law firms' records," and after he repeatedly lied to them for months about his ability to disburse the funds - no harm inured to anyone and hence he should escape liability for his actions. Id. at 374.

The prosecutor responded to this defense in summation as follows:

> PROSECUTOR: And I would submit to you but for that search warrant, Mr. Mahoney would never have given the money or he'd have been putting them off and putting them off and putting them off for however long they would believe his lies because he only paid that back after the search warrant was executed. And again I would submit to you that the defense argument that they got their money therefore, he didn't have any criminal intent and didn't commit a theft, that is ridiculous. I'll give you a whole bunch of examples.

> Somebody who is shoplifting at a store and gets caught by the security guard on the way out and then says well, I still have it inside my pocket. Here, you can have it back. So now I didn't commit a shoplifting. Or somebody goes into a person's house and commits a burglary and takes an expensive piece of jewelry and witness sees who the person is and person gets away.
>
> DEFENSE COUNSEL: Judge, I object.
>
> COURT: Overruled
>
> PROSECUTOR: And then an arrest warrant is issued for the person and eleven months later the person is arrested, and then the person says oh, here's that watch. You can have it back now. I didn't commit the burglary. And there's no theft because I didn't have any intent. And you know, if the person had asked me enough times for their watch back I would have give[sic] it to them.
>
> The defendant through his own testimony seems to imply that the [victims] had some responsibility to call him everyday and ask for their money, and meanwhile he's lying to them. [State v. Mahoney, 188 N.J. at 374.]

The Appellate Division accepted defendant's argument that his repayment of the settlement funds raised an issue as to "whether an actual crime had been committed," and held that the prosecutor's comments exceeded the bounds of fair comment and was reversible error. Mahoney, 188 N.J. at 375. The Supreme Court

disagreed with the Appellate Division and held that the prosecutor's remarks were fairly based on the facts of the case and the reasonable inferences therefrom and were well within the bounds of propriety. Id. at 376.

The Supreme Court found that the prosecutor's comments legitimately placed an unforgiving and harsh glare on the defendant's "no-harm-no-foul" defense. Id. The Court determined that in light of the arguments advanced by defendant, it was entirely proper for the prosecutor to point out that, once defendant had completed the crimes for which he was charged, returning the money he stole did not negate an element of the offenses. Id. at 376-77.

In State v. Atwater, 400 N.J. Super. 319 (App. Div. 2008), the Appellate Division found some of the prosecutor's remarks during summation were not supported by the record and constituted reversible error. The facts in Atwater involved a vehicular homicide that occurred on Christmas Eve where the defendant drove around a vehicle stopped to allow two women to cross the street and he hit the women, killing them. Defendant himself was injured but left the area, leaving his car, after receiving some medical treatment. Defendant's father returned to the scene and informed the police of his son's whereabouts.

There was evidence that defendant's BAC was .07% at the time of the homicide, below the 1.0% level for intoxication at that

time. Given these facts, the Appellate Division found that the prosecutor's remarks that defendant was "blotto" or "drunk" were not supported by the evidence. Atwater, 400 N.J. Super. at 336-37. The court was also offended by the prosecutor's comment that defendant did not slow down when he passed the stopped vehicle but accelerated and was "closing in on the kill." Id. The court found the remark was not supported by the record because there was no evidence that defendant acted intentionally or was focused on hitting the victims. Id.

CLAWANS - COMMENTS ON NON-PRODUCTION OF A WITNESS

The Supreme Court recently did a complete rewrite of the law of adverse inferences, especially when the inference is going to be made against a criminal defendant. In State v. Hill, 199 N.J. 545 (2009), the Supreme Court held that an adverse inference charge under Clawans should **not** issue against criminal defendants. Hill, 199 N.J. at 566. The Court found that "the inclusion in a criminal trial of a Clawans charge [against defendant] from the court risks improperly assisting the State in its obligation to prove each and every element of the charged crime beyond a reasonable doubt." Id. The Court held that it would be "difficult to foresee a situation where a Clawans charge might play a proper role in a case against a criminal defendant,"

and such situations, if any, would be the "rare case." Hill, 199 N.J. at 566-67.

The adverse inference doctrine was derived from the Supreme Court opinion in State v. Clawans, 38 N.J. 162, 171 (1962), where the Court set forth when it would be appropriate to allow one party to urge a jury to draw an adverse inference against an opposing party for the failure to call an available witness. Id. at 170-72. The Supreme Court also decided that it would be permissible for a trial court to instruct that jury on such an inference in both civil and criminal trial settings. Id.

The situation arose in Clawans from the defense request that the trial court instruct the jury that an adverse inference should be drawn against the State from its failure to present as a witness a person who was present at the alleged conversation that was the subject of the criminal charges. State v. Clawans, 38 N.J. at 170. The trial judge denied defendant's request. Id.

On appeal, the Supreme Court found that defendant's proposed adverse inference charge was too broad, but nevertheless determined that defendant was entitled to an adverse inference charge, albeit in different language, given to the jury based on the State's failure to present a "vital" witness. Id. at 173-75.

There are several procedures that must be followed before the defendant can comment in summation on an "absent" witness or request that the trial court give an adverse inference charge

against the State to the jury. The first requirement is prior notice. State v. Hill, 199 N.J. at 560; Clawans, 38 N.J. at 172. That means that the defendant must first inform the trial judge and the prosecutor out of the presence of the jury, at the close of the State's case, of his intention to comment on the non-production of a witness. State v. Hill, 199 N.J. at 560; State v. Irving, 114 N.J. 427, 442 (1989); State v. Carter, 91 N.J. at 128; State v. Clawans, 38 N.J. at 172. Prior notification is required whether the defendant is requesting an adverse inference charge to the jury or wishes to mention the "missing" witness and adverse inference during closing argument. Hill, 199 N.J. at 561.

The defendant must state the name of the witness not called and the basis for the belief that the witness has superior knowledge of the relevant facts. State v. Hill, 199 N.J. at 560-61. This procedure allows the State the opportunity to present the witness or to argue to the trial court why an adverse inference is not warranted. State v. Clawans, 38 N.J. at 172.

It is only after all the particulars are disclosed that the trial court may properly determine whether the inference should be urged in summation or an adverse charge be given to the jury. State v. Irving, 114 N.J. at 442; State v. Carter, 91 N.J. at 128; State v. Clawans, 38 N.J. at 172. In making this determination the trial court must consider whether:

> (1) the uncalled witness is peculiarly within the control or power of only one party, or there is a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony that the witness might be expected to give;
>
> (2) the witness is available to that party both practically and physically;
>
> (3) that the testimony of the uncalled witness will elucidate relevant and critical facts in issue, and
>
> (4) such testimony appears to be superior to that already utilized in respect to the fact to be proven.
>
> [State v. Hill, 199 N.J. at 561-62; State v. Carter, 91 N.J. 86, 127-28 (1982); State v. Hickman, 204 N.J. Super. 409, 414 (1985); certif. denied, 103 N.J. 495 (1986)].

Prior to the Supreme Court decision in Hill, the Clawans doctrine was reexamined by the Appellate Division in State v. Velasquez, 391 N.J. Super. 291 (App. Div. 2007). That a case involved a situation where both the State and the defense wanted the trial court to charge an adverse inference against the other from the failure to produce one witness, the mother of the child sexual assault victim.

The defendant was charged with sexual assaults against the daughter of his paramour and the older sister of one of her friends. Id. at 299-302. Prior to trial, the daughter of defendant's paramour recanted her accusations against defendant. Id. at 302-304. At trial, defense counsel and the prosecutor both asked the trial court for permission to argue to the jury

that an adverse inference should be drawn from the other's failure to produce the recanting child's mother as a witness. Id. at 305.

The trial court determined that the mother's testimony could potentially add to the evidence about the child's recantation and since she had a strong relationship with the defendant and was hostile to the State, the court granted the prosecutor's request to comment and denied the defense request. Velasquez, 391 N.J. Super. at 305-06. The Appellate Division disagreed and reversed. Id. at 309-15.

The Appellate Division found that neither the defense nor the State wanted to call the mother of the recanting victim as a witness because both expected her testimony to be both beneficial and harmful. Velasquez, 391 N.J. Super. at 310. The fair inference was that both the defense and the State hoped to do without her testimony and take advantage of the Clawans' missing witness instruction against the other. Id. The appellate court condemned such behavior and flatly stated that trial courts "should not permit a Clawans charge to be used as one might employ a piece in a game of chess." Id.

The Appellate Division, in its review of the Clawans doctrine, stressed the need for a trial court to exercise caution in authorizing the inference. Velasquez, 391 N.J. Super. at 306-07. It emphasized that a court should not start with the

assumption that an absent witness's testimony must be favorable to either one side or the other or that an adverse inference must arise against either. Id. at 308. The trial court should evaluate a party's decision not to call a witness by considering the "person," who is the witness, and the content of his or her expected "testimony." Id.

When the person is one who cannot testify, may assert a privilege or is unlikely to give favorable testimony due to bias, the inference is unwarranted because non-production is reasonably explained by the inability to secure the testimony, rather than the fear of its content. Velasquez, 391 N.J. Super. at 308. Similarly, when the expected testimony from the witness is unimportant to the party's case, cumulative or inferior to the testimony already presented on the issue, it is more reasonable to infer that non-production is explained by the fact that the testimony is unnecessary. Id. at 308-09.

VOUCHING FOR WITNESSES

A prosecutor may argue that a witness is credible, so long as the prosecutor does not personally vouch for the witness or refer to matters outside the record as support for the witness's credibility. State v. Walden, 370 N.J. Super. 549, 560 (App. Div.), certif. denied, 182 N.J. 148 (2004); State v. Scherzer, 301 N.J. Super. 363, 445 (App. Div.), certif. denied, 151 N.J. 466 (1997).

A prosecutor does not "vouch" for the credibility of his witnesses when he acknowledges the imperfect nature of the State's proofs and the weaknesses in the case because some witnesses have criminal convictions or motives to implicate the defendant. State v. Lenin, 406 N.J. Super. 361, 383 (App. Div.), certif. denied, 200 N.J. 477 (2009). The prosecutor may also comment that the discrepancies and inconsistencies in the various witnesses' accounts may be due to blurred memories over the passage of time. Id.

While the credibility of a witness can be attacked by the use of prior convictions, the reverse is not allowed. The credibility of a witness cannot be bolstered by evidence of a lack of a criminal record. State v. Villanueva, 373 N.J. Super. 588, 602 (App. Div. 2004). For example, in State v. Villanueva, supra, the Appellate Division found that it was error for the prosecutor to argue that the robbery victims were more likely to tell the truth than defendant because they lacked any criminal convictions. Id.

Caution is also advised when discussing the credibility of the testimony of a codefendant who pleaded guilty to the offense and is testifying against defendant at trial. The guilty plea of a codefendant is inadmissible at trial as substantive evidence of the defendant's guilt. State v. Stefanelli, 78 N.J. 418, 430 (1979); State v. Murphy, 376 N.J. Super. 114, 122 (App. Div.

2005). However, a witness's guilty plea is certainly admissible to affect his or her credibility as a witness. Stefanelli, 78 N.J. at 433; Murphy, 376 N.J. Super. at 122.

In Murphy, the court found reversal error when the prosecutor made remarks in summation that enhanced the credibility of the codefendant. The prosecutor made an analogy to a "prisoner of war" and stated that:

> You know, we all watch movies. We're all aware of the war films and prisoners of war. When did the prisoners of war get beaten the most? He got beaten the most when he fooled his captors, when he tricked them. If he told the truth, he didn't get beaten, he didn't get anything. It's when he deceived his captor. [Murphy, 373 N.J. Super. at 124.]

The trial judge issued an immediate instruction to the jury to disregard the comments, nevertheless, the appellate court found that the remarks were so prejudicial that a reversal was warranted. Id. at 124-25. The court noted that there was no evidence that the codefendant's statement and testimony were motivated by fear of a physical assault or by anything other than his own personal interest. Id. at 124.

COMMENTS ON VICTIMS

When a victim's character has no bearing on the determination of defendant's guilt, a prosecutor may not comment on the evidence in a manner that serves only to highlight the

victim's virtues in order to inflame the jury. State v. Williams, 113 N.J. at 451-452; State v. Jang, 359 N.J. Super. 85, 97 (App. Div.), certif. denied, 177 N.J. 492 (2003); State v. Lockett, 249 N.J. Super. 428, 435 (App. Div.), certif. denied, 127 N.J. 553 (1991). In State v. Williams, 113 N.J. at 448-454, the Supreme Court found that the prosecutor's comments during her opening and summation on the murder victim's good character, employment as special education teacher, religious devotion, involvement in church choir and future wedding plans, were inflammatory and unduly prejudiced defendant.

It is also improper for a prosecutor to urge the jurors to consider the peaceful characters of the robbery victims in the absence of any evidence relating to the issue and any instruction as to the proper use of such evidence, if any. State v. Villanueva, 373 N.J. Super. 588, 601-02 (App. Div. 2004). Evidence that a victim possess a peaceful trait of character is admissible pursuant to N.J.R.E. 404(a)(2) only in a homicide prosecution. Id. at 602.

Nor can the prosecutor rely on information outside the record to vouch for the credibility of the victim. In State v. Bradshaw, 195 N.J. 493 (2008), the Supreme Court held that the prosecutor's comments on the victim's enhanced ability to concentrate because of her deafness was improper and based on information outside the record. Id. at 510. The State did not

present any evidence that the victim had a stronger sensory perception than a person who was not deaf. Id. The Court found that the prosecutor's comments that the victim was a "lifelong 40-year old trained observer" who, because of her disability "has to be able to observe things" and whose "whole world is about her ability to recognize things," went beyond the reasonable inferences from the evidence in the case. Id.

In State v. Jang, 359 N.J. Super. 85, 97 (App. Div.), certif. denied, 177 N.J. 492 (2003), the Appellate Division held that the prosecutor's remarks that the victim, "as her last act of heroism", sacrificed her life to save her family by entering the garage, were inappropriate and not supported by the record. Id. at 95.

In State v. Lockett, 249 N.J. Super. at 434-435, the prosecutor told the jury:

> You have to do the right thing and the right thing, I submit to you, is to find this man guilty os aggravated manslaughter. But while you are doing that remember that [victim] lost his life. A man born of woman, a man with family , with friends, a man doing nothing other than crossing the street by his house.... And because of the conduct of this man, his life was snuffed out like that. In a horrible way. Absolutely horrible.
>
> And what you must not forget, while you are considering the guilt or innocence of this defendant, is that [victim] has lost his life and

> that when he lost his life, because of the conduct of this man, we are all diminished, it took something away from all of us. When a church bell tolled for [victim], we all heard it. [State v. Lockett, 249 N.J. Super. at 435]

The Appellate Division found that the prosecutor's comments regarding the victim were improper because they had the effect of improperly urging the jury to convict defendant out of sympathy for the victim. Id.

VOUCHING FOR CREDIBILITY OF POLICE OFFICERS

A prosecutor should also avoid making statements in which he or she vouches for the credibility and honesty of the State's witnesses. Prosecutors should be especially careful when discussing the credibility of police officers. A prosecutor cannot argue that police officers would not lie because serious charges could be brought against them which would jeopardize their jobs. Our courts have consistently held that such statements by a prosecutor about a police officer's credibility are wholly inappropriate. State v. R.B., 183 N.J. 308, 331-333 (2005); State v. Frost, 158 N.J. at 85; State v. Staples, 263 N.J. Super. 602, 606-607 (App. Div. 1993).

For example, in State v. West, 145 N.J. Super. 226 (App. Div. 1976), certif. denied, 73 N.J. 67 (1977), the Appellate Division held that the State is prohibited from arguing before a jury that the testimony of a police officer is inherently

credible because police officers are fired if they lie. Id. at 234.

Similarly, in two cases involving such comments the appellate court ruled that the following remarks were improper:

> Why, question, why is [Detective X] going to do that? He has had twenty years on the police force. If he is going to ruin his career, let it be over something better than that. [State v. Donald Ashworth, Docket No. A-4142-89T4, decided July 11, 1991].
>
> * * *
>
> Investigator [X] testified quite credibly and forthrightly and I submit to you that these police officers have no reason to lie.
>
> That when you evaluate the credibility of the witnesses, you will find that they have no reason to jeopardize their entire careers for one case to come in here and make this up, fabricate a story. This case is too simple. [State v. Elhilaly, Docket No. A-924-89T4, decided July 18, 1991].

A more troublesome area is whether a prosecutor can respond to a defense attack on a police officer's credibility by telling the jury that the police officer had nothing to gain by lying. In State v. R.B., 183 N.J. 308, 331-32 (2005), the Supreme Court held that it is improper for a prosecutor to contend in summation that the police had no motive to lie. See, e.g., State v. Murphy, 412 N.J. Super. 553, 560 (App. Div. 2010); State v. Vasquez, 374 N.J. Super. 252, 260 (App. Div. 2005); State v.

Goode, 278 N.J. Super. 85, 90 (App Div. 1994); cf. State v. Rivera, 253 N.J. Super. 598, 605-606 (App. Div.), certif. denied, 130 N.J. 12 (1992). The comments in R.B. that drew the Court's censure were the prosecutor's argument that:

> Detective [X] had no reason to lie. Defense even brought it up, he was only assigned to that unit for two months. He's not going to, two months into the job, fabricate a partial confession from somebody. I guess the implication is he's going to score points by falsely accusing somebody - [State v. R.B., 183 N.J. at 331.]

Defense counsel objected and the trial court sustained the objection and instructed the jury to disregard the prosecutor's last remark. Id.

The Supreme Court held that it was improper for a prosecutor to contend in summation that the police had no motive to lie. State v. R.B., 183 N.J. at 331-332. The Court found that these comments impermissively suggested to the jury that the testimony of the police officers should be believed because they were law enforcement officers rather than judging their credibility on the believability of their testimony. Id. at 332. The Court also

determined that the prosecutor should not have "stretched his advocacy to the use of sarcasm in defense of the credibility" of the detective. Id. at 333.

The Appellate Division applied the Supreme Court's decision in R.B. to the facts in State v. Murphy, 412 N.J. Super. 553, 560-563 (App. Div. 2010). During summations, the defense counsel attacked the credibility of the police officer and the prosecutor responded by saying that, "Officer [x] is an Asbury Park police officer who has no outcome - no stake in the outcome of this proceeding, whereas the defendant clearly does." Murphy, 412 N.J. Super. at 559. Defense counsel objected to the prosecutor's comment and the judge overruled the objection and held that the remark was fair comment on credibility. Id. at 559, 561.

The Appellate Division found that the comment in Murphy to be indistinguishable from the comment the Supreme Court found improper in R.B. Murphy, 412 N.J. Super. at 560-563. The appellate court determined that the impact of the prejudicial comment was compounded by the trial judge's overruling of the defense objection and finding it to be fair comment. Id. at 561. The court decided that the remark was not harmless error because it "had the clear capacity to unfairly tilt the outcome in favor of the State." Id. at 561-563.

CREDIBILITY ATTACKS ON POLICE OFFICERS WHO ARE DEFENDANTS

In State v. Morais, 359 N.J. Super. 123 (App. Div.), certif.

denied, 177 N.J. 572 (2003), the Appellate Division held that the prosecutor's comments on the "blue wall" was fair comment where defendant was a police officer and so were many of his witnesses. The court recognized that the term "blue wall" was common parlance for police officers' reluctance to incriminate fellow officers. Id. at 132. A prosecutor may comment on the credibility of the defense witnesses, even if they are police officers, and such remarks are fair comment. Id.; State v. Munoz, 340 N.J. Super. 204, 218 (App. Div.), certif. denied, 169 N.J. 610 (2001).

COMMENTS ON CHARACTER WITNESSES

A prosecutor can appropriately comment on a character witness' lack of truthfulness when he or she testifies or on his or her complete unfamiliarity with the events leading up to the criminal charges filed against defendant. State v. Neal, 361 N.J. Super. 522, 536 (App. Div. 2003). A prosecutor cannot cast aspersions on defendant for calling character witnesses. Id.

For example, in State v. Neal, 361 N.J. Super. at 535-536, the Appellate Division found it was improper for the prosecutor to argue in a case where defendant was charged with perjury, that defendant "should be really ashamed of himself that he would put those character witnesses of his in the line of fire like that to come in and say good things about him when he knows he lied." See State v. Marshall, 123 N.J. 1, 159-160 (1991), cert. denied, 507

U.S. 929 (1993) (improper for prosecutor to suggest that "there's a place in hell" for defendant because he used his sons' testimony in an attempt to gain an acquittal).

INAPPROPRIATE APPEALS TO THE JURY

> The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. [ABA Standard 3-5.8(c)]
>
> The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. [ABA Standard 3-5.8(d)]

NAME CALLING

Under no circumstances should a prosecutor use derogatory names in referring to a defendant. A prosecutor must refrain from using epithets about a defendant or his character. State v. Roman, supra, 382 N.J. Super. at 59. In the past, names such as butcher boy, leg breaker, punk, equal opportunity shooter, thug, or maniac and comparing the accused to various forms of the animal kingdom have drawn the court's censure. State v. Sheika, 337 N.J. Super. at 250. It is improper to refer to defendant as a "cancer" or "a parasite upon society" State v. Williams, 113 N.J. 393, 455 (1988), or to describe defendant as a "coward," "liar," or "jackal," State v. Pennington, 119 N.J. at 577, or to

characterize defendant as "a ninny," "a buffoon," and a "violent criminal." State v. Gregg, 278 N.J. Super. 182, 189 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995).

In State v. Roman, 382 N.J. Super. at 59, the Appellate Division found that cross-examination of defendant about his changing stories was proper as was an argument to the jury inviting disbelief. Id. During summation, the prosecutor said that defendant "was nothing more than a despicable liar," and the court found that "at worst, the prosecutor here was guilty of only hyperbole." Id. at 59.

However, in State v. Patel, Docket No. A-6463-89T3, the Appellate Division held that it was reversible error for the State to "paint a portrait of defendant as one who gambled, under reported his income, and took advantage of a 'black kid from a black community.'" Similarly, in State v. Russo, 243 N.J. Super. 383, 408 (App. Div. 1990), certif. denied, 126 N.J. 322 (1991), the court held that it was improper for the prosecutor to refer to defendant's wife as a "bitch" and call the defense psychiatric experts "whores."

REMARKS TO PARTICULAR JURORS

It is improper for a prosecutor to refer to a juror individually by name, experience or background. State v. Morais, 359 N.J. Super. at 131. In Morais, defendant was a police officer on trial for false swearing. The prosecutor argued that

the narcotic police officers should have searched a drug suspect immediately after arresting him and then made the following remarks:

> Isn't that logical? Isn't that what you would expect a cop to do? You know, many of you know police officers. I believe when you were questioned during the jury *voir dire*, someone, you're married to a cop, I even think.

The Appellate Division held that the remark was inappropriate but found that the error was harmless.

PERSONAL BELIEF IN DEFENDANT'S GUILT

> It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. [ABA Standards, 3-5.8(f)].

It is clearly improper for a prosecutor to declare his or her individual belief or official opinion of a defendant's guilt, or personal opinion regarding a case, especially when it implies that such belief is based upon evidence not presented at trial. State v. Wakefield, 190 N.J. 397, 440 (2007); State v. Jenkins, supra, 299 N.J. Super. at 70. It is inappropriate for a prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. State v. Abdullah, supra, 373 N.J. Super. at 268. Thus, comments like "I think he lies. I think he did lie before you," or "I don't think he was credible, and "I don't think you

should buy his story because I don't buy it," were improper because the comments were couched in terms of the prosecutor's belief. State v. Jenkins, supra.

Such opinions are considered improper because the jury may view it as an invitation from the prosecutor to rely on him or her as a crime expert and because the jury may believe that prosecutor's judgment is based on evidence not presented at trial. State v. Wakefield, 190 N.J. 397, 440 (2007); State v. Jenkins, supra, 299 N.J. Super. at 70; State v. Hinds, 278 N.J. Super. 1, 18 (App. Div. 1994), rev'd on other grounds, 143 N.J. 540 (1996).

A prosecutor may, however, suggest that witnesses lied, or suggest that witnesses are not truthful. State v. Morton, supra, 155 N.J. at 457-58; State v. Abdullah, 372 N.J. Super. at 268. This is especially so where there is conflicting evidence or reasonable inferences can be drawn from the evidence presented during the trial. State v. Abdullah, 372 N.J. Super. at 268. While a prosecutor has the right to call to the jury's attention discrepancies in a defendant's testimony and then argue that the defendant was not truthful, a prosecutor cannot express a personal opinion regarding the credibility of defendant's testimony. State v. Jenkins, supra, 299 N.J. Super. at 70.

A prosecutor should likewise refrain from suggesting that he has personal knowledge of a defendant's guilt from his expertise

and wholly aside from the evidence presented at trial. In State v. Ramseur, 106 N.J. at 320, the Supreme Court held it was improper for the prosecutor to ask a defense expert witness on cross-examination "whether she thought her 'common sense' was better than that of the prosecutor who had 'tried two hundred criminal cases and investigated a thousand.'"

In State v. Lenin, 406 N.J. Super. 361 (App. Div. 2009), the Appellate Division rejected defendant's claim that the lead investigator in the case improperly testified as to his belief in defendant's guilt. Id. at 382. The investigator testified that defendant was considered the main suspect because he lied to the police and gave inconsistent statements. Id. at 382. The court found that the investigator's testimony merely responded to defense counsel's challenge that the State ignored other viable suspects and focused narrowly on the wrong man, the defendant. Id. The court found that the witness did not opine on defendant's guilt but simply explained that defendant's inconsistencies and implausibilities caused him to be singled out as the prime suspect. Id.

In State v. Atkins, 405 N.J. Super. 392 (App. Div. 2009), the Appellate Division rejected defendant's claim that the prosecutor offered her own testimony as an expert during summation when she discussed the absence of DNA evidence in a child sexual assault case. Id. at 402. The prosecutor responded

to the defense attack on the lack of DNA evidence by pointing out that the child testified that the defendant did not ejaculate during the sexual assault. Id. at 400. The prosecutor also noted that the child was taking a bath when she disclosed the abuse, which could have washed away any DNA evidence. Id. at 400.

The appellate court found that the prosecutor's comments did not depart from the facts and evidence elicited at trial and the reasonable inferences that could be drawn therefrom. State v. Atkins, 405 N.J. Super. at 402. The court found that the prosecutor's comment that the exposure to soap and water might have an effect on diluting or removing a substance was logical, was not expert testimony, was within the ken of the average juror and was appropriate. Id.

EMOTIONAL APPEALS

A prosecutor must confine his or her remarks to the evidence and not make emotional appeals to the jury. In State v. Blakney, 189 N.J. 88 (95), the Supreme Court found that the prosecutor's highly emotional and personalized remarks in a child homicide case crossed the bounds of propriety and were unnecessarily inflammatory. The Court found the following remarks of the prosecutor to be particularly troubling:

> You don't have the luxury of looking at these photographs and

> feeling the sorrow and anger and rage that I feel when I look at them, and if during the course of this trial I let those feelings out because I yelled too loud or because I threw a doll into that seat, forgive me. Every once and a while I can't remain distant anymore. It just gets the better of you. So I'm sorry if I offended you.
>
> * * *
>
> I'm done. I could probably go on for, go on to lunch, maybe longer, But I can't look at these photos anymore. I just can't.
>
> * * *
>
> Why the hell would you do that to a child? Why? Because you're frustrated? Because you don't want to be a mother anymore? I mean, what is most repulsive about this case is that we are confronted with the notion that a mother can do this to her child. We are repulsed by that. Motherhood, a more noble avocation you can't find. [State v. Blakney, 189 N.J. at 95-96].

DUTY TO CONVICT OR TO PROTECT SOCIETY FROM DEFENDANT

A prosecutor can ask for justice in the form of a conviction provided that it is based on the evidence presented in the case. State v. Levin, 406 N.J. Super. 361, 382-83 (App. Div. 2009).

However, it is improper to make comments which imply that it is the jury's function to protect anyone. State v. Roman, supra, 382 N.J. Super. at 58. The jury's role is to determine whether the State has proven its case against defendant beyond a

reasonable doubt. Id. Nor is it proper for a prosecutor to tell the jury that it is their duty to convict defendant and that a failure to do so would constitute a violation of their oaths as jurors. Comments that have drawn the censure of the courts include:

> And so one final time I'm going to ask you to live up to your oath and apply [the] law. I'm going to ask you to reratify and exalt that law which holds us together. I'm going to ask you to return the verdict that says that Frank Pennington alone is responsible .. I'm going to ask you to return the verdict that's called for by your oath, by the law, by the evidence, that the aggravating factors here, shotgun murder, robbery, here far outweigh those minuscule excuses that he has proffered. [State v. Pennington, 119 N.J. at 575-576]
>
> * * *
>
> If you don't have the courage, ladies and gentlemen, then you must acquit them. [State v. Sims, 140 N.J. Super. 164, 175 (App. Div. 1976)].

Nor should a prosecutor suggest that defendant is

> hoping that he's found twelve stupid people in the county to decide this case. He is hoping that by some stroke of luck somehow you guys might drop the ball and get so confused that you misread the evidence, find him not guilty, so that he can just walk out of here like nothing happened. [State v. Pindale, 249 N.J. Super. 266, 286 (App. Div. 1991)].

The prosecutor cannot argue in his summation that defendant always has been and always will be a dangerous person and therefore the jury should convict in order to "protect society from crime." The appellate courts found the following comments to be improper:

> By that first aggravating factor alone, ladies and gentlemen, the second murder, the total lack of rehabilitation - let me ask you this, let's assume you give Bryan Coyle a break. Let's assume you do not impose the death penalty. Can you really sit there confidently and say to yourself, well, he'll never do this again? Is there anybody who can be confident of that knowing what his attitude is, knowing how he reacted within just a couple of months after getting out of jail in the first murder? Can anyone of you say he's going to turn out to be a good, productive citizen in jail and after jail? You can't, you can't, because when he got out of jail the first time he showed you what kind of a person he is. This man cannot be rehabilitated. It's not possible, based on the facts and the evidence that we have in this case. So, I say to you that based on the first aggravating factor alone, the fact that he has killed twice, you are entitled, you are justified and you probably should impose the death penalty. [State v. Coyle, 119 N.J. 194, 230 (1990)].
>
> * * * *
>
> He did the thing the right way. Everything that this guy did wrong,

he did right. Now the [victim] family is basically saying to you -- and don't think they won't move right out of town if you let him off.

They're saying to you: Do me justice now. This is America. And if he wants to get up and say whatever he wants to say to you people, this man who respects authority if it respects him, he's saying to you: Help me. I've got a family here to raise. I'm not doing a perfect job, I'm not doing the worst job, either.

But I live here in Toms River, and all I have between this man is you, you people. That's it.

The American way, you're going to do him right? I hope so. Wouldn't want something like this to happen later on, and don't think it won't.

This man's words: I'm at the point where I really don't care what happens anymore, because we're together till death do us part. And I don't take that lightly.

As he showed you, he doesn't take it lightly. "I'll kill you dead before I let somebody else have you forever, and that's some real shit." And don't think that this man doesn't mean it, that he won't try it again.

I hope you do justice for that family. [State v. Richard Geibel, Docket No. A-1047-89T4, decided May 17, 1991].

* * * *

If he had walked out of there

> [police station], he would have been given a license to kill. [State v. Koedatich, 112 N.J. at 324].
>
> * * * *
>
> The laws are made for our protection and in this case, ladies and gentlemen, we must realize that it is our responsibility to protect everybody here who has no interest in this case and to protect everybody out there in the culture of Essex County from the cruel, horrible, inhumane acts of murder. [State v. Ramseur, 106 N.J. at 321].

A prosecutor should not make comments that appeal to the fears of the jurors or their personal safety. The court in State v. Eddie Valentine, Docket No. A-4986-06T4 (App. Div. February 2, 2010), found that the prosecutor made several "alarmist" comments about the jurors' concerns for personal safety. The victim was a cab driver who was robbed at gunpoint. The prosecutor made the following statements during opening and closing remarks that focused on the fear issue:

> When we go to work, we think we are going to be safe, safe to go there, safe to come home, safe from harm, from anyone trying to harm us.
>
> * * *
>
> We have the right to feel safe when we go to work, travel from place to place, where we go to see our friends, have the right to travel around, go to our jobs without fear of being threatened, fear of being

harmed, fear of being robbed.

The Appellate Division believed that the prosecutor's comments impermissibly shifted the focus away from whether the State had met its burden of proof to establish the statutory elements beyond a reasonable doubt, to the need to protect society from further harm in the future. State v. Eddie Valentine, Docket No. A-4986-06T4 (s.o. at 23).

RACIAL REMARKS OR EMOTIONAL APPEALS TO THE JURY

It is improper for a prosecutor to make an emotional appeal to the jury or base an argument upon racial prejudice or stereotypes. State v. Black, 380 N.J. Super. 581, 594 (App. Div. 2005), certif. denied, 186 N.J. 244 (2006). Emotional appeals have the capacity to shift the jury's attention from the evidence and produce a verdict fueled by emotion rather than a dispassionate analysis of the evidence. State v. Black, 380 N.J. Super. at 595. For example, references to the extraction of a child's organs during an autopsy are inflammatory and should be avoided. State v. Timmendequas, 161 N.J. 515, 581 (1999), cert. denied, 534 U.S. 858 (2001); State v. Black, 380 N.J. Super. at 595.

In State v. Black, supra, a case involving the death of a ten-month-old child, the Appellate Division found the following remarks at the conclusion of the prosecutor's summation to be improper and inflammatory:

> Little Ziaya has been silenced in this world forever. But she testified to us through those doctors. Even in death, that little girl cannot rest. Doctors had to cut her body open, they had to take out her brain and her eyes. And in her little body, they were able to determine the awful truth. And the awful truth is that her father murdered her.
>
> Let Ziaya rest now. Hear her voice through those doctors. The evidence the State has put forth is powerful. I submit to you it more than supports the State's burden and is more than sufficient to convict the defendant.
>
> Ladies and gentlemen, I ask you, then, on behalf of the people of the State of New Jersey, and ask you on behalf of Ziaya, give her the justice she so much deserves, and convict defendant of murder. [State v. Black, 380 N.J. Super. at 592.]

In State v. Clarence Moore, Docket No. A-1910-87T4, (App. Div. 1991), the appellate court held that it was improper for a prosecutor to argue in a sexual assault case that the defendant had a predilection for white women which the jury might consider in determining whether the State had proved its case. See Moore v. Morton, 255 F.3d 95 (3d Cir. 2001) (habeas granted because of improper comments on summation). In the Moore case, the defendant, who was black, was charged with sexually assaulting a white woman. The prosecutor pointed out that defendant was married to a white woman and improperly argued:

> So I ask you this: What did we learn when we found out that Cheryl Moore was the wife of the defendant? I suggest to you in a non racist way that what we found out was that Clarence McKinley Moore made a choice to be with a Caucasian woman --- [interrupted by objection].

The prosecutor in that case also made an improper appeal to the emotions of the jury - an attempt to influence and prejudice it - when he said:

> The last thing I have to say is that if you don't believe her [the victim] and you think she's lying, then you've probably perpetrated a worse assault on her.

Similarly, it is improper to appeal to the "base interests of the jury by exploiting the ethnic differences of the parties." In State v. Patel, Docket No. A-6463-89T3 (decided May 7, 1991), the defendant, an immigrant from India who owned a small grocery store, was charged with hiring a young black man named Jones to burn down a rival store. At defendant's trial for arson, Jones was the primary witness for the State. The prosecutor commented in summation:

> They didn't even pay him the thousand dollars. Bad enough they exploited this black kid from a black community into committing the fire, but they didn't even come through with the money they said they would give him. They only gave him a hundred dollars. So, now, the kid faces seven years in State's prison for a hundred

> dollars.
>
> * * * *
>
> Also, realize it's a cash business, so his money -- there is money probably in here, that was alluded to by [defense counsel], that's not reported. Cash business, that's the nature of the beast, all right.
>
> You'll also note, in the tax returns, 1988 in particular, that he paid only $784, and just had a gross income of $11,365. Now, he told you he was doing good. Does this indicate to you he was doing good? And this doesn't account for the extra cash that he had during the flow of his business.

The Appellate Division determined that the "prosecutor's blatant racial comments were highly inflammatory and prejudicial." The court found that evidence of Jones' financial problems and long-standing drug addiction may have "engendered sympathy and bias when contrasted with defendant's position as a self-proclaimed successful food store operator in the black community, who was of foreign extraction."

ASKING THE JURY TO SEND A "MESSAGE" WITH ITS VERDICT

It is improper to suggest to the jury that they have a moral obligation to convict defendant or that a not guilty verdict would be a violation of their oaths as jurors. State v Knight, 63 N.J. 187, 193 (1973); State v. Goode, 278 N.J. Super. 85, 89 (App. Div 1994); State v. Acker, 265 N.J. Super. 351, 355-357 (App. Div. 1993), certif. denied, 134 N.J. 485 (1993); State v.

Rose, 112 N.J. 454, 521 (1988); State v. Pindale, 249 N.J. Super. at 286; State v. Kounelis, 258 N.J. Super. 420, 429 (App. Div.), certif. denied, 133 N.J. 429 (1992); State v. Holmes, 255 N.J. Super. 248 (App. Div. 1992); State v. Stewart, 162 N.J. Super. at 103-104; State v. Sims, 140 N.J. Super. at 175.

For example in State v. Hawk, 327 N.J. Super. 276, 282 (App. Div. 2000), the prosecutor told the jury during summation:

> At the opening of the State's case, I told you that I wanted you to hold somebody, meaning, mainly, Douglas Hawk accountable for his actions that happened on August 29th, 1996. Now what [message] are you going to send the community if you reach a verdict of guilty? Well, the message that you will send is that this community will not tolerate distributers and sellers of LSD. That's the message you're going to send with your verdict of guilty against Douglas Hawk.
>
> * * * * *
>
> The State asked you to hold people accountable for their actions. There's two versions. Two verdicts you can give: Guilty or not guilty. Guilty tells Douglas Hawks, you do the crime, you do the time. The second version tells Douglas Hawk or the community, you know what, ...maybe the law enforcement officials in Salem County and Cumberland County didn't do their job.

In State v. Morais, supra, 359 N.J. Super. 123, the Appellate Division found that the prosecutor's remarks on the

integrity of the criminal justice system were an appropriate response to defense counsel's summation. Defendant was a police officer and defense counsel referred to the war on drugs in his summation and urged the jurors to protect their community and send a message to the criminals. Id. at 133. Defense counsel asked the jurors to acquit the police officers and reject the testimony of the State's witness because he was a drug dealer. Id. The prosecutor responded in the following manner:

> It's about insuring that the police are honest, that they don't on their own decide what the law is going to be, and make things up on people; that we can count on them when they come into this witness stand and testify on trials, put their hands on the Bible and sit here and testify in trials ranging from murder to rape.
>
> * * * * *
>
> When they come in to testify at trial where a person's guilt or innocence hangs in the balance, a person's liberty hangs in a balance, there's nothing more important than that people who live here, all of us have confidence that that officer who may be looking over to a defendant and saying, yes, that person right over there, that's the person who I caught, that's the person who was robbing someone, that's the person who had drugs right there, that guy right there, I caught him with fifty decks of heroin...
>
> What's more important than that, people like all of us who sit on

> juries have confidence that the officer is telling the truth.

The appellate court took into account defense counsel's remarks and the context of the trial and determined that the "prosecutor's remarks balanced the scale." State v. Morais, 359 N.J. Super. at 133.

A prosecutor must avoid telling the jury it has a duty to protect a certain class of victims. The Appellate Division held that it was improper for the prosecutor to tell the jury, in a prosecution for sexual assault of a child, that it had a duty "to protect this child." State v. Buscham, 360 N.J. Super. 346, 364-365 (App. Div. 2003). The appellate court has also held that it is impermissible for a prosecutor to argue that defendant, who was school board member, should be held "accountable for the betrayal of the children [of] Asbury Park." State v. Neal, 361 N.J. Super. 522, 537 (App. Div. 2003).

Similarly, in State v. Acker, 265 N.J. Super. at 356, the prosecutor argued during summation that:

> All kinds of groups have spokesmen, people marching up when anyone offends them except children. We do have some special laws to protect them. Those laws are only as good as the juries that are willing to enforce them. Albeit, it will be difficult decision if you find him guilty beyond a reasonable doubt to say it, it sure will be. It's going to be tough. But it's not going to be any tougher than turning your back on these three

> little kids who did what they were taught to do. They were taught to report it, to tell about it. They had the courage to come in here and tell you about it. Give them some justice folks. [State v. Acker, 265 N.J. Super. at 354-55].

The Appellate Division found the remarks to be "egregious," because the clear import of the prosecutor's remarks was that unless the jury convicted defendant, the jurors would violate their oaths. Id. at 356-357. The appellate court reversed the convictions because it found that this argument alone had the clear capacity to deprive defendant of his right to a fair trial. Id. at 357.

PERSONAL ATTACKS ON DEFENSE COUNSEL

One of the main areas of concern in the conduct of the prosecuting attorney is the increasing number of personal attacks leveled against defense counsel. A prosecutor is not permitted to attack, disparage, or demean adverse counsel, either directly or indirectly. State v. Abdullah, supra, 372 N.J. Super. at 269. This all too common occurrence begins when a defense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985).

The appropriate response to improper or prejudicial remarks by a defense counsel is an objection and curative action by the trial court. United States v. Young, 470 U.S. at 13-14; 105

S.Ct. at 1045. A prosecutor should not take matters into his own hands and begin his own ad hominem attack against defense counsel. Retaliation may soothe wounded egos but it definitely jeopardizes the conviction on appeal. The best revenge is a fairly obtained conviction that can withstand any attack on appeal.

Prosecutors are prohibited from casting unjustified aspersions on the defense or defense counsel. State v. Wakefield, supra, 190 N.J. at 446; State v. Nelson, 173 N.J. 417, 461 (2002); State v. Abdullah, 372 N.J. Super. at 270; State v. Sherman, 230 N.J. Super. 10, 16 (App. Div. 1988). Nor should the prosecutor accuse defense counsel of concealing their client's guilt through deception. Id.; State v. Neal, 361 N.J. Super. 522, 536 (App. Div. 2003). When a prosecutor attacks a defense counsel personally or demeans his role at trial, he demeans the profession and the integrity of the trial process. State v. Thornton, 38 N.J. 380, 397 (1962), cert. denied, 374 U.S. 816 (1963); State v. Watson, 224 N.J. Super. 354, 362 (App. Div.), certif. denied, 111 N.J. 620, cert. denied, 488 U.S. 983 (1988). A criminal trial is not a sporting event. Winning and doing justice are not always equivalent. State v. Watson, supra at 363.

The following are examples of comments which have been sharply criticized by the appellate courts.

I know what [witness X] said, but come on, I mean [witness X], the mother of his [defendant's] child, [witness X] who basically comes in here and tells you that the alibi was concocted by her and [defense counsel] after she goes to hire him. [State v. Munoz, 340 N.J. Super. at 217].

* * * *

For the life of me, I've sat through this trial and summations and asked myself what are the defenses here, what's going to be the defense theory, what are they going to tell the Jury happened on that night. Well, you know now they're not going to tell you what happened on that night, because, if they did, their clients would be convicted, so they're going to try to use certain courtroom maneuvers to work on you.

The first defense is the defense of confusion, let's confuse the jury....

The name of this case is State versus Roland Sherman and Todd Barnes. They did it, and they're guilty, and nothing that a lawyer can say standing up here with books and diagrams and pictures can change that, and they know it. [State v. Sherman, 230 N.J. Super. at 16].

* * * *

His mommy hired him a lawyer. Does this man think that he is going to be able to buy his way out of it? . . . They could spend a billion dollars and it's not going to bring back [the deceased,]

The defense's role in this case is to try to confuse you. [State v. Pindale, 249 N.J. Super. at 286].

* * * *

Why don't we cut through all the smut, we have this discussion about legality, probability, possibility, we'll start out with the defendant guilty] of death by auto.

It is typical with the best defense counsel, when the evidence is so overwhelming that it really makes your gut wrench, what do you do, you don't say look at the evidence, you say look over in the corner of the room, by God, look at some smoke in the corner of the room.

You say look at the smoke over here, because I don't want you to look in this direction, I don't want you to look at the defendant's conduct, I don't want you to look at the circumstances of the case, I don't want you to look at the facts because, if you look at the facts, I'm crushed. My defendant is guilty. [State v. Lockett, 249 N.J. Super. 428, 434 (App. Div.), certif. denied, 127 N.J. 553 (1991)].

* * * *

Smoke. Smoke. Don't listen to what she said, don't listen to the fact that it rings true, don't listen to the fact that golden thread continues to be wound around the necks of the defendants, don't think about that. Listen to my puffer, listen to me blow smoke, come with me, come with me, because we're going to go into the back of

the courtroom. Let's go -- let's gather ourselves out back there and let's talk about stuff that really is not related to the truth. Because God, the last thing I want you to do is to remember what the facts are in this case, because if you do, my client is sunk...

The Prosecutor, the nameless Prosecutor, he's just trying to present certain of the evidence to you because he's out to get [defendant]. It's this great conspiracy, it's the traditional defense of desperation. The traditional defense of desperation, if all the evidence points to your client, your clients, what do you say? Everybody else is conspiring against us, gee, this is unfair. Gee, all the evidence is against me, I don't understand this. I look at the facts it looks like I can't get away from the fact that my client is involved with the murder, so what do I say? I've got to say something to this jury, conspiracy, I got it. I've got it, uh huh, I've got it, it's a conspiracy. Everyone, everyone involved in the case is lying just to get my client. That's what it must be. Listen to me, if I shout loud enough I will persuade you, although I am -- I don't really have great powers of persuasion, members of the jury, I'm just a country boy...

Now don't be made fools because arguments have to be made to you in summation, don't be made fools of. This is not about fooling you, that's not what justice means, that you get fooled by dazzle, by tap dance, by maneuvers, by theatrics.

> That's not what justice is about.
>
> [State v. Roger Williams, Docket No. A-4776-88T5 (decided July 11, 1990)].

In State v. Frost, 158 N.J. at 86, the Supreme Court found that it was improper for the prosecutor to make comments during summation which suggested that defense counsel's arguments were "lawyer talk," and that defense counsel hoped that one or more of the jurors had "a bad taste in [their] mouth toward [police] officers." The Court emphasized that a defense counsel should not be subjected to disparaging remarks for simply doing his or her job.

The Appellate Division reversed an aggravated manslaughter conviction because of comments made by a prosecutor during summation which denigrated the defense of insanity. State v. Rodriguez, 365 N.J. Super. 38, 49-53 (App. Div. 2003), certif. denied, 180 N.J. 159 (2004). The prosecutor told the jury:

> And ask yourself when you're analyzing the evidence is he so sick that we're going to excuse him for the murder of [victim]... His whole psychiatric defense business is so pat and so contrived that I submit to you it's not worthy of your consideration. They did nothing. The defense did nothing. And they come in here and boldly suggest to you that you should let a murder be excused on account of mental illness. Chew on that for a minute, ladies and gentlemen...
>
> You're going to have to make a

> decision that you're going to have to live with. And you got to make this decision just like you make any other decision. You got to decide whether I'm going to say, okay, insanity, excuse, hospitalization work[s] for me or whether you're going to say the evidence of his guilt is overwhelming.... there is no question he killed [victim]. The only way he gets away with a conviction for a crime is the insanity defense. [State v. Rodriguez, 365 N.J. Super. at 49-50].

The Appellate Division found that the prosecutor's comments concerning the "excuse" of the insanity defense had the capacity to denigrate the defense in the eyes of jury, and sent a message to the jury that society should not condone "excusing" a heinous crime based on the insanity defense. Id. at 50-51.

Nevertheless, a prosecutor may suggest to the jury that the defense's presentation of the evidence was unbalanced and incomplete. State v. Wakefield, supra, 190 N.J. at 451; State v. Josephs, 174 N.J. 44, 127 (2002)(comments on defense mitigation specialist Carmeta Albarus); State v. Timmendequas, 161 N.J. 515, 592-95 (1999) (comments on defense mitigation expert Carol Krych). A prosecutor's statements on the deficiency of a defendant's defense and inferences to be drawn therefrom are permissible as long as they are grounded in the record. State v. Wakefield, 190 N.J. at 451; State v. Josephs, 174 N.J. at 127. In assessing the worth of the defense's case, the jury is

entitled to consider whether it was receiving a full picture, as interest and bias are always considered relevant. Id.

The State does not denigrate the defense by pointing out what evidence was not presented or by speaking frankly about what is manifest in the record. State v. Timmendequas, 161 N.J. at 594-95. Similarly, a prosecutor may respond to a defense counsel's arguments that the State's case left many unanswered questions by contending that the areas commented on by defense were fundamentally not important to the overall picture of the case. State v. Kelly, 406 N.J. Super. 332, 351 (App. Div. 2009), aff'd, 201 N.J. 471 (2010).

COMMENTS ON DEFENDANT'S DEMEANOR

In State v. Rivera, 253 N.J. Super. 598 (App. Div.), certif. denied, 130 N.J. 12 (1992), the Appellate Division held that a prosecutor should not ordinarily be permitted to comment on a non-testifying defendant's demeanor or behavior at trial. Id. at 604. The court recognized that there might be a limited exception to this general rule and set forth guidelines for the trial courts to apply in appropriate circumstances. If a defendant attempts to interject his unsworn comments into a trial by word, gesture, display of emotion, or other demeanor, such an affirmative act may fairly be the subject of limited comment noting the fact of the behavior and that the comment or demeanor should not be considered by the jury. Id. at 604-05.

Only in the clearest cases should the State be permitted some responsive comment, and only when a simple jury instruction would not be sufficient to cure the effect of defendant's affirmative conduct. Id. at 605. Even then the prosecutor's comment must not infringe upon defendant's right not to testify. Id. at 605.

In State v. Adames, 409 N.J. Super. 40 (App. Div.), certif. denied, 200 N.J. 504 (2009), the Appellate Division reversed a murder conviction because of the prosecutor's cross-examination of the defense psychiatrist and comments during summation on the non-testifying defendant's demeanor. Defendant bludgeoned his father to death with a baseball bat and raised an insanity defense at his trial for murder. Id. at 42-43. The defense expert testified that defendant's "flat effect" was an indicator of schizophrenia. The prosecutor cross-examined the doctor about a conversation she witnessed between defendant, his lawyer and the witness where defendant appeared to be laughing and whispering. Id. at 54-55.

Defense counsel objected to any reference to the conversation but the trial court allowed the prosecutor to ask the doctor about defendant's demeanor during the conversation. State v. Adames, 409 N.J. Super. at 55-56. The prosecutor continued the cross-examination and later discussed defendant's demeanor during summation. Id. Specifically, the prosecutor

refereed to defendant's alleged laughing demeanor during the conversation with counsel and the expert and the lack of any schizophrenic behavior exhibited during trial. Id. at 56-57.

The Appellate Division held that the defendant's interaction with counsel and the expert did not rise to the level of conduct that would trigger the limited right to comment on the demeanor and conduct of a non-testifying defendant permitted under State v. Rivera, supra, 253 N.J. Super. 598. State v. Adames, 409 N.J. Super. at 57. The Court found that defendant's failure to act during the trial as if he was hearing voices and his interaction during a conversation could not be viewed as an unsworn attempt to influence the jury. Id. at 58-59.

The court held that the fact that a defendant raises an insanity defense does not give the prosecutor the right to comment on a defendant's non-testimonial behavior or make unsworn statements as to the defendant's conduct during the proceeding. Id. at 59-60. The court recognized the impossibility of eliminating the jury's consideration of a non-testifying defendant's demeanor and behavior during trial, especially when the defendant's mental health at the time of the crime is the only question posed to the jury. Id. at 60. Nevertheless, this possibility does not open the door for the prosecutor to comment on the defendant's behavior or demeanor. Id.

COMMENTS ON WITNESS INTIMIDATION

A prosecutor can comment in his opening statement that the witnesses had been threatened if there is evidence to support the remark. State v. Echols, 199 N.J. 344, 359-360 (2009). In Echols, after the prosecutor stated in his opening that the witnesses had been threatened and intimidated by defendant and members of the "Hit Squad" gang, he then said:

> Listen to everything with an open mind. [The witnesses who had allegedly been intimidated] are not people who like you who are able to sit in a fairly nice courtroom in Essex County. **The sheriff officers are here, so that you can feel safe and comfortable. You knowing nothing is going to happen to you.** You are just hearing evidence. Think about the people who are living in the community and why they might say, Well, my son is more important. My life is more important. I never saw nothing. I don't want to be involved anymore. get me out of this. Keep an open mind. That is all I am asking at this point. Listen openly and carefully to the evidence you hear from the witness stand. [State v. Echols, 199 N.J. at 352].

The Supreme Court held that it was appropriate for the prosecutor to explain to the jury why some of the witnesses who had implicated the defendant in the death of the victim later changed their stories. Id. at 359-60. However, the Court found that the prosecutor's reference to the safety of the jurors in the courtroom was completely unrelated to facts to be presented at trial and he should not have contrasted the threats and

intimidation of the witnesses with the fact that the jurors would be hearing the case in a safe environment. Id. at 360.

CONCLUSION

These are just a few of the problems which have arisen with respect to prosecutorial misconduct. The courts are taking a hard-line on this problem and have reversed convictions on these grounds and threatened disciplinary action against the prosecutors involved. Prosecutors should familiarize themselves with the law and their ethical obligations and conduct themselves accordingly.