Chapter 36

The Closing Stage of a Jury Trial: Renewal of the Motion for Acquittal; Closing Argument; Jury Instructions; The Jury's Deliberations and Verdict

Part A. The Renewed Motion for Judgment of Acquittal

§ 36.01 THE RENEWED MOTION FOR ACQUITTAL; PARTIAL DIRECTED VERDICTS

Chapter 35 described the nature and functions of the renewed motion for acquittal in a bench trial, together with various legal doctrines that bear upon the motion. Most of what was said about the latter doctrines there is also pertinent to jury trials. In a jury trial, however, the motion has heightened importance because it determines whether the case will go to the jury or be dismissed by the judge.

The judge may grant a motion for acquittal in whole or in part. S/he may dismiss counts of the Petition and submit others to the jury. S/he may grant an acquittal on the offense charged in the Petition and submit lesser included offenses to the jury. See § 36.05 *infra*.

Whereas defense argument on the motion for acquittal and closing argument are consolidated in a bench trial, they are, of course, separate in a jury trial. At the conclusion of all of the evidence (when both prosecution and defense have "rested"), defense counsel makes his or her renewed motion for acquittal, and the prosecutor responds. (Counsel should request that the jury be excused while the motion is made, argued, and ruled on, so that a denial of the motion does not convey to the jury the impression that the judge has ratified the sufficiency of the prosecution's case.) If the judge denies the motion in whole or in part, the attorneys then submit requests for jury instructions (see § 36.02 *infra*) and thereafter make their closing arguments to the jury (see §§ 36.10-36.12 *infra*).

In a jury trial on a criminal or delinquency charge, the court may not direct a verdict for the prosecution no matter how overwhelming and essentially uncontested the evidence of guilt. *See, e.g., United States v. Martin Linen Supply Co*., 430 U.S. 564, 572-73 (1977) (dictum); *Sandstrom v. Montana*, 442 U.S. 510, 516 n.5 (1979) (dictum); *Standefer v. United States*, 447 U.S. 10, 22 (1980) (dictum); *Rose v. Clark*, 478 U.S. 570, 578 (1986) (dictum); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (dictum); *cf. Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979) (dictum); *United States v. Bailey*, 444 U.S. 394, 412 n.9 (1980) (dictum); *Harris v. Rivera*, 454 U.S. 339, 345-46 (1981) (per curiam) (dictum).

Part B. Requests for Jury Instructions

§ 36.02 THE CONFERENCE ON INSTRUCTIONS

In some jurisdictions it is customary or obligatory, prior to the lawyers' closing arguments, for the judge to confer with the prosecutor and defense counsel to determine what the jury will be charged (or to "settle the instructions," as it is often called). *See*, *e.g.*, *United States v. Melhuish*, 6 F.4th 380, 392 (2d Cir. 2021) (dictum) ("[w]e have 'repeatedly held that defense counsel should be afforded the opportunity to review a proposed jury instruction'"). This may be done as a matter of routine, or counsel may have to request a conference if s/he wants one.

At the conference the judge may read to counsel, or allow counsel to read, part or all of what the judge proposes to instruct the jury. (Usually the "standard" parts of the charge will not be read or made available to counsel unless specifically requested. If counsel wants to see what the judge is going to charge about the role and obligations of jurors, the process of jury deliberation, the attitudes with which the jurors should approach their deliberations, proof beyond a reasonable doubt, and other "boilerplate" matters, counsel will have to ask explicitly to see these portions of the judge's draft.) The judge will then entertain objections and proposed modifications and will rule on them. See §§ 36.03-36.05, 36.09 *infra.*

Whether or not the judge is required to or does disclose his or her own draft jury charge, s/he will receive and rule upon proposed instructions by both parties (often called "requests for charge" or "prayers" or "points for charge"). *See, e.g.*, FED. RULE CRIM. PRO. 30 (if a party "request[s] in writing that the court instruct the jury on the law as specified in the request" (Rule 30(a)), "[t]he court must inform the parties before closing arguments how it intends to rule on the requested instructions" (Rule 30(b)); *cf. People v. Clark*, 453 Mich. 572, 589-91, 556 N.W.2d 820, 826-27 (1996) (reversing a conviction and remanding for a new trial because "the judge, after agreeing to a modified instruction, subsequently decided to charge the jury with the unmodified instruction after defense counsel relied on and conformed his closing arguments to the modified instruction"; "The rule that counsel be informed of the instructions to be given to the jury before closing arguments enables counsel to tailor arguments to the proper legal standards. If the instruction is changed after an attorney relies on it, it impairs not only the content and quality of the final argument, but the effectiveness of the representation as well."); *Ardoin v. Arnold*, 653 Fed. Appx. 532, 534-35, 536 (9th Cir. 2016) (the trial court "violated Ardoin's Sixth Amendment right to counsel during closing argument" by refusing to reopen closing arguments after authorizing the jury – during jury deliberations, in response to a question from the jury – to consider a felony murder theory that previously had applied only to Ardoin's co-defendant, thereby depriving counsel for Ardoin of any "opportunity whatsoever to argue felony murder after learning that the jury could convict on that theory"). The parties' requests for instructions are ordinarily required to be submitted to the court and opposing counsel, in writing, at a specified time (usually at the close of the evidence or at such other time as the trial judge orders). *See, e.g.*, FED. RULE CRIM. PRO. 30(a). They may or may not also be filed with the courtroom clerk, depending on local practice. In jurisdictions that have form books of approved jury instructions (sometimes called "pattern instructions"), counsel can simply request "Number 344" or "Number 344 as modified by . . . [*specifying any desired changes*]."

Oral requests for charge are permitted in some localities. However, even when they are

permitted, counsel should ordinarily make his or her requests in writing. This enhances the likelihood that the judge will stick to counsel's exact wording if the request is granted, and it assures an adequate record for appeal if the request is denied.

At the conference, the judge takes up each request for charge and rules on it, usually endorsing each request "allowed" ("granted"), "denied," or "charged in substance" ("covered"). The last of these notations indicates that the judge accepts the principle of the requested instruction but has, or thinks s/he has, adequately dealt with the point in another portion of the draft charge.

Procedures for preserving objections to the court's refusal to adopt proposed defense instructions vary. In some localities all written requests for charge are routinely made a part of the record that will go up on appeal; the judge's endorsement of a request "denied" or "covered" suffices to preserve a claim of error in the refusal of that request. In other localities counsel must arrange specially with the clerk to file the defense requests that the judge has denied. Elsewhere, the judge dictates his or her rulings to the court reporter during or after the conference on instructions – or the entire conference is stenographically recorded – and counsel must object to each ruling as it is dictated or made. In some jurisdictions, counsel may have to incorporate the rulings in formal bills of exceptions. Alternatively or in addition, counsel may be required to specify each denial of a defense request for instructions as a separate claim of error in a postverdict motion for a new trial (see § 37.02(a) *infra*) in order to preserve the claim for appeal. *Cf*. *People v. Fermin*, 36 A.D.3d 934, 935, 828 N.Y.S.2d 546, 548 (N.Y. App. Div., 2d Dep't 2007) ("the defendant's claim that the court erred in refusing to charge the jury as to justification pursuant to Penal Law § 35.15(2) [regarding the use of "deadly physical force in defense"] . . . is preserved for appellate review" even though defense counsel "specifically sought a justification charge pursuant to Penal Law § 35.05" [on "use of physical force"] because the trial court, "in making its ruling in terms pertinent to Penal Law 35.15(2), 'expressly decided the question' now raised on appeal in response to a 'protest by a party'").

In all of these regards, counsel should be sure s/he knows what local practice requires. If, as is commonplace, statutes and rules are silent on the operational details, counsel should seek advice from senior court clerks and from experienced defense attorneys whose practice includes appellate work.

§ 36.03 THE LORE OF CHARGING THE JURY

Conventionally, the trial judge is required to instruct the jury orally. *See*, *e.g.*, *United States v. Becerra*, 939 F.3d 995, 1000-02 (9th Cir. 2019) ("Since before the founding of our Republic, courts have universally met the need to educate jurors by orally advising jurors 'in the presence of the parties, the counsel, and all others . . . in matters of law arising upon th[e] evidence. . . .' ¶ . . . [T]he historic practice of oral jury instruction remains central to the fairness of jury trials. That conclusion does not mean that procedures for instructing juries have remained static – or should. *Additions* to oral instructions have enhanced the likelihood that jury

instructions will effectively communicate to jurors the legal principles governing their critical task. For example, pattern jury instructions, now routinely promulgated and updated, originated in the early 20th century and became widely used in the 1960s. . . . Also, although the use of written jury instructions was once a rarity, courts now often supplement oral jury instructions with written ones, giving them to jurors to read contemporaneously with the oral instructions or to take to the jury room after the oral charge. . . . But even as the exact form of a trial court's jury charge has evolved, there has always been a bedrock recognition that the trial court must orally charge the jury before deliberations commence.").

In addition to the substantive law on which the court will charge the jury and which is discussed at the conference on instructions, there is, in many jurisdictions, a more or less elaborate body of law on the subject of the judge's charge itself – what it must contain, what it may contain, its form, and so forth – that counsel will want to have in mind.

Usually, there are a few matters concerning which the court is obliged on its own initiative to charge the jury and to charge the jury correctly. The failure of counsel to bring omissions or errors in these matters to the court's attention is not fatal to a claim, on post-trial motions or appeal, that the charge was inadequate or erroneous. The matters whose omission or incorrectness may subsequently be noticed as "plain error in the charge" are commonly limited to (1) the elements of the offense (*see, e.g., Langford v. Warden, Ross Correctional Institution*, 593 Fed. Appx. 422, 427-33 (6th Cir. 2014), *vacated & remanded*, 576 U.S. 1049 (2015), *reaff'd on remand*, 665 Fed. Appx. 388 (6th Cir. 2016) (the trial court's failure to "instruct the jury that conviction as an accomplice, under Ohio law, requires that the defendant have the same intent as the principal" (*id*. at 428) violated the defendant's constitutional "'right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged'" (*id*. at 427), even though defense counsel did not object to the error despite having been specifically asked by the judge whether he "had any objections to the complicity section of the proposed jury instructions" (*id*. at 439 (Boggs, J., dissenting)); *United States v. Samora*, 954 F.3d 1286 (10th Cir. 2020); *United States v. Giannukos*, 908 F.3d 649 (10th Cir. 2018); *In re Ferrell*, 14 Cal. 5th 593, 602, 526 P.3d 110, 115, 306 Cal. Rptr. 3d 374, 381 (2023) (vacating a conviction because one of three alternative prosecution theories submitted to the jury was legally erroneous: "When, as here, an alternative theory is legally incorrect, instructions on that theory violate a defendant's constitutional right to 'a jury properly instructed in the relevant law.'")), (2) the statement that the burden of proof is on the prosecution beyond a reasonable doubt, and (3) a statement of the number of jurors who must agree to render a verdict. All other asserted imperfections must be objected to and any asserted omissions must be pointed out, with proposed language to cover the omitted point. *See, e.g.*, *Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977); *Hankerson v. North Carolina*, 432 U.S. 233, 244 n.8 (1977) (dictum); *cf. United States v. Frady*, 456 U.S. 152 (1982); *Engle v. Isaac*, 456 U.S. 107 (1982).

The judge is ordinarily not required to give the charges requested by counsel in the precise language of the request, even though that language correctly states an applicable legal principle. The judge may cover the matter in his or her own language instead. *See*, *e.g.*, *United*

States v. Stallings, 2023 WL 3534445 (5th Cir. 2023). But the jurisdictions differ in this regard, as they do on the questions (1) whether the judge is forbidden to comment on the evidence in addition to stating the applicable legal principles – and, if so, what constitutes a forbidden "comment" (*compare Gutierrez v. State*, 177 So.3d 226 (Fla. 2015), *and State v. Girard*, 34 Or. App. 85, 578 P.2d 415 (1978), *and State v. Stukes*, 416 S.C. 493, 499-500, 787 S.E.2d 480, 483 (2016), *and State v. Levy*, 156 Wash. 2d 709, 718-25, 132 P.3d 1076, 1080-84 (2006) (dictum), *and State v. Nomura*, 79 Hawai'i 413, 416-17, 903 P.2d 718, 721-22 (1995) (dictum), *with State v. Hopkins*, 108 Ariz. 210, 495 P.2d 440 (1972); and see § 36.13 *infra*); (2) to what extent and under what circumstances the judge is required to give instructions on the theory of the defense (see § 36.06, subdivision (6) *infra*); (3) whether the judge may refuse entirely to give a requested instruction because, although correct in its major outlines, it is incorrect on specific details or whether s/he has an obligation to give the substance of it, corrected as may be required to conform to law (*compare Privette v. State*, 320 Md. 738, 746-49, 580 A.2d 188, 192-93 (1990), *and Manuel v. State*, 667 So.2d 590, 592-93 (Miss. 1995), *and State v. Young*, 2021-NMCA-049, 495 P.3d 1189, 1196-97 (N.M. App. 2021), *with State v. Brazeal*, 247 Or. 611, 431 P.2d 840 (1967), *and compare United States v. Tydingco*, 909 F.3d 297, 302-03 (9th Cir 2018) ("Here, the court instructed the jury simply that the term 'harbor' 'means 'to afford shelter to.' The instructions did not include any requirement that the jury consider whether Defendants intended to violate the law. Defendants asked the court to instruct the jury that it had to find that they sheltered X.N. for the specific purpose of avoiding detection by immigration authorities. The court declined to give that proposed instruction. We hold that, although the court properly rejected Defendants' particular formulation, harboring instructions must require a finding that Defendants intended to violate the law."), *and United States v. Pursley*, 22 F.4th 586 (5th Cir. 2022) (a defendant is entitled to have a proposed instruction given if it "(1) . . . [is] substantially correct as a statement of the law, (2) [is] not . . . substantially covered in the charge as a whole, and (3) concern[s] an important issue in the trial, such that failure to give it seriously impairs the presentation of an effective defense" (*id*. at 591-92); "a proposed jury instruction is 'substantially incorrect' when, for example, the instruction relied on inapplicable law or had no foundation in the text of the relevant statute" (*id*. at 592).) *with United States v. Ravenell*, 66 F.4th 472 (4th Cir. 2023) ("[N]either of Ravenell's proffered jury instructions on the statute of limitations were legally correct. We have previously held that a district court commits reversible error in declining to provide a proffered jury instruction only when 'the instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense.' . . . On the record before us, Ravenell falters at step one." *Id*. at 481. The Court of Appeals goes on find no abuse of discretion in the district court's failure to give any statute-of-limitations instruction at all because the burden was on Ravenell to rebut the presumption that a conspiracy continues until a conspirator affirmatively withdraws, and Ravenell presented "no affirmative evidence" (*id*. at 483) of withdrawal; this holding is not couched in terms of a finding that there was no evidence from which the jury could have found the prosecution time-barred, but rather a ruling that the district judge's refusal to fashion a correct legal instruction that would have deviated substantially from the instruction proposed Ravenell was "not an abuse of the substantial discretion we afford district judges in fashioning

jury instructions" (*id*.)); *cf*. *Thomas v. State*, 67 P.3d 1199, 1202-03 (Wyo. 2003)); (4) how exactingly appellate courts will scrutinize particular passages in the charge for erroneous statements, as distinguished from reading the charge as a whole (for example, whether the judge who has given a general charge stating that the prosecution bears the burden of proof beyond a reasonable doubt may use the form "if you find" in defining the several elements of the offense rather than "if you find beyond a reasonable doubt"), and so forth. These various local doctrines relating to the charge and to the process by which it is required to be drawn up will affect the manner in which counsel proceeds at the conference on instructions, and counsel should go into the conference with an adequate grounding in them.

§ 36.04 GENERAL AREAS COVERED BY THE CHARGE

In general, the court's charge will cover:

(1) The elements of the crime charged in the Petition (see § 36.06 subdivision (3) *infra*) and of all lesser included crimes (see § 36.05 *infra*).

(2) The elements of, or the legal principles necessary to evaluate, any defense theory (such as self-defense or entrapment) raised by the evidence (see § 36.06 subdivision (6) *infra*).

(3) The legal principles governing any factual and evidentiary issues presented by the case (such as the preconditions for finding a tacit admission; or the preconditions for basing a conviction of burglary or theft upon a finding of possession of recently stolen property (*see*, *e.g.*, *Walker v. State*, 896 So.2d 712 (Fla. 2005)).

(4) The number of jurors who must agree in order for the jury to return a verdict.

(5) The prosecution's burden of proof beyond a reasonable doubt; the meaning of the phrase "beyond a reasonable doubt"; the presumption of innocence; any special rules governing the prosecution's burden (such as corroboration requirements); and the allocation and quantum of the burden of proof on subsidiary issues (see §§ 35.03-35.05 *supra*). Appellate courts tend to be fairly strict in insisting that trial judges give correct instructions regarding the burden of proof. *See*, *e.g.*, *Tibbles v. People*, 2022 CO 1, 501 P.3d 792 (Colo. 2022) (under "the proper test for determining whether a trial court's statements to the jury lowered the prosecution's burden of proof . . . [–] whether there is a reasonable likelihood that the jury understood the court's statements, in the context of the instructions as a whole and the trial record, to allow a conviction based on a standard lower than beyond a reasonable doubt" (*id*. at 794) – an instruction which "equated the concept of reasonable doubt to the doubt that a prospective homebuyer would have upon observing a structurally significant, floor-to-ceiling crack in the home's foundation" (*id*. at 803) constituted reversible error).

(6) Permissive inferences and presumptions bearing on the ultimate issues in the case (see § 35.06 *supra*). *But see, e.g.*, *Hall v. Haws*, 861 F.3d 977, 980-81, 990 (9th Cir. 2017) (a standard state jury instruction "which allowed the jury to infer guilt of murder from evidence that defendants were in possession of recently stolen property plus slight corroborating evidence" violated the Due Process Clause because "the presumed fact does not follow from the facts established").

(7) Permissive inferences and presumptions and other "fact-finding aids" relating to standard and recognized fashions of reasoning from the evidence (such as inferences from the failure of a party to call a witness (see § 10.08 *supra*); from a finding that a witness testified falsely in one particular (*see*, *e.g.*, *People v. Johnson*, 225 A.D.2d 464, 639 N.Y.S.2d 802 (N.Y. App. Div., 1st Dep't 1996)); or from factual circumstances that the proof tends to show: flight of the respondent (*see*, *e.g.*, *Thompson v. State*, 393 Md. 291, 901 A.2d 208 (2006)); concealment of evidence (*e.g.*, *Jarrett v. State*, 220 Md. App. 571, 588-91, 104 A.3d 972, 982-84 (2014)); and so forth).

(8) Required or recommended ways of weighing particular sorts of testimony (such as the requirement that the testimony of an accomplice is to be received with caution and scrutinized with care (see § 36.06 subdivision (2) *infra*) or the rules governing a jury's reliance on circumstantial evidence (*see, e.g.*, *People v. Lamb*, 211 A.D.3d 1345, 1347, 180 N.Y.S.3d 391, 394 (N.Y. App. Div., 3d Dep't 2022) (reversing a conviction because the trial court improperly denied the defendant's request for a jury instruction on circumstantial evidence: the trial court erred in denying the instruction based on the prosecution's argument that it had presented "direct evidence"; even if there was "direct evidence as to one element of a crime," the defendant nonetheless is entitled to the instruction if the "'only proof'" of some other element was circumstantial; the trial court erred further by failing to analyze the prosecution's proof sufficiently to realize that the purportedly "direct evidence" was based on "an inference" and actually "'was entirely circumstantial'")).

(9) Limitations on the permissible use of certain items of evidence (such as the use of a testifying respondent's prior adjudications or prior [bad] acts only for impeachment, not as the basis for inferring propensity (see §§ 30.07(a), (b) *supra*; § 36.06 subdivision (1) *infra*).

(10) Matters that are to be put out of account or not given described effects in the deliberations of the jury (such as the impermissibility of considering evidence that was struck, of drawing inferences from the respondent's failure to testify, of speculating from objections that were sustained, of treating the statements of counsel as evidence, or of treating the Petition as evidence).

(11) The general role of the jury and the court (including the ultimate responsibility of the jury for fact-finding, the requirement that the jury follow the law charged by the court, and admonitions not to draw inferences from the court's evidentiary rulings or rulings on motions for a directed verdict and not to speculate upon, or be influenced by, the judge's attitudes toward the case).

(12) [*In some jurisdictions*] A summary of the evidence.

(13) [*In some jurisdictions*] An expression of opinion on the evidence.

(14) [*In jurisdictions where juries fix the sentence for the offense in issue*] The sentence options and the legal principles relating to the jury's sentencing choice.

(15) Procedures that the jury should follow in the process of deliberation (choosing a foreperson, using exhibits, requesting supplemental instructions, separating, and so forth).

Counsel should have considered all of these areas prior to the conference on instructions and should be familiar with the governing principles and aware of what s/he wants to have charged – and *not* to have charged – in each area. S/he will be particularly responsible for charges on the defense theories and on principles of law relating to them and for charges on evidentiary matters. In cases in which the respondent did not testify at trial, counsel will probably be asked specifically whether s/he wants a charge on the impermissibility of drawing any negative inferences from the respondent's failure to testify. See § 33.05 *supra.*

§ 36.05 LESSER INCLUDED OFFENSES

It is especially important that counsel have a well-considered position on the submission of lesser included offenses. *See, e.g., Crace v. Herzog*, 798 F.3d 840, 843, 852-53 (9th Cir. 2015); *McNeal v. State*, 412 S.W.3d 886, 889-90, 893 (Mo. 2013). The general principle theoretically applicable here is that the court may (and ordinarily must, on request of counsel (*see, e.g.*, *Keeble v. United States*, 412 U.S. 205, 208 (1973); *Jeffers v. United States*, 432 U.S. 137, 153-54 (1977) (plurality opinion); *State v. Locke*, 90 S.W.3d 663 (Tenn. 2002); *Sweed v. State*, 351 S.W.3d 63 (Tex. Crim. App. 2011); *Thomas v. State*, 67 P.3d 1199, 1202-06 (Wyo. 2003)) submit to the jury any offenses that are lesser included offenses of the crime charged in the charging paper and upon which the evidence would support a conviction. *See also*, *e.g.*, *State v. Montgomery*, 39 So.3d 252 (Fla. 2010); *State v. Rice*, 573 S.W.3d 53 (Mo. 2019); *Dandridge v. Commonwealth*, 72 Va. App. 669, 852 S.E.2d 488 (2021); *State v. Young*, 2021-NMCA-049, 495 P.3d 1189 (N.M. App. 2021); *People v. Millbrook*, 222 Cal. App. 4th 1122, 166 Cal. Rptr. 3d 217 (2014) ("Millbrook's testimony that Manoa pulled out a gun and that he thought Manoa was going to shoot him would have supported a finding of self-defense. Even if the jury did not believe that Millbrook shot in self-defense, however, it still could have concluded that he shot in the heat of passion arising from Manoa's treatment of him . . . or from a fear that did not rise to

the level of fear required to establish self-defense." (*Id*. at 1139-40, 166 Cal. Rptr. at 231.) "'[S]ubstantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself . . . .'" (*Id*. at 1137, 166 Cal. Rptr. at 230.); *State v. Allen*, 69 S.W.3d 181, 188-89 (Tenn. 2002) ("The trial court must provide an instruction on a lesser-included offense supported by the evidence even if such instruction is not consistent with the theory of the State or of the defense. The evidence, not the theories of the parties, controls whether an instruction is required."); *State v. Huckabee*, 2021-NCCOA-353, 278 N.C. App. 558, 561, 863 S.E.2d 420, 422 (2021) ("'When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant.'"); *Commonwealth v. Drewnowski*, 44 Mass. App. Ct. 687, 694 N.E.2d 1301, 1307 (1998) ("'[i]n determining whether any view of the evidence would support a conviction on a lesser included offense, "all reasonable inferences must be resolved in favor of the defendant."'"); *Parker v. State*, 981 A.2d 551, 553 (Del. 2009) ("'[a] defendant is entitled to an instruction on a lesser included offense if there is any evidence fairly tending to bear upon the lesser included offense, however weak that evidence may be.'"); *State v. Dahlin*, 695 N.W.2d 588, 596 (Minn. 2005) ("We emphasize that both credibility determinations and the weighing of evidence are tasks reserved to the jury. . . . In determining whether a lesser-included offense instruction should be given, trial courts must consider only whether a rational basis exists in the evidence to acquit of the greater charge and convict of the lesser – without considering either the strength of the evidence or the credibility of the witnesses."); *compare Beck v. Alabama*, 447 U.S. 625 (1980) (holding that a defendant has a federal constitutional right to the submission of an evidentially supported lesser offense in a capital case), *and Williams v. Trammell,* 539 Fed. Appx. 844 (10th Cir. 2013), *with Schad v. Arizona*, 501 U.S. 624, 645-48 (1991) (rejecting a defendant's contention "that the due process principles underlying *Beck* require that the jury in a capital case be instructed on every lesser included noncapital offense supported by the evidence, and that robbery was such an offense in this case" (*id*. at 646), and holding that instructions which gave the jury "the option of finding . . . [the defendant] guilty of a [*i.e.*, at least one] lesser included noncapital offense" (*id*.) "sufficed to ensure the verdict's reliability" (*id*. at 648)), *and Hopkins v. Reeves*, 524 U.S. 88, 90-91 (1998) (holding that *Beck* does not require instructions on "offenses that are not lesser included offenses of the charged crime under state law"), *and Hopper v. Evans*, 456 U.S. 605 (1982) (distinguishing *Beck* because the *Hopper* record contained no evidence supporting conviction of a lesser offense), *and Spaziano v. Florida*, 468 U.S. 447 (1984) (distinguishing *Beck* because in *Spaziano* the lesser offense was barred by a statute of limitations; in this situation the Court holds that the accused should be given the choice between waiving the statute or waiving the lesser-included-offense instruction. (*id.* at 456-57)).

A "lesser included offense" is an offense defined by law in such a manner that:

(1) Each of its elements is an element of the crime charged, and

(2) It has no elements that are *not* elements of the crime charged, and

(3) It lacks some element of the crime charged.

See, e.g., Schmuck v. United States, 489 U.S. 705, 717-19 (1989), and authorities cited; *see also Carter v. United States*, 530 U.S. 255, 260-61 (2000). Thus assault is a lesser included offense of the crime of assault with a deadly weapon; assault is also a lesser included offense of rape; but assault with a deadly weapon is not a lesser included offense of rape, even though, in fact, in a particular rape case the assailant may have been armed and may have committed an assault with a deadly weapon.

Difficult technical problems arise with regard to whether some lesser offenses are included in some greater ones, particularly if the lesser offense has an element that is not necessarily coincident with an element of the greater crime in all cases but inevitably is so in a subclass of cases (for example, the question whether unauthorized use of government property is a lesser included offense of grand larceny in a case in which the allegedly stolen item *was* government property). *See*, *e.g.*, *McKiver v. State*, 55 So.3d 646, 648-49 (Fla. App. 2011) (reversing a conviction because the trial judge denied a defense request to instruct the jury on trespass as a lesser included offense of the charge of burglary of a dwelling; "In 1981, the [Florida] supreme court established a two-category framework for trial courts to apply when determining whether a jury instruction on a lesser-included offense should be given. 'The first category, which incorporated some lesser degrees of offenses, contains offenses *necessarily* included in the offenses charged. The second category, which now incorporates all attempts and the remaining lesser degrees of offenses, encompasses offenses which *may* or *may not* be included in the offense charged, depending on the accusatory pleadings and evidence.' . . . Necessary lesser-included offenses are designated as category one offenses, whereas permissive lesser-included offenses are designated as category two offenses. . . . ¶ The trial court must instruct the jury on category one (necessary lesser-included) offenses. . . . In contrast, a trial court may or may not be required to give jury instructions on permissive (category two) offenses. . . . 'Upon request, a trial judge must give a jury instruction on a permissive lesser included offense if the following two conditions are met: "(1) the indictment or information must allege all the statutory elements of the permissive lesser included offense; and (2) there must be some evidence adduced at trial establishing all of these elements."' . . . ¶ The requested instruction at issue here, trespass, is a category two, permissive lesser-included offense of burglary of a dwelling."). Difficult problems also arise with regard to whether the record will support a conviction on the lesser charge (for example, whether, when theft is shown and the only evidence of the value of the stolen item is the complainant's generic description of it and his or her testimony that it was worth $110, the record will support a conviction of petty theft (theft of an item worth less than $100)).

Defense counsel will have considerable ground for legal contention on these issues. What is important for him or her to decide first is whether s/he *wants* a particular lesser included offense or *any* lesser included offenses submitted. The considerations are complex but boil down basically to the question whether counsel wishes to give the jury a compromise position. A jury faced with the alternatives of convicting on a serious crime or of acquitting *may* acquit, particularly if (a) the evidence is close or (b) the respondent is sympathetic or (c) there are extenuating circumstances or (d) the penalty for the offense charged seems incommensurately

harsh. Given the option of conviction on a lesser charge, the jury may buy into the lesser conviction. If counsel senses that the jury is divided and that the stronger jurors favor the defense, counsel may well want to have the jury decide guilt or innocence of the offense charged on an all-or-nothing basis.

Counsel must take stock of the jurors and decide whether s/he wants to put them to the all-or-nothing choice. There are no general guidelines for this decision; it is a matter of the feel of the case and of the jury. If counsel decides that s/he does not want lesser charges given, s/he should resist them, arguing that they are not available in law or on the record. *Cf. Wood v. State*, 882 S.E.2d 50, 55 (Ga. App. 2022) (rejecting a claim of ineffective assistance of counsel based on defense counsel's failure to request a lesser included offense instruction: "At the hearing on Wood's motion for new trial, defense counsel testified that he and Wood discussed simple battery as a possible lesser-included offense, but that Wood was 'very vocal and very adamant' that he wanted to claim self-defense. Counsel also explained that requesting an instruction on simple battery could have harmed Wood's case because sometimes juries cannot follow alternative theories. Because trial counsel's decision to pursue an 'all or nothing' defense was not patently unreasonable, this claim of ineffective assistance . . . fails."). (A trial judge is entitled to submit uncharged offenses at the request of the prosecution or *sua sponte* over defense objection if s/he correctly concludes that (1) they meet the jurisdiction's criteria for lesser included offenses and (2) they are supported by sufficient evidence to warrant a conviction. *See*, *e.g.*, *People v. Garcia*, 188 Ill. 2d 265, 721 N.E.2d 574, 242 Ill. Dec. 295 (1999); *Harbin v. State*, 14 So.3d 898 (Ala. Crim. App. 2008), and cases cited. *But see People v. Seignious*, 202 A.D.3d 511, 513-16, 162 N.Y.S.3d 358, 360-62 (N.Y. App. Div. 1st Dep't 2022) (the trial court's submission of a lesser-included offense was improper "because the People, through the way they presented their case, deprived defendant of notice of the possibility that the jury would be asked to consider [second-degree burglary as] a lesser-included [offense of the charged crime of "burglary in the second degree as a sexually motivated crime"]": although the defendant "does not dispute . . . that second-degree burglary is a lesser included offense of second-degree burglary as a sexually motivated offense" and the appellate court finds that "there was a reasonable view of the evidence upon which the jury could find that defendant committed second-degree burglary, but not as a sexually motivated felony," the court applies the principle that "'[d]efendants ha[ve] a constitutional right to notice of the charges on which they were to be tried'" and concludes that the prosecution's stance in pretrial motions and opening statement "lulled" the defendant into defending solely against "the sex-motivated burglary" and "not any potential lesser included crimes").) If s/he wants them, s/he should urge them and be prepared to submit instructions covering the elements of each one that s/he wants charged. As a practical matter, some judges will give considerable deference to the wishes of defense counsel and will not be strictly bound by the theoretical rules requiring the submission of lesser offenses. These judges feel that if counsel and the respondent want to put the jury to a yes-or-no decision on the major crime, they should generally be permitted to take that gamble. Similarly, many judges will submit lesser offenses, at counsel's request, even though there is hardly arguable support for them in the record. A ubiquitous practice, for example, is to submit the lesser offense of second-degree murder in a first-degree prosecution based on the felony-murder theory, even though there is

often not a shred of evidence upon which the *mens rea* of second-degree murder can be found.

There is a difference of opinion, among the jurisdictions, about whether the decision to request the submission of a lesser-included offense is a strategic decision to be made by defense counsel or the type of fundamental determination that is reserved for the respondent to make. *Compare, e.g., People v. Colville*, 20 N.Y.3d 20, 23, 979 N.E.2d 1125, 1126, 955 N.Y.S.2d 799, 800 (2012) ("the decision whether to seek a jury charge on lesser-included offenses is a matter of strategy and tactics which ultimately rests with defense counsel"; the conviction is reversed and the case is remanded for a new trial because the trial judge rejected defense counsel's request for submission of lesser-included offenses, which was opposed by the defendant.), *with People v. Brocksmith*, 162 Ill. 2d 224, 229-30, 642 N.E.2d 1230, 1232-33, 205 Ill. Dec. 113, 115-16 (1994) ("we believe that the decision to tender a lesser included offense is analogous to the decision of what plea to enter, and that the two decisions should be treated the same. Because it is defendant's decision whether to initially plead guilty to a lesser charge, it should also be defendant's decision to submit an instruction on a lesser charge at the conclusion of the evidence. In both instances the decisions directly relate to the potential loss of liberty on an initially uncharged offense."; the conviction is reversed because "defense counsel, rather than defendant, made the ultimate decision to tender a lesser included offense instruction."). Even if the decision is a strategic one for counsel to make, "[d]efense counsel undoubtedly has a duty to discuss potential strategies with the [respondent]" (*Florida v. Nixon*, 543 U.S. 175, 178 (2004)), and counsel should accord very great weight to the client's view.

§ 36.06 DEFENSE REQUESTS FOR INSTRUCTIONS

The general theory of the defense determines what instructions counsel should request. S/he should consider, among other possibilities, requests for charges:

(1) *Limiting the use of items of prosecution evidence*. *See*, *e.g.*, *Cercy v. State*, 2019 WY 131, 455 P.3d 678, 688 (Wyo. 2019) (reversing a conviction because the trial judge failed to give a jury instruction requested by the defense; "No instruction limited the purpose for which the jury could consider the evidence of cunnilingus, despite Mr. Cercy's requests for such an instruction. Further, the court failed to provide the jury with the requested instruction, including the language of the third-degree sexual assault statute, so it could not have known that the legislature specifically excluded sexual intrusion from the crime. Finally, the definitions provided never explained the difference between 'sexual intrusion' and 'sexual contact.' While no single instruction was necessarily incorrect, under the facts presented to the jury in this case, the instructions leave serious doubt as to the circumstances under which the jury could convict Mr. Cercy of third-degree sexual assault. The district court abused its discretion in failing to adequately instruct the jury, and we reverse on that basis."). For example, in jurisdictions that allow the prosecutor to impeach the respondent with prior adjudications or prior [bad] acts (see § 30.07(b) *supra*), counsel may request an instruction that evidence of the respondent's prior adjudications or prior [bad] acts may be considered only insofar as the jury finds it relevant in assessing his or her credibility as a witness and may not be considered as bearing directly on the

respondent's guilt or innocence, because the law does not permit the speculation that a person may be more or less likely to have committed the present offense simply because s/he has or has not committed an offense at some earlier time. See § 30.07(a) *supra*. After the terminal period, insert the following: And in multiple-respondent trials, counsel may – and ordinarily must – request an instruction under *Bruton v. United States,* 391 U.S. 123 (1968) (§ 23.9.1 *supra*), limiting any defendant's incriminating statements to use against their maker, not the co-respondent. *See Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017).

(2) *Depreciating the weight of categories or items of prosecution evidence.* For example, counsel may request an instruction that the incriminating testimony of an alleged accomplice should be viewed with caution and suspicion. *See*, *e.g.*, *Wheeler v. State*, 560 So.2d 171 (Miss. 1990). Or, in a case involving an eyewitness identification, counsel can request "[e]yewitness-specific jury instructions . . . to warn the jury to take care in appraising identification evidence" (*Perry v. New Hampshire*, 132 S. Ct. 716, 728-29 (2012)). *See Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 314-45 (3d Cir. 2016) (en banc) (McKee, C.J., concurring) (observing that "'[j]urors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable,'" and "[t]herefore, thorough and appropriately focused jury instructions that reflect the scientific findings are critical to allowing jurors to discharge their solemn obligation to assess [such] evidence" (*id*. at 343); and documenting and analyzing factors that undermine the reliability of eyewitness identifications (*see id*. at 320-45)); Fiona Leverick, *Jury Instructions on Eyewitness Identification Evidence: A Re-Evaluation*, 49 CREIGHTON L. REV. 555, 586 (2016) (concluding that "jury instructions can be effective in educating jurors about the risks associated with eyewitness identification evidence and in evaluating such evidence sensitively" but that, "[i]n order to do so, . . . [such instructions] need: to be expressed in language that jurors can understand; to accurately reflect the relevant scientific evidence; to indicate to jurors why they are being given; and to be provided in writing (or in a suitable alterative form to those who have literacy difficulties)"); see also § 25.03 *supra* (listing useful reference sources on recurring problems in eyewitness identification procedures, and citing judicial opinions that require variously specified jury instructions in cases involving eyewitness identification testimony, including instructions on the special fallibility of cross-racial identifications).

(3) *Listing the elements of the offense charged (and of any lesser included offense submitted) in a form that emphasizes that the elements are distinct and that the jury must find each and every element separately. See*, *e.g.*, *Ochs v. State of Nevada*, 2022 WL 17412886, at *1 (9th Cir. 2023) ("[i]t is well established that the Due Process Clause is violated when the jury is given an instruction that relieves the State of its burden to prove every element of an offense beyond a reasonable doubt"); *Riley v. McDaniel*, 786 F.3d 719, 723-24 (9th Cir. 2015) (the defendant was denied due process by a jury "instruction [which] defined deliberation as a part of premeditation, rather than as a separate element" where "Nevada first-degree murder law did indeed contain three separate mens rea elements"); *Langford v. Warden, Ross Correctional Institution*, 593 Fed. Appx. 422 (6th Cir. 2014), *subsequent history in* 665 Fed. Appx. 388 (6th Cir. 2016) ("'The Constitution gives a criminal defendant the right to have a jury determine,

beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.'" 593 Fed. Appx. at 427. "[T]he trial court did not instruct the jury that conviction as an accomplice, under Ohio law, requires that the defendant have the same intent as the principal. As the magistrate judge correctly reasoned, this violated Supreme Court law." *Id.* at 427.); *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 284-85, 289 (3d Cir. 2018) (jury instructions on conspiracy and accomplice liability permitted the jury to convict an accessory before the fact of first-degree murder without himself having had an intent to kill – the *mens rea* for murder one under Pennsylvania law; because "the Constitution requires proof beyond a reasonable doubt of every element necessary to constitute the crime," the trial court's failure to inform the jury of the intent-to-kill requirement "relieved the Commonwealth of its burden of proving . . . specific intent . . . , in violation of [the accessory's] right to due process under the United States Constitution"); *accord, Reyes v. Madden*, 780 Fed. Appx. 436 (9th Cir. 2019); *Duarte v. Williams*, 2021 WL 4130075 (9th Cir. September 10, 2021); *Tyson v. Superintendent, Houtzdale SCI*, 976 F.3d 382, 392 (3d Cir. 2020) ("If the instruction contains 'some "ambiguity, inconsistency, or deficiency,"' such that it creates a 'reasonable likelihood' the jury misapplied the law and relieved the government of its burden of proving each element beyond a reasonable doubt, the resulting criminal conviction violates the defendant's Constitutional right to due process."); *People v. Brown*, 14 Cal. 5th 453, 473, 524 P.3d 1088, 1102, 305 Cal. Rptr. 3d 127, 143-44 (2023) (reversing a conviction where the trial judge's instructions regarding the mental element of the crime charged did not require the finding of specific intent which the California Supreme Court holds, as a matter of first impression in the case at bar, is the applicable *mens rea*: "The omission of an element of an offense from a jury instruction violates 'the right to a jury trial under the Sixth Amendment to the United States Constitution' by depriving the defendant of 'a jury properly instructed in the relevant law.' . . . Having found such an error, we must 'examin[e] the entire cause, including the evidence, and consider[ ] all relevant circumstances.' . . . Unless, based on this examination, we conclude 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' we reverse the conviction."); *State v. Lajala*, 149 Hawai'i 186, 485 P.3d 80 (Hawai'i App. 2021) (in a prosecution for an offense which requires that, with intent to hinder the apprehension, prosecution, conviction, or punishment of another, the defendant "renders assistance to the other person" the court holds that jury instructions were "prejudicially insufficient and erroneous for failing to define 'renders assistance' for the purpose of determining the material elements, including the conduct element, of the charged offense" (*id.* at 188, 485 P.3d at 82); the applicable statute contains a five-part definition of "renders assistance" and the defendant requested that the definition be included in the jury instructions but the trial court omitted it; "Because 'it is a grave error to submit a criminal case to a jury without accurately defining the offense charged and its elements[,]' we conclude that the Circuit Court erred in failing to instruct the jury on the definition of 'renders assistance' in this case." *Id.* at 194, 485 P.3d at 88.); *State v. Smith*, 2021-NMSC-025, 491 P.3d 748 (N.M. 2021) (in a prosecution for battery against a household member, the defendant "argued . . . that, based on the evidence presented at trial, the metropolitan court erred by refusing to instruct the jury that the State must prove that his conduct was unlawful. The Court of Appeals . . . concluded 'that the court's refusal to instruct on the essential element of unlawfulness was reversible error.' . . . ¶ The State petitioned this Court for a writ of certiorari and argued that an instruction on the

statutory element of unlawfulness was not required because Defendant did not establish all the elements of a specific, recognized, legal defense. However, the State's argument is contrary to *State v. Osborne*, [1991-NMSC-032, 111 N.M. 654, 808 P.2d 624 (1991),] which held that a defendant is not required to establish all the elements of "an exception or defense" when the term *unlawful* is used in a criminal statute. . . . Instead, when there is evidence that supports a defendant's theory that the conduct is justifiable or excusable, a trial court has a duty to instruct the jury that the state must prove a defendant's conduct was *unlawful* beyond a reasonable doubt." (*id*. at 750.) "Because a trial court must instruct the jury concerning a contested, essential element of the crime, the metropolitan court erred by failing to give an unlawfulness instruction in this case." *Id*. at 752.); *and see Ruan v. United States*, 142 S. Ct. 2370 (2022) *and United States v. Ruan*, 56 F.4th 1291 (11th Cir. 2023), *and United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023); *Rehaif v. United States*, 139 S. Ct. 2191 (2019); *Maslenjak v. United States*, 582 U.S. 335 (2017); *United States v. Minor*, 63 F.4th 112 (1st Cir. 2023) (en banc); *United States v. McCauley*, 983 F.3d 690 (4th Cir. 2020); *United States v. Mast,* 938 F.3d 973, 977-78 (8th Cir. 2019) (elaborating on *Morissette v. United States*, 342 U.S. 246 (1952) and its progeny to hold that "because neither the statutory language nor the legislative history indicates an intent to dispense with a mental state requirement as an element of . . . [the crime], courts may not treat the statute as setting out a strict liability offense; some mental state is required. . . . ¶ In Mast's case, the jury was erroneously instructed that the lesser offense was a strict liability crime when, in fact, the lesser offense requires proof of the defendant's negligence."); *Commonwealth v. Arnold*, 284 A.3d 1262, 1269 (Pa. Super. 2022) ("[T]he trial court's refusal to issue any *mens rea* instruction to the jury was premised on its misreading of the Contraband Offense as a strict liability crime that did not require one. Due to that error, Appellant is entitled to a new trial on the Contraband Offense."). *Cf. United States v. Lindberg*, 39 F.4th 151, 161, 164 (4th Cir. 2022) (in a prosecution for conspiring to bribe a state insurance commissioner in connection with an official act, the trial judge charged the jury that "'the removal or replacement of a [S]enior [D]eputy [C]ommissioner by the [C]ommissioner would constitute an official act'"; this instruction constituted reversible error because "the Supreme Court was clear in . . . [construing the applicable statute] that '[i]t is *up to the jury*, under the facts of the case, to determine whether the public official agreed to perform an "official act" at the time of the alleged *quid pro quo*'"); *State v. Odom*, 412 S.C. 253, 772 S.E.2d 149 (2015) (dictum) (in a prosecution for criminal solicitation of a minor by a person over 18, it is error to take judicial notice of the defendant's age and instruct the jury that it must find that element of the offense conclusively proven). Counsel may also request an instruction stating the rule that the jury may consider only the offenses charged in the Petition and its lesser included offenses (*see State v. Hicks*, 768 S.E.2d 373 (N.C. App. 2015); *cf. Cole v. Arkansas*, 333 U.S. 196 (1948)).

(4) *Stating the general burden of proof and burdens on subsidiary issues favorably to the defense.* The two authoritative formulations of the constitutionally requisite standard for conviction are: (a) that an accused may not be convicted "'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'" (*Cage v. Louisiana*, 498 U.S. 39 [at 39] (1990), quoting *In re Winship*, 397 U.S. 358, 364 (1970)); and (b) that the law " requires that each element of a crime be proved to a jury beyond a reasonable

doubt" (*Hurst v. Florida*, 577 U.S. 92, 97 (2016)). Because the first formulation focuses on "facts" and the second on "elements," counsel can request that each be stated separately. (Beyond emphasizing that the two requirements are distinct, their statement in separate sentences provides the benefit of repetition of the core phrase, "beyond a reasonable doubt." The value of repetition in persuasion has been recognized for a couple of thousand years at least. *See* [CICERO], RHETORICA AD HERENNIUM, IV, XXVIII, 38.) Useful elaborations of the beyond-a-reasonable doubt standard which counsel should consider include:

(i) "In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In delinquency cases such as this, the state's proof must be more powerful than that. It must be beyond a reasonable doubt." *See*, *e.g.*, *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), relying on the widely influential Instruction 21 in FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1987).

(ii) "A reasonable doubt does not mean a doubt for which you have to give a specific reason." *See e.g.*, *State v. Medina*, 147 N.J. 43, 52-53, 685 A.2d 1242, 1246-47 (1996); *State v. Hudson*, 286 N.J. Super. 149, 153, 668 A.2d 457, 458 (1995) ("a reasonable doubt may be one that defies the jury's ability to express or articulate the reasons for it").

(iii) "A reasonable doubt may arise simply because you believe that the prosecution's evidence has failed to exclude every fair and rational hypothesis except that of guilt." *See*, *e.g.*, *State v. Cervantes*, 87 Wash. App. 440, 448, 942 P.2d 382, 385 (1997).

(iv) "The respondent is presumed innocent and this presumption stays with the respondent through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt. A reasonable doubt as to the guilt of the respondent may arise from the evidence, from conflicting evidence or from the lack of evidence on the part of the prosecution." *Cf.* FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 3.7 [modified in light of *State v. Boyken*, 217 N.W.2d 218, 219 (Iowa 1974)].

(v) "The requirement of proof beyond a reasonable doubt means that you must return a verdict of not guilty unless you have a firm and abiding conviction of the respondent's guilt." *See Victor v. Nebraska*, 511 U.S. 1, 14-15 (1994) ("An instruction cast in terms of an abiding conviction as to guilt . . . correctly states the government's burden of proof."); FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS, Instruction 21, *supra* ("Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. . . ."); *State v. Frei*, 831 N.W.2d 70, 79 (Iowa 2013), *partially overruled on an unrelated point*, *Alcala v. Marriott International, Inc.*, 880 N.W.2d 699, 708 & n.3 (Iowa

2016) ("Numerous state courts have . . . adopted the FJC pattern instruction and expressly approved its firmly convinced language").

(vi) "A reasonable doubt is any lack of certainty that a reasonable person could have based upon any shortcoming or questionable aspect of the prosecution's evidence. Because the respondent is presumed to be innocent, [he] [she] does not have to present any evidence. [But when the respondent does present evidence, as in this case, a reasonable doubt may also arise from any genuine question which that evidence raises as to the respondent's guilt.]"

For discussions of various verbal formulations that do and do not adequately convey the concept of reasonable doubt, *see Victor v. Nebraska*, 511 U.S. at 5; *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *See also, e.g.*, *Morris v. Cain*, 186 F.3d 581, 584-88 (5th Cir. 1999); *Smith v. United States*, 709 A.2d 78, 79-82 (D.C. 1998) (en banc); Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions,* 50 U. RICH. L. REV. 1139 (2016); Michael D. Cicchini, *The Battle Over the Burden of Proof: A Report from the Trenches*, 79 U. PITT. L. REV. 61 (2017); Michael D. Cicchini, *Reasonable Doubt and Relativity*, 76 WASH. & LEE L. REV. 1443 (2019). Defense counsel can also request that the jury be instructed regarding any refinements of the general burden of proof that are applicable to the case at bar. *See*, *e.g.*, *United States v. Adams*, 583 F.3d 457 (6th Cir. 2009) (reversing a conviction because the trial judge refused to instruct the jury that the defendant could not be convicted solely on the basis of his uncorroborated admission of guilt).

(5) *Stating the presumption of innocence.* Under some circumstances a respondent has a federal constitutional right to an instruction on the presumption of innocence *in addition to* an instruction on the prosecution's burden of proof beyond a reasonable doubt. *Compare Taylor v. Kentucky*, 436 U.S. 478 (1978), *with Kentucky v. Whorton*, 441 U.S. 786 (1979) (per curiam). "'[A]xiomatic and elementary,' the presumption of innocence 'lies at the foundation of our criminal law.'" *Nelson v. Colorado*, 581 U.S. 128, 135-36 (2017).

(6) *Explaining the legal principles underlying defense contentions.* For example, counsel may request an instruction that evidence of intoxication was admitted as bearing upon the question whether the respondent could form the requisite intent for the crime; that the specific intent to kill [*or* to steal, or whatever] is an element of the crime which must be proved beyond a reasonable doubt; that the respondent can no more be found guilty of the crime if the jury has a reasonable doubt concerning his or her intent than if it has a reasonable doubt whether s/he did the act of killing [*or* of taking money, or whatever]; and that if, by reason of the evidence presented regarding the respondent's intoxication, the jury has a reasonable doubt with regard to whether the respondent formed the required intent, the jury must acquit the respondent. Whenever the theory of the defense requires the jury to apply legal principles that are not subsumed within the elements of the crime charged, instructions spelling out those principles are necessary. "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."

Mathews v. United States, 485 U.S. 58, 63 (1988); *accord*, *Manuel v. State*, 667 So.2d 590, 591 (Miss. 1995) ("[a] defendant is entitled to submit instructions that present her theory of the case to the jury"); *State v. Reed*, 2022 WL 9931717, at *4 (W. Va. 2022) ("It is well-settled that 'in criminal cases a defendant generally is entitled to a jury charge that reflects any defense theory for which there is a foundation in the evidence.'"); *McClure v. State*, 306 Ga. 856, 864, 834 S.E.2d 96, 103 (2019) ("A defendant is entitled to a requested jury instruction regarding an affirmative defense when at least slight evidence supports the theory of the charge, whether in the State's evidence or evidence presented by the defendant, and regardless of whether the theory of the affirmative defense conflicts with any other theory being advanced by the defendant."); *United States v. Anderson*, 55 F.4th 545, 549 (7th Cir. 2022) (in a prosecution for enticing a minor, the defendant was entitled to an entrapment instruction because "a defendant who offers 'some evidence' of both government inducement and his own lack of predisposition is entitled to have the entrapment defense submitted to the jury": in the case at bar, "a jury could find government inducement in the form of 'subtle, persistent, or persuasive conduct . . . [and, a]s for predisposition, Anderson had no record of any sexual misconduct or any other offenses against children. It was the government agent [posing online as a child], not Anderson, who first suggested a criminal liaison.). *See also, e.g.*, *Elvik v. Baker*, 612 Fed. Appx. 412, 414-15 (9th Cir. 2015), *vacated & remanded*, 577 U.S. 1129 (2016), *reaff'd on remand*, 660 Fed. Appx. 538 (9th Cir. 2016); *Harris v. Alexander*, 548 F.3d 200, 205-06 (2d Cir. 2008); *Bradley v. Duncan*, 315 F.3d 1091 (9th Cir. 2002); *Barker v. Yukins*, 199 F.3d 167 (6th Cir. 1999); *Reese v. State*, 314 Ga. 871, 880 S.E.2d 117 (2022); *State v. A.L.A.*, 251 N.J. 580, 280 A.3d 274 (2022); *State v. Workman*, 437 S.C. 62, 876 S.E.2d 151 (S.C. App. 2022); *State v. Smith*, quoted in subdivision (3) *supra*; *Maciel v. State*, 631 S.W.3d 720 (Tex. Crim. App. 2021); *People v. Miller*, 2021 IL App (1st) 190060, 2021 WL 4452266 (Ill. App. September 29, 2021); *Lienau v. Commonwealth*, 69 Va. App. 254, 818 S.E.2d 58 (2018), approved en banc, 69 Va. App. 780 823 S.E.2d 43 (Mem) (2019); *King v. Commonwealth,* 64 Va. App. 580, 770 S.E.2d 214 (2015) (en banc); *Cliff Berry, Inc. v. State,* 116 So.3d 394 (Fla. App. 2012); *People v. Jones*, 175 Ill. 2d 126, 676 N.E.2d 646, 221 Ill. Dec. 843 (1997); *General v. State*, 367 Md. 475, 789 A.2d 102 (2002); *State v. Lockwood*, 43 Or. App. 639, 643-46, 603 P.2d 1231, 1234-35 (1979); *Miller v. State*, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991); *State v. White*, 2015-Ohio-492, 142 Ohio St. 3d 277, 290, 29 N.E.3d 939, 952 (2015) ("A trial court has broad discretion to decide how to fashion jury instructions, but it must 'fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.' . . . We require a jury instruction to present a correct, pertinent statement of the law that is appropriate to the facts. . . . ¶ Here, it is not disputed that White used deadly force in the line of duty, and therefore the jury charge should have been tailored to instruct the jury on when a police officer is justified in using deadly force."); *Jackson v. United States*, 645 A.2d 1099, 1101 (D.C. 1994) ("[i]t is well settled that '[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor'") (dictum); *State v. Arroyo*, 284 Conn. 597, 610, 935 A.2d 975, 984 (2007) ("if the evidence pointing to a third party's culpability, taken together and considered in the light most favorable to the defendant, establishes a direct connection between the third party and the charged offense, rather than merely raising a bare suspicion that another could have committed

the crime, a trial court has a duty to submit an appropriate charge to the jury"); *and see United States v. Pérez-Rodríguez*, 13 F.4th 1 (1st Cir. 2021) (finding an exacting standard of plain error satisfied where a trial judge failed to instruct the jury on an evidentially supported entrapment defense). *Cf. Baer v. Neal*, 879 F.3d 769, 781 (7th Cir. 2018) ("Evidence of Baer's mental health and drug use were intertwined as the cornerstone of Baer's defense, and defense counsel's sole strategy for avoiding a death sentence was ensuring that the jury considered and gave effect to Baer's mental health and intoxication evidence. . . . Baer's trial counsel . . . [rendered ineffective assistance by failing] to object to instructions that effectively blocked consideration of this crucial mitigating evidence.).

(7) *Instructing the jury of the requirement of unanimity and how that requirement applies to the charges in the case at bar. Compare United States v. Echeverry*, 698 F.2d 375 and 719 F.2d 974 (9th Cir. 1983), *and Commonwealth v. Conefrey,* 420 Mass. 508, 510, 650 N.E.2d 1268, 1270 (1995) (in a prosecution for indecent assault on a child, where the child testified to eight distinct episodes of sexual abuse, it was not sufficient for the judge to charge the jury that its verdict had to be unanimous; it was reversible error to refuse the defendant's request to "give this specific unanimity instruction: 'In order to convict the defendant you must unanimously agree beyond a reasonable doubt upon at least one incident.'"), *with Schad v. Arizona*, 501 U.S. 624 (1991), *and United States v. Barai*, 55 F.4th 1245 (9th Cir. 2022).

(8) *Instructing the jury not to consider matters that occurred during trial and that the jury may be disposed to hold against the respondent.* For example, counsel may request an instruction that the jury is not to infer guilt from the respondent's failure to take the stand. The defense appears to have an unqualified federal constitutional right to an instruction on this subject. *Carter v. Kentucky*, 450 U.S. 288 (1981); *James v. Kentucky*, 466 U.S. 341 (1984); *White v. Woodall*, 572 U.S. 415, 420 (2014) (dictum); see § 33.05 *supra*.

(9) *Cautioning and educating the jurors about the danger of racial bias. See* Colin Miller, *The Constitutional Right to an Implicit Bias Jury Instruction*, 59 AMERICAN CRIM. L. REV. 349 (2022); AMERICAN BAR ASSOCIATION, ACHIEVING AN IMPARTIAL JURY [AIJ] TOOLBOX, cited in § 21.01, *supra*, at 15-22; Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243. But counsel should be aware that there is considerable debate among experienced trial lawyers whether these instructions do more good than harm. Much depends on the composition of the jury, the local social ethos, and the cast and circumstances of the particular case at bar.

(10) *Requiring the jury to specify the basis for its verdict in cases in which alternative prosecution theories are possible and the choice among them has sentencing consequences or is necessary to ensure the integrity of a conviction. See United States v. Hankton*, 51 F.4th 578, 591-94 (5th Cir. 2022); *and cf. Stromberg v. California*, 283 U.S. 359, 367-68 (1931); *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942); *Yates v. United States*, 354 U.S. 298, 312 (1957); *Mills v. Maryland*, 486 U.S. 367, 376 (1988); *Black v. United States*, 561 U.S. 465, 470 (2010).

Attention should also be paid to the possibility of a missing-witness instruction (see § 10.08 *supra*) and to the matter of lesser included offenses, discussed in § 36.05 *supra*.

Whether counsel's proposed charges should be conservative (stating the law as counsel knows s/he can clearly satisfy the court it is) or venturesome (embodying debatable defense theories) depends in part on whether, under local practice, a judge may refuse entirely to charge on a given subject simply because the specific instruction requested by defense counsel does not state the law correctly. See § 36.03 third paragraph, subdivision (3) *supra*. When local law permits a judge thus to deny the whole of any requested instruction that is incorrect in part, counsel who wants to press a venturesome point should prepare alternative proposed charges, clearly designated as such, for submission *seriatim*. The alternatives should be cross-referenced and should specify the order of counsel's preference among them so that s/he can claim error in the failure to give a more favorable one even though a less favorable alternative which s/he proposed was given.

For example, counsel might submit proposed instructions designated Respondent's Requests for Instruction Number 3, Number 3-A, and Number 3-B. Number 3 would tell the jury that the respondent cannot be convicted of assaulting an officer unless s/he actually knew that the person whom s/he assaulted was an officer. Number 3-A would tell the jury that the respondent cannot be convicted of assaulting an officer unless s/he actually knew or was grossly reckless in failing to know that the person whom s/he assaulted was an officer, and it would contain at the top the notation: "If the Court refuses Respondent's Request for Instruction Number 3, respondent objects to that refusal and, without waiving that objection, requests that the Court instruct as follows." Number 3-B (telling the jury that the respondent cannot be convicted of assaulting an officer unless s/he actually knew or unless a reasonable person in the respondent's situation would have known that the individual s/he assaulted was an officer) would bear a similar notation at the top in reference to Number 3-A.

If local practice allows, counsel should delay submitting Number 3-A until after the judge has refused Number 3 and should delay submitting Number 3-B until after the judge has refused Number 3-A. Judges given several alternative formulations at the outset may choose one that is less favorable to counsel than the one that the judge would have accepted if s/he had not been advised of the alternatives that were going to follow. If local practice requires the advance submission of all requests for instructions, then Request Number 3 in the preceding series would bear at the bottom the notation: "If this Request Number 3 is given, Respondent's Requests for Instruction Numbers 3-A and 3-B should not be given" and so forth.

Like defense evidence, defense instructions should ordinarily be selective and should avoid raising too many issues for jury consumption. They should focus squarely on the defense theory of the case. They should state the rules of law underlying that theory clearly and succinctly, in terms that counsel will be able to pick up and use in his or her closing argument.

The requests to charge should not be argumentative. An easy way to connect the

applicable law to the facts without being argumentative is to frame each instruction in the form of a hypothetical syllogism: "If you find *A* and if you find *B*, then you must return a verdict of not guilty [*or* "then you should consider *C*"]" – and adding definitions of *A* and *B* if necessary. There must, of course, be some support in the record for each finding hypothesized, and counsel should be prepared to tell the court what it is.

The drafting of proposed instructions usually warrants counsel's care, and often considerable creativity. Jonathan M. Barnes, *Comment: Tailored Jury Instructions: Writing Instructions that Match a Specific Jury's Reading Level*, 87 MISS. L. J. 193 (2018). Counsel should remember that it is through his or her proposed instructions that s/he has the opportunity to present the principal legal issues in the case – matters of statutory construction, matters of first impression relating to the requisite *mens rea* of offenses, and so forth. It is also at this point that counsel principally exercises a "law-testing" or "law-making" role – for example, by challenging accepted definitions of the crime charged. *See*, *e.g.*, *Ruan v. United States*, 142 S. Ct. 2370 (2022); *United States v. Minor*, 63 F.4th 112 (1st Cir. 2023) (en banc); *State v. Bird*, 2015 UT 7, 345 P.3d 1141 (Utah 2015). Finally, the erroneous refusal of the trial court to give requested instructions is a fertile field for error and reversal. *E.g.*, *United States v. Yates*, 16 F.4th 256 (9th Cir. 2021). Although it is not counsel's job to "plant" error, it is decisively counsel's job to press every legitimate legal claim the client has and to insist that the client not be convicted except at a trial at which those claims have been decided correctly.

§ 36.07 PREPARING AND PRESENTING THE DEFENSE REQUESTS FOR CHARGE

As indicated in the third paragraph of § 36.02 *supra*, requests for charge are ordinarily required to be given to the court in writing at the conclusion of the evidence, just before the lawyers make their closing arguments to the jury. If at all possible, counsel should prepare the requests before the end of the last witness's testimony, so as to avoid being caught in a last-minute rush that will make careful drafting impossible. Since the judge's decision to grant or deny the requests will ordinarily have to be made on the spot, with no time for real research, counsel should bring to court suitably highlighted photocopies of any statutory texts and judicial opinions that s/he can find to support each request. When counsel has not had an opportunity to prepare his or her requests for charge in advance or when additional points come to mind in the closing minutes of the evidentiary trial, counsel should write out the requests in longhand on a legal pad for submission to the court or type them electronically. If there is no natural break (such as a lunch break) in the proceedings between the conclusion of testimony and the commencement of closing arguments and counsel does not have his or her requests for charge completed, s/he should ask for a recess to draft them.

Counsel's requests for instructions should ordinarily not be submitted until the latest possible moment required by local rules or the trial judge's order. If, is as common, the local rules provide that the parties' requests must be submitted "at the close of the evidence" or at such time as the judge requires, counsel should urge the judge not to call for submissions before the prosecution has rested its evidentiary case. Giving the prosecutor detailed elucidation of defense

theories or points of law while there is still time to address prosecution evidence to them is bad business.

§ 36.08 LEARNING WHAT THE COURT PLANS TO CHARGE

One important function of the conference on instructions, from the viewpoint of the defense, is the opportunity it affords to learn what the court will charge. This will be important in planning counsel's closing argument.

As indicated in § 36.02 *supra*, some judges will routinely disclose everything of substance that they expect to charge, and in a number of jurisdictions they are required by law to do so. With other judges, counsel may have to inquire specifically what the court intends to charge on each particular point. With still others it is necessary to infer the court's intentions from discussion of the parties' requests to charge; thus, counsel's arguments concerning those requests may have to be pursued in a way that furthers this end.

§ 36.09 OBJECTIONS TO THE COURT'S CHARGE

The court's instructions are required to include the subjects itemized in § 36.04 *supra*. They must state the law correctly (*see*, *e.g.*, *Ciminelli v. United States,* 143 S. Ct. 1121 (2023); *United States v. Gaudin*, 515 U.S. 506 (1995); *United States v. Cortes*, 757 F.3d 850 (9th Cir. 2014); *State v. Khalil*, 956 N.W.2d 627 (Minn. 2021); *State v. Kyllo*, 166 Wash. 2d 856, 215 P.3d 177 (2009); *People v. Bush*, 157 Ill. 2d 248, 623 N.E.2d 1361 (1993); *Vigil v. State*, 859 P.2d 659 (Wyo. 1993), *overruled on another issue in Granzer v. State*, 193 P.3d 266 (Wyo. 2008); *State v. Ancira*, 2022-NMCA-053, 517 P.3d 292, 297-99 (N.M. App. 2022) (alternative ground); *People v. Gonzales*, 326 Ill. App. 3d 629, 761 N.E.2d 198 (2001); *McWhorter v. State*, 971 So.2d 154 (Fla. App. 2007); see also § 36.03 *supra*), and they must be balanced fairly (*see*, *e.g.*, *United States v. Moffett*, 53 F.4th 679, 685 (1st Cir. 2022) (in an effort to clarify the jury's task in a complex multi-count trial, the judge included in the verdict form for each count a parenthetical reference to the prosecution exhibit which was the focus of that count; the court of appeals holds that this procedure had the effect of slanting the instructions in favor of the prosecution (which had been asked by the trial judge to identify the exhibit to be linked with each count) and thereby violated the defendant's Sixth Amendment right to trial by jury: "[A] district court in commenting on the evidence to the jury in a criminal case may not do so in a manner that 'usurp[s] the jury's factfinding role,' . . . or 'relieve[s] the prosecution of [its] burden in an unfair way . . . .' . . . ¶ [In *United States v. Rivera-Santiago*, 107 F.3d 960, 965 (1st Cir. 1997) (per curiam)] we held that a district court's answer to a jury's question that 'selected only a part of [a witness's] testimony given on direct examination to be read' back to the jury violated the defendants' Sixth Amendment right to a trial by jury. . . . We explained that the violation resulted because the district court's answer to the jury's question 'culled the evidence' in a manner that was contrary to the defendants' interests. That was so, we explained, because the district court effectively directed the jury to consider only certain testimony that favored the government . . . . ¶ We also have indicated that a district court may cross the constitutional line even without in

effect directing the jury to consider *only* the government's evidence. We have indicated that the constitutional line also may be crossed whenever the district court, in addressing the jury regarding evidence, places 'undue weight' on portions of the government's evidence and thereby tilts the trial in that party's favor."); *Bihn v. United States*, 328 U.S. 633 (1946); *United States v. Dove*, 916 F.2d 41 (2d Cir. 1990); *United States v. Assi*, 748 F.2d 62 (2d Cir. 1984); *Blaine v. United States*, 18 A.3d 766 (D.C. 2011); *State v. Reddish*, 181 N.J. 553, 613-15, 859 A.2d 1173, 1209-10 (2004); *People v. Jones*, 216 A.D.2d 324, 627 N.Y.S.2d 778 (N.Y. App. Div., 2d Dep't 1995); *State v. Olson*, 482 N.W.2d 212 (Minn. 1992); *People v. Compton*, 119 A.D.2d 473, 500 N.Y.S.2d 685 (N.Y. App. Div., 1st Dep't 1986) (alternative ground); *People v. Moore*, 43 Cal. 2d 517, 275 P.2d 485 (1954); *and see Yelverton v. United States*, 904 A.2d 383, 389 (D.C. 2006) (dictum)). In stating the elements of the offense and other findings that must be made in order to convict, the instructions must be framed "'"with sufficient definiteness that ordinary people can understand what conduct is prohibited,"' . . . [and with sufficient specificity so as not to] '"encourage arbitrary and discriminatory enforcement"'" (*United States v. Percoco*, 143 S. Ct. 1130, 1138 (2023)).

Local practice may require that all objections to the court's proposed charge be noted at the time of the conference on instructions or may require that objections be noted after the court completes its charge to the jury. Sometimes objection at both times is required. Counsel should be familiar with the requirements.

Part C. Closing Argument

§ 36.10 CLOSING ARGUMENT GENERALLY

As a general matter, the closing arguments of the attorneys recapitulate the theories of each party and attempt to justify the inferences and conclusions that each feels should be drawn from the evidence. In almost all jurisdictions the prosecutor argues first and defense counsel second. In some jurisdictions the prosecutor is always permitted to rebut and thereby have the last word; in other jurisdictions the prosecutor is permitted to rebut only if the defense has presented evidence. Some judges will permit surrebuttal argument by the defense when the prosecutor has obviously sandbagged and reserved most of his or her substantive arguments for rebuttal so as to deprive defense counsel of the opportunity to respond to those arguments.

Counsel should be sure that s/he is familiar with the local rules concerning the order of closing. The shaping of the closing argument for the defense depends critically on whether the prosecutor will or will not have an opportunity for reply.

Closing arguments in a jury trial are radically different from those in a bench trial as described in Chapter 35. Because juries are far less capable than judges of understanding legal doctrines and because jurors tend to be more receptive than judges to factual and common-sense arguments, the defense closing in a jury trial has to stress the facts and avoid lengthy discussion of legal doctrines. See § 36.12 *infra*. The jury's susceptibility to inflammatory arguments also

requires that counsel be alert to object to prosecutorial references to prejudicial matters and appeals to the jurors' emotions. See § 36.11 *infra.*

§ 36.11 THE PROSECUTOR'S CLOSING

§ 36.11(a) Content of the Prosecutor's Closing; Impermissible Areas and Arguments

The prosecutor's closing argument will typically emphasize the enormity of the crime, the indisputable character of the prosecution's evidence (the efficiency of the investigating officers, the expertise of the prosecution's experts, the objectivity of its public-spirited eyewitnesses, and so forth), the incredibility and self-serving quality of the defense evidence, and – to the extent possible within the limits of the rule forbidding direct allusion to the respondent's character unless the respondent has opened that issue (see §§ 30.07(a), 33.17 *supra*) – the shabby nature of the respondent and defense witnesses.

The courts have repeatedly held (and counsel will likely be able to find caselaw within his or her jurisdiction holding) that:

(1) "The prosecutor should not knowingly misstate the evidence in the record, or argue inferences that the prosecutor knows have no good-faith support in the record." AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, PROSECUTION FUNCTION (4th ed. 2017), Standard 3-6.8(a), *Closing Arguments to the Trier of Fact*. *See*, *e.g.*, *Berger v. United States*, 295 U.S. 78, 85-89 (1935) ("The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."; the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"; although the prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one"; "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge, are apt to carry much weight against the accused when they should properly carry none."); *Russell v. United States*, 701 A.2d 1093, 1099 (D.C. 1997) (the prosecutor's argument "that Russell aided and abetted Hahn in setting the three fires, including the one on October 14 which led to Russell's conviction," even though "there was not one shred of evidence before the jury connecting Hahn in any way with any of those fires," required reversal despite defense counsel's failure to object; "the trial court committed plain error by failing to intervene *sua sponte* and correct the prosecutor's egregious misstatements of the evidence."); *People v. Bogard*, 449 P.3d 315 (Wyo. 2019) (reversing a sexual assault conviction because "the prosecutor argued facts that were not in evidence by repeatedly stating that . . . [the victim] was sobbing . . . during the alleged assault" (*id*. at 330) and also commented that the victim came to the scene of the assault in order to attend a party, "not . . . to go hook up and get fucked in a

bathroom" (*id*. at 331), a "use of profanity . . . [which] was an obvious attempt to invoke feelings of anger, indignation, and outrage in the jury about what Mr. Bogard allegedly did to SK in the bathroom" (*id*. at 331); the Wyoming Supreme Court holds that these remarks constituted prosecutorial misconduct and – in conjunction with other misbehavior by the prosecution which fell short of reversible plain error but were damaging to the defense – deprived the defendant of a fair trial); *Evans v. Jones*, 996 F.3d 766, 775 (7th Cir. 2021) (vacating a conviction on the ground of prosecutorial misconduct constituting a clear violation of due process: "It is well established that a prosecutor may not reference facts not before the jury to bolster a witness's credibility"); *United States v. Beaulieu*, 973 F.3d 354, 360-61 (5th Cir. 2020) (reversing a conviction: "AUSA McMahon repeatedly expressed his 'personal opinion on the merits of the case [and] the credibility of the witnesses.' . . . He repeatedly made arguments at closing based on 'evidence not presented at trial.' . . . And he closed by telling the jury that it must convict Beaulieu not because of the facts and law – but because to rule otherwise would 'disrespect or dishonor a chief federal district court judge.' . . . These are textbook examples of prosecutorial misconduct."); *People v. Benitez*, 120 A.D.3d 705, 706-07, 991 N.Y.S.2d 133, 134-35 (N.Y. App. Div., 2d Dep't 2014) (the prosecutor, in referring to a tip that initiated the police investigation, "strongly implied that whoever had provided the tip had implicated the defendant," thereby improperly "suggest[ing] to the jury, in this one-witness identification case, that the complainant was not the only person who had implicated the defendant in the commission of the robbery"; conviction reversed: "a new trial is necessary.").

(2) The prosecutor must not misstate the law. *See, e.g.*, *State v. Watson*, 313 Kan. 170, 484 P.3d 877 (2021) ("[T]he State committed two errors during closing argument. The prosecutor misstated the evidence by arguing Watson failed to provide *any* proof that he had worked the total hours recorded on his time sheets, an argument that disregarded Watson's own testimony. The prosecutor also misstated the law by arguing Watson was guilty of Medicaid fraud based solely on his submission of inaccurate timesheets, without regard to whether Watson had acted with intent to defraud. These errors substantially diminished, or effectively eliminated, an essential element of the crime of conviction – the defendant's intent to defraud Medicaid. Simultaneously, the errors undermined Watson's central defense to this charge – that he acted without intent to defraud." *Id*. at 171-72, 484 P.3d at 880. This "prosecutorial error alone entitles Watson to a new trial" (*id*. at 186, 484 P.3d at 888).); *People v. Collins*, 65 Cal. App. 5th 333, 336, 279 Cal. Rptr. 3d 407, 410 (2021) (reversing a robbery conviction on the ground of improper prosecutorial argument; "Here, the prosecutor in closing argument repeatedly told the jury that '[t]he law is an objective standard' and that it did not 'matter if anybody is afraid.' However, the law has for decades required proof of the [putative robbery] victim's actual, subjective fear."); *Ford v. Peery*, 999 F.3d 1214, 1222, 1224, 1226-27 (9th Cir. 2021) (dictum) ("the prosecutor's repeated statements to the jury during final argument that the presumption of innocence no longer applied [because the defendant had received "'a fair trial'"] were misstatements of clearly established law as articulated by the Supreme Court": "Prosecutorial misconduct includes misstatements of law."); *United States v. Starks*, 34 F.4th 1142 (10th Cir. 2022) (same); *Deck v. Jenkins*, 814 F.3d 954, 963, 985, 986 (9th Cir. 2016) (the prosecutor's rebuttal closing argument violated due process by misstating the state law of attempt in a way

that "negated an essential element of attempt" and thereby "lowered the prosecution's burden of proof"); *United States v. Velazquez*, 1 F.4th 1132, 1134 (9th Cir. 2021) ("During closing argument, the government compared the reasonable doubt standard to the confidence one needs to 'hav[e] a meal' or 'travel to . . . court' – without worrying about the 'possib[ility]' that one will get sick or end up in an accident. Velazquez claims that this improper argument, and the district court's failure to cure it, caused him prejudice. We agree. . . . We vacate Velazquez's conviction and remand for a new trial.").

(3) The prosecutor must "scrupulously avoid any reference to a . . . [respondent's] decision not to testify" (ABA STANDARDS FOR CRIMINAL JUSTICE, *supra*, Standard 3-6.8(a)). *See, e.g.*, *Commonwealth v. Cruz*, 98 Mass. App. Ct. 383, 390-92, 154 N.E.3d 958, 966-67 (2020) (reversing a conviction because of several compounding errors including (1) the prosecutor's argument in closing that "'the only two people who can tell you about [what happened] are [the 14-year-old complainant] and the [d]efendant,' which "was 'reasonably susceptible of being interpreted as a comment on the defendant's failure to take the stand . . .'" and (2) the prosecutor's argument in closing that the complainant "should be believed because she had 'come[ ] in for no other reason but to tell you about these traumatic events. She has nothing to gain by going through the court process and being on that stand. And it made her emotional.' This remark ran afoul of the settled rule that "[a] prosecutor may not . . . suggest to the jury that a victim's testimony is entitled to greater credibility merely by virtue of her willingness to come into court to testify.'"); *Gongora v. Thaler*, 710 F.3d 267, 275-83 (5th Cir. 2013) (per curiam) (the prosecutor's closing argument violated the defendant's right to a fair trial by "repeatedly referr[ing] to Gongora's failure to testify": "the prosecutor made a series of at least five comments referring to Gongora's silence as he argued to the jury that Gongora was the shooter," asking the jury repeatedly "'who you would expect to hear from.'"); *Girts v. Yanai*, 501 F.3d 743, 748, 755-56, 760 (6th Cir. 2007) (the prosecutor improperly commented on the defendant's failure to testify by, *inter alia*, stating that "'[t]here has been no evidence offered to say these people [prosecution witnesses] are incorrect,'" and that "'there is only one person that can tell you how . . . [cynanide] was introduced [into the deceased's system], and that's the defendant'"); *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1049-53 (7th Cir. 2005) (the prosecutor's statement "'Let the Defendant tell you,'" which was "directed at Ben-Yisrayl individually" and was not merely an "'invit[ation] to defense counsel to explain, in its closing argument,'" constituted an improper "suggestion to infer guilt from the defendant's silence"); *State v. Rice*, 573 S.W.3d 53, 61 (Mo. 2019) (reversing a death sentence because the prosecutor argued at the penalty trial "But when you go back there and when you do this [deliberate on punishment], I hope you remember only 12 of you are going to do it, [but] there's a 13th juror in this room. The 13th juror is sitting behind you, we often call them the defendants, but he's the 13th juror and if I'd been allowed to ask him those questions last week, he would have told us . . . ."); *cf. State v. Angel T.*, 292 Conn. 262, 973 A.2d 1207 (2009) (reversing a conviction because the prosecutor presented evidence – and argued to the jury in closing – that the defendant failed to meet with the police at their request during their investigations although they tried to arrange an interview with him both through his attorney and by phoning him directly, in order to obtain his version of the facts; "We conclude that the prosecutor's questions and comments were inappropriate because

they implied that the jury could infer the defendant's guilt from his retention of an attorney during the police investigation . . . ." *Id*. at 264, 973 A.2d at 1210. "[T]he vast majority of the federal and state courts . . . that have considered this issue have followed [*United States ex rel. Macon v.*] *Yeager*[, 476 F.2d 613 (3d Cir. 1973),] and have concluded that prosecutors may not suggest that a defendant's retention of counsel is inconsistent with his or her innocence." *Id*. at 278, 973 A.2d at 1218.). *See also* § 33.05 *supra*.

(4) The prosecutor must not "argue in terms of counsel's personal opinion," or "imply special or secret knowledge of the truth or of witness credibility" (ABA STANDARDS FOR CRIMINAL JUSTICE, *supra*, Standard 3-6.8(b)). *See, e.g.*, *United States v. Young*, 470 U.S. 1, 7-8 (1985) (dictum) ("Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence."); *Fortune v. State*, 428 S.C. 545, 551, 837 S.E.2d 37, 41 (2019) ("The assistant solicitor told the jury he has a statutory duty to screen cases, he suggested he had already determined . . . [that the defendant] was guilty, and he claimed he would have dismissed the case if he determined otherwise"; this argument constituted misconduct and violated the defendant's Due Process right to a fair trial); *Stermer v. Warren*, 959 F.3d 704 (6th Cir. 2020) (the prosecutor began his discussion of the defendant's exculpatory statements by saying "we know she is a liar" and he repeated this assertion again and again with some variations throughout his closing argument; the Sixth Circuit analyzes the argument to determine whether these statements were asking the jury to infer incredibility from the evidence or whether they expressed the prosecutor's personal opinion; finding that they did the latter, the court holds that they constituted misconduct violating the defendant's due process right to a fair trial); *Newlon v. Armontrout*, 885 F.2d 1328, 1335-38 (8th Cir. 1989) (the prosecutor's closing argument in the penalty phase of a capital trial violated due process by, *inter alia*, "express[ing] . . . [the prosecutor's] personal belief in the propriety of the death sentence and impl[ying] that he had special knowledge outside the record," and by "emphasiz[ing] his position of authority as prosecuting attorney of St. Louis County"); *Shurn v. Delo*, 177 F.3d 662, 667 (8th Cir. 1999) (the prosecutor's closing argument in the penalty phase of a capital trial violated due process by, *inter alia*, "emphasiz[ing] his position of authority and express[ing] his personal opinion on the propriety of the death sentence"); *State v. Walker*, 182 Wash. 2d 463, 468, 477-78, 341 P.3d 976, 979, 985 (2015) (the prosecutor committed "egregious misconduct" by using a PowerPoint presentation in closing argument that, *inter alia*, " repeatedly expressed the prosecutor's personal opinion on guilt – over 100 of its approximately 250 slides were headed with the words 'DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER,' and one slide showed Walker's booking photograph altered with the words 'GUILTY BEYOND A REASONABLE DOUBT,' which were superimposed over his face in bold red letters."). *See also State v. Salas*, 408 P.3d 383, 391-92 (Wash. App. 2018) ("The prosecutor in the present case did not make the mistake of superimposing the word 'guilty' over a photograph of the defendant or modifying exhibits with superimposed text. The State defends the slides on the basis that the photographs had all been admitted as exhibits and the captions contained information elicited from the witnesses. ¶ But under *Walker* . . . , the potential prejudice of a slide presentation does not arise solely from the alteration of exhibits. The broader proposition is that slide shows may not be used to inflame passion and prejudice." ¶ The captions

reinforce the visual contrast. They evoke high school stereotypes. Lopez was a musician, whereas Salas played football and was once in a fight club. Which type of person was more likely to initiate a fight? Salas was an outdoorsman, while Lopez was a customer service representative. Which type of person was more likely to use a knife? ¶ A rule of thumb for using PowerPoint is 'If you can't say it, don't display it.'"); *cf.* the *Rivera* and *Watters* cases cited in § 29.02 *supra*, condemning prosecutors' use in opening arguments of powerpoint slides with the defendant's photo and the word "guilty"; "[A] PowerPoint may not be used to make an argument visually that would be improper if made orally." *Watters v. State*, 129 Nev. 886, 890, 313 P.3d 243, 247 (2013); *and see United States v. Weatherspoon*, 410 F.3d 1142, 1146-49 (9th Cir. 2005) (the prosecutor's repeated statements during closing argument that police officers and other prosecution witnesses "'told the truth'" constituted impermissible personal "vouch[ing] for the credibility of [the] witnesses"; "Vouching of that sort is dangerous precisely because a jury 'may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled'"; "Although to be sure no lawyer, either public or private, should lay his or her own credibility on the line by expressing his or her own opinion about a witness' [sic] believability, the difference is that a private lawyer's impropriety in that respect carries no implication of official governmental support."); *People v. Casiano*, 148 A.D.3d 1044, 1045, 50 N.Y.S.3d 439, 441 (N.Y. App. Div., 2d Dep't 2017) (the prosecutor "engaged in improper conduct" during closing argument by "vouch[ing] for the credibility of the People's witnesses with regard to significant aspects of the People's case by asserting, inter alia, that 'the witnesses who came before you provided truthful testimony that makes sense,' that they gave the 'kind of truthful and credible testimony that you can rely on,' and that one witness had 'no reason . . . to be anything but truthful with the 911 operator'"); *State v. Albino*, 312 Conn. 763, 779-80, 97 A.3d 478, 490 (2014) (dictum) ("In . . . direct examination, the prosecutor made statements reiterating that the state had not promised Ayala anything in exchange for his testimony and that Ayala was free to change his story. . . . Then, in closing argument, the prosecutor stated: '[T]he state's not promising anything to . . . Ayala and he made that clear to you, *and we make it clear to the jury*.' (Emphasis added.) ¶ Because the prosecutor effectively testified to the state's lack of any promises to Ayala in the guise of questioning, such statements were improper."); *State v. Ish*, 170 Wash. 2d 189, 196, 241 P.3d 389, 392-93 (2010) (dictum) ("Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony"); *United States v. Starks*, 34 F.4th at 1173 ("'[i]t is a due process error for a prosecutor to indicate "a personal belief in the witness' [sic] credibility"'"); *United States v. Rosser*, 2023 WL 4080095, at *4-*5 (6th Cir. 2023) (a prosecutor's statement in closing argument that "I think . . . [a witness] was giving it to you straight" was improper vouching but was not plain error reversible in the absence of an objection in the particular case at bar); *Black v. State*, 2017 Wyo. 135, 405 P.3d 1045, 1055 (2017) (the prosecutor committed misconduct "when he vouched for the skill of the investigating officers. During closing, the prosecutor stated: 'I have been stunned by the police work here. I used to be in Cheyenne, the police work that this detective has done has been as complete as anything I've ever seen. . . .' [and asserted] that a particular officer involved with the investigation was 'good' and that . . . '[the lead detective] has done unbelievable police work.'");

United States v. Acosta, 924 F.3d 288 (6th Cir. 2019).

(5) The prosecutor "should make only those arguments that are consistent with the trier's duty to decide the case on the evidence" (ABA STANDARDS FOR CRIMINAL JUSTICE, *supra*, Standard 3-6.8(c)). *See, e.g.*, *United States v. Canty*, 37 F.4th 775 (1st Cir. 2022) (in a drug-distribution prosecution, (1) the prosecutor's arguments in opening and closing that the defendants had come to Maine from Brooklyn, New York to exploit the suffering of Mainers whose addiction helped the defendants make easy money was an improper "'appeal to the "jury's emotions and role as the conscience of the community"'" (*id.* at 787); (2) the prosecutor's closing argument that the defendants' co-conspirators went to jail before being granted immunity in exchange for their testimony against the defendants – an argument purportedly responding to defense counsels' attacks upon the credibility of these turncoat witnesses – "constituted an improper guilt-by-association argument" (*id.* at 788); (3) the prosecutor's rebuttal argument that the government investigators had put three years of hard work into this case – an argument purportedly responding to defense counsels' attacks on the credibility of the investigators for their failure to find certain evidence they were seeking – was improper vouching (see the preceding subparagraph) (*id.* at 788-89); (4) the prosecutor also committed misconduct in making a rebuttal argument which was "'unsupported by any evidence'" and which invited the jury to use against one defendant evidence that had been admitted only against a codefendant (*id*. at 789); and (5) the cumulative effect of these improprieties amounted to plain error requiring a reversal of the defendants' convictions despite their lack of contemporaneous objections) (*id*. at 790-97); *Simpson v. Warren*, 475 Fed. Appx. 51, 64 (6th Cir. 2012) (the prosecutor improperly sought to "inflame the jury's passions" by "twice stat[ing] [in closing argument] that 'dump[ing]' and 'throw[ing]' Officer Weston's 'dead body' before the jury should not be a prerequisite to convicting" the defendant of a charge of assault with intent to commit murder of the officer, who "was not only [still] alive, but testified at . . . [the defendant's] trial"); *State v. Albino*, 312 Conn. at 774-75, 97 A.3d at 486-87 (dictum) ("gratuitous comments about the defendant 'executing' Rivera and committing 'murder in cold blood' were improper, considering that the defendant's evidence was deemed sufficient to warrant jury instructions on lesser included offenses inconsistent with a wholly unprovoked act of brutality that has been deemed by courts to justify the use of such terms. ¶ In addition, we see no connection between the issues in the present case and the prosecutor's comment regarding 'the indignity of death' when showing the jury Rivera's autopsy photograph. Because the lack of dignity in Rivera's appearance has no relevance to the issues in the present case, this statement would seem calculated solely to appeal to the jurors' emotions."); *People v. Bogard*, quoted in subdivision (1) *supra*, 449 P.3d at 331 ("[C]ourts generally find it permissible for a prosecutor to repeat profanity in argument when the profanity is part of the evidence presented at trial. Otherwise, courts condemn counsel's use of profanity in the courtroom. We have never specifically addressed the parameters under which a prosecutor may use profanity in argument; however, it is well-settled that 'arguments calculated to inflame the passion or prejudice of the jury violate ABA Standards for Criminal Justice regarding argument to the jury.' . . . The word 'inflammatory' means '[t]ending to cause strong feelings of anger, indignation, or other type of upset; tending to stir the passions.'"); *United States v. Weatherspoon*, 410 F.3d at 1149-50 (the prosecutor's statements in rebuttal argument

encouraging the jury to return "a conviction to protect other individuals in the community," thereby speaking to "the potential social ramifications of the jury's reaching a guilty verdict" rather than seeking a guilty verdict based exclusively on the evidence at trial, "were clearly designed to encourage the jury to enter a verdict on the basis of emotion rather than fact" and, "[a]s such, . . . were clearly irrelevant and improper"); *McGriff v. United States*, 705 A.2d 282, 288-89 (D.C. 1997) (it was improper for the prosecutor to argue to the jury that "'through your verdict you can send them [the defendants] that message that you will not stand for this and that you will not tolerate this in your community'"; "'This court has stated repeatedly that an attorney must not ask a jury to 'send a message' to anyone. . . . Juries are not in the message-sending business. Their sole duty is to return a verdict based on the facts before them. Urging a jury to 'send a message' is impermissible because it implies that there is a reason to find the defendant guilty other than what the evidence has shown."); *Plymail v. Mirandy*, 8 F.4th 308, 312-13, 320 (4th Cir. 2021) (the prosecutor's closing argument (1) warning "the jury of the existence of 'trickster lovers' who disguise themselves to 'your sons and daughters' as well-intentioned individuals, but have a 'sweet tooth . . . for masochistic, sadomasochistic horror'. . ."; (2) telling the jury that "these 'trickster lovers' . . . would be sent a message from the jury's verdict . . . [that] would either be that the community would not condone such behavior or that the 'sadomasochistic' persons are free to do as they please"; and (3) concluding with "a final thought: '[t]hink of the community' and deliver a verdict 'for womankind, for all of us.'" violated due process; this argument was not justified as a response to defense counsel's arguments about "how easy it was for an 'angry, offensive' woman to harm 'innocent . . . males,'" . . . and that "'This is dangerous, Gentleman [sic]. . . . it's dangerous to even look at a woman today because she can shout "Rape" under any condition . . . and you have to disprove it and it's tough because there are only two people there and society tends to believe the woman.'"; a prosecutor "must object to improper arguments, not merely respond in kind"; and, in any event, "[t]he prosecutor went well beyond any reasonable attempt to 'right the scale' that defense counsel's comments improperly tipped. . . . This prosecutor's plea to convict based on considerations extraneous to the evidence was neither responsive nor proportional to the defense counsel's comments."); *Dutton v. State*, 2021 WL 4281308, at *7 (Md. Special App. 2021) ("The prosecutor told the jury, 'I don't know when Salisbury became Compton, but it is.' . . . [T]he prosecutor was referring to the City of Compton, California, a majority Hispanic and Black city in the southeast region of Los Angeles county, notorious in popular culture for gang violence and crime during the 1980s and 1990s. . . . Rather than convincing the jury that the evidence presented proved Dutton's guilt beyond a reasonable doubt, the prosecutor, with this remark, asked the jury to find that gang violence is, in fact, a problem in Salisbury, and suggest that the members of the jury could be part of the solution by convicting Dutton. . . . We hold that this comment was improper."); *Hodge v. Hurley*, 426 F.3d 368, 384 (6th Cir. 2005) ("[T]he prosecutor's suggestion that the jury try to 'put [itself] in the place of someone that might run into [Hodge] at night' is a version of the impermissible 'golden rule argument.' . . . ('The prosecutor cannot properly threaten the jury that an acquittal would jeopardize them personally. Such arguments ask the jurors to shed their objectivity and to assume the role of interested parties.') . . . ; ('This type of argument, where the jurors are asked to put themselves in the place of plaintiff, is commonly known as the "Golden Rule Argument" and, upon objection being

made, is normally considered objectionable and incompetent for the reason that it constitutes an appeal to the jury to abandon their position of impartiality and to exercise their discretion in the guise of an interested party.')."); *People v. Vance,* 188 Cal. App. 4th 1182, 1188, 116 Cal. Rptr. 3d 98, 102 (2010) ("There is a tactic of advocacy, universally condemned across the nation, commonly known as 'The Golden Rule' argument. In its criminal variation, a prosecutor invites the jury to put itself in the victim's position and imagine what the victim experienced. This is misconduct, because it is a blatant appeal to the jury's natural sympathy for the victim."); *Dutton v. State*, *supra*, 2021 WL 4281308, at *8 ("The prosecutor also said, '[A]t the end of the day, it's somebody's somebody, a 20-year-old kid that *we* let die on the street.' (emphasis in original). This argument turns the jury's attention away from the facts and evidence, and towards their own interests and feeling about . . . [the victim's] murder. The use of the word 'we' – emphasized in the excerpt – places blame on the jury, and thus asks the jurors to consider their owns interests, instead of the evidence in the case. . . . Furthermore, the 'it's somebody's somebody' comment seems to ask the jurors to place themselves in the shoes of . . . [the victim's] family and friends who lost their 'somebody.' . . . Again, this was an improper golden rule style argument."); *Ritchie v. State*, 344 So.3d 369 (Fla. 2022) (dictum); H. Mitchell Caldwell & Allison Mather, "*Do to Others What You Would [Not] Have Them Do to You": California Is an Outlier in Sanctioning Emotional Appeals in Deciding between Life and Death*, 33 REGENT U. L. REV. 81 (2020); *People v. Casiano*, 148 A.D.3d at 1045, 50 N.Y.S.3d at 441 ("In describing a complainant [in closing argument], the prosecutor [improperly] asserted that he was 'exactly what you hoped to see from someone who had troubles with the law in their youth,' but had 'changed [his] life' and now worked at an organization that helps 'low-income people [obtain] health care,' which was a clear attempt to appeal to the sympathy of the jury"). *See also Bennett v. Stirling*, 842 F.3d 319 (4th Cir. 2016) (the prosecutor's closing argument in a capital sentencing hearing "was suffused with racially coded references to a degree that made a fair proceeding impossible" (*id*. at 321); "[T]he remarks challenged here were unmistakably calculated to inflame racial fears and apprehensions on the part of the jury. . . . ¶ . . . The comments plugged into potent symbols of racial prejudice, encouraging the jury to fear Bennett or regard him as less human on account of his race. . . . ¶ . . . The prosecutor's references . . . were not only gratuitous but were, as the district court explained, 'a not so subtle dog whistle on race that this Court cannot and will not ignore.'" (*id*. at 324-25); "The criminal justice system must win the trust of all Americans by delivering justice without regard to the race or ethnicity of those who come before it." *Id*. at 328.); *State v. Zamora*, 199 Wash. 2d 698, 512 P.3d 512 (2022) ("[The] Prosecutor . . . began voir dire by introducing the topics of border security, illegal immigration, and crimes committed by undocumented immigrants. The prosecutor repeatedly elicited potential jurors' comments and views on these topics, referring at one point to '100,000 people' 'illegally' crossing the border each month. . . . He began asking jurors whether they felt they were closer to choosing a side of 'we have [or] we don't have enough border security.' . . . He also asked jurors if they had 'heard about the recent drug bust down at Nogales, Arizona where they picked up enough [of] what's called Fentanyl that would have killed 65 million Americans.'" *Id*. at 703, 512 P.3d at 515-16. "We conclude that the prosecutor's questions and remarks apparently intentionally appealed to the jurors' potential racial or ethnic bias, prejudice, or stereotypes and therefore constitute race-based prosecutorial misconduct. . . [infecting the trial

with plain error which is not subject to harmless-error analysis]. We reverse the Court of Appeals and vacate the convictions." *Id*. at at 701, 512 P.3d at 515.); *State v. Bagby*, 200 Wash. 2d 777, 779, 522 P.3d 982, 985-86 (2023) ("The court unanimously holds that two elements of the prosecutor's conduct objectively constituted a flagrant or apparently ill-intentioned appeal to jurors' racial bias in a way that undermined the defendant's credibility and presumption of innocence. Because the race-based misconduct was so flagrant and ill intentioned that a timely objection and jury instruction could not have cured resulting prejudice, the errors are per se prejudicial, warranting reversal. ¶ The two elements of the prosecutor's misconduct constituting reversible error were repeated use of the term 'nationality' to distinguish the defendant, a Black man who is a United States citizen, from other witnesses, all but one of whom are not Black, and framing of several white witnesses as 'Good Samaritans' while conspicuously excluding the sole Black witness, who notably tried to deescalate the first incident at issue."); *State v. Rogan*, 91 Hawai'i 405, 413, 984 P.2d 1231, 1239 (1999) (in a prosecution for sexual assault upon a child, the prosecutor's argument that "This is every mother's nightmare. Leave your daughter for an hour and a half, and you walk back in, and here's some black, military guy on top of your daughter" was misconduct requiring not only a mistrial but that the prosecution be precluded from retrying the defendant: "courts throughout the country have consistently condemned appeals to racial prejudice during closing argument."); *State v. Kirk*, 157 Idaho 809, 812, 339 P.3d 1213, 1216 (Idaho App. 2014) (the prosecutor's quotation of the "look away" lines from "Dixie" in closing argument required the reversal of an African-American defendant's conviction for sex offenses with minors: "The State maintains . . . that there was no 'clear or obvious' constitutional error here because the prosecutor acted with innocent intent, presenting 'simply a personal story of singing in her youth' to make a legitimate point that Kirk's closing argument asked the jury to 'look away' from the prosecution's evidence. This was not, the State argues, an overt appeal to racial prejudice. We agree that the racial reference here was indirect and perhaps innocently made. This prosecutor may not have intended to appeal to racial bias, but a prosecutor's mental state, however innocent, does not determine the message received by the jurors or their individual responses to it."); Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & LAW 325, 347 (2006); Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE WESTERN L. REV. 39 (2020); *Romine v. Head*, 253 F.3d 1349, 1367-68 (11th Cir. 2001) (the prosecutor misled the jury in the capital sentencing phase of the trial and rendered the proceeding fundamentally unfair by "quot[ing] scripture as higher authority for the proposition that death should be mandatory for anyone who murders his parents," thereby conveying to the jury that "mercy can have no place in a capital sentencing proceeding [which] is undeniably wrong"); *Farina v. Secretary, Florida Department of Corrections*, 536 Fed. Appx. 966, 983 (11th Cir. 2013) ("the prosecutor's improper use of Biblical reference to proclaim death as the only viable punishment – mandated by the divine – so diminished the jury's decision-making ability [as] to render the proceedings unfair and unjustly prejudicial"); *United States v. Acosta*, 924 F.3d 288 (6th Cir. 2019), summarized in § 33.09(a) *supra*; *State v. Ceballos*, 266 Conn. 364, 832 A.2d 14 (2003) (reviewing the case law condemning religion-based arguments by prosecutors). *Compare Baer v. Neal*, 879 F.3d 769, 788 (7th Cir. 2018) (finding defense counsel ineffective for failing to object to improper prosecutorial arguments: "[Prosecutor] Cummings's misstatements were prolific and

harmful to Baer's case, yet Baer's trial counsel failed to object at every opportunity. Cummings's comments began in voir dire, where his comments conditioned jurors to believe that Baer was a liar, that mental illness was a 'copout' and 'defense,' that Baer should not receive a GBMI conviction because he appreciated the wrongfulness of his actions (improperly using the insanity defense standard), life without parole was at a high risk of providing release, and the Clark family wanted a death sentence. All these comments were made before the jury heard any evidence in Baer's case. Then, at the close of the penalty phase, Cummings again injected inflammatory comments and facts not in evidence, including remarks about Cummings's mother's prostitution, people being laid off to afford the state's pursuit of the death penalty, and Baer's crime being worse than any of the prior 125 murders Cummings had heard of in his career in law enforcement. Each of these comments made by Cummings carried the weight and authority of the state."), *with Darden v. Wainwright*, 477 U.S. 168, 179-80 & n.12 (1986) (although the prosecutors "made several offensive comments reflecting an emotional reaction to the case," which "undoubtedly were improper," these comments did not "'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process,'" given that the "prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent"; "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense"; "[t]he trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence"; "[t]he weight of the evidence against [the defendant] . . . was heavy"; and "[d]efense counsel were able to use the opportunity for rebuttal very effectively, turning much of the prosecutors' closing argument against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against" the defendant.). *Compare State v. Walsh*, 125 Hawai'i 271, 260 P.3d 350 (2011) (holding that generic tailoring arguments (*i.e.*, arguments urging that the defendant's trial testimony be disbelieved because s/he had the opportunity to hear all of the preceding testimony and to tailor his or her own version of the facts accordingly) violates the state constitutional rights to confrontation (which assures a defendant that she can be present throughout the trial) and to testify, although specific tailoring arguments (*i.e.*, arguments that specific aspects of the defendant's trial testimony were fabricated to conform to specific items in the testimony of particular preceding witnesses) are permissible), *and State v. Stephanie U.,* 206 Conn. App. 754, 789, 261 A.3d 748, 772 (2021) (exercising the court's supervisory authority to "to set forth a procedure to ensure that prosecutors make only specific and not generic tailoring remarks during a criminal trial"), *and State v. Daniels*, 182 N.J. 80, 861 A.2d 808 (2004) (same), *with Portuondo v. Agard*, 529 U.S. 61 (2000) (holding that generic tailoring arguments do not *per se* violate any federal Fifth or Sixth Amendment rights or Due Process.).

(6) The prosecutor must not disparage the respondent's character in ways that violate the rules governing other-crimes evidence (see § 30.07(a), (b) *supra*) or the rules governing rebuttal to good-character evidence introduced by the defense (see § 33.17 *supra*). *See, e.g.*, *Gumm v. Mitchell*, 775 F.3d 345, 381-85 (6th Cir. 2014) (the prosecutor committed misconduct in rebuttal closing argument "by using highly inflammatory and prejudicial evidence, much of which was

known to be of questionable reliability, to assert that . . . [the defendant] had a propensity to commit the acts in question" and by "portraying [the defendant] . . . as a sexual deviant whose character aligned with the crimes in this case"); *Simpson v. Warren*, 475 Fed. Appx. at 62, 64 (the prosecutor improperly encouraged the jury to consider the defendant's "'bad character as a thumb on the scale in favor of a finding of guilt'" by arguing, in a trial for assault with intent to commit murder and gun possession, that the apparently "'nice looking fellow'" whom the jury was seeing in the courtroom was actually "'the type of man who knows about all of this ammunition and guns, that hangs out with Hughes and Sharp and Smith, the type of man that carries this gun . . . and points it and shoots it,'" and by using other-crimes evidence introduced at trial to argue that the "'total picture . . . makes out a person who, but for a bad aim, could very well be before you as a killer'"). *Cf. Stermer v. Warren*, summarized in subdivision (4) *supra*. Disparaging legitimate trial conduct by defense counsel is also forbidden. *See United States v. Aquart*, 912 F.3d 1, 42 (2d Cir. 2018) ("The Sixth Amendment affords a defendant the right to a 'meaningful opportunity to present a complete defense.' . . . The law does not cabin that right to consistent defense theories. Rather, it demands that defendants be allowed 'to present wholly inconsistent defenses.' . . . [T]he government violated Aquart's Sixth Amendment right when it urged the jury to draw an adverse inference from the fact that the defense had advanced different theories as to confederate Taylor's role at the guilt and penalty phases of trial."); *People v. Casiano*, 148 A.D.3d at 1046, 50 N.Y.S.3d at 441 (the prosecutor's closing argument impermissibly "denigrated the defense and undermined the defendant's right to confront witnesses by implying that the complainants were victims of an overly long cross-examination and that one was a 'saint' for answering so many questions"); *State v. Albino*, 312 Conn. at 776-78, 97 A.3d at 487-89 (dictum) (comments in which "the prosecutor analogized the defense strategy to an octopus' defense mechanism of shooting ink into the water, thus muddying the water so the octopus can escape" and "refer[ing] to the defense strategy as a 'shotgun approach. You shoot it against the wall and you hope that something will stick.'" were improper); *Fortune v. State*, *supra* (the prosecutor engaged in reversible misconduct, violating the federal Due Process Clause, by arguing that his job was to present the truth, whereas defense counsel's job was to manipulate and shroud the truth, confuse jurors and get a not guilty verdict regardless of the truth); *Dutton v. State*, *supra*, 2021 WL 4281308, at *6 ("During closing arguments, the prosecutor told the jury that Dutton's counsel was lying: ¶ ['']the only person selling you crap is [Dutton's trial counsel]. He's twisting the testimony, he's inserting his opinion in facts, he's picking apart typos because desperate times call for desperate measures.['] ¶ This comment from the prosecutor violates at least two well-understood rules. First, a prosecutor may not say, or even imply, that defense counsel has fabricated a defense. . . . *Second*, it is improper for a prosecutor to 'impugn the ethics or professionalism of defense counsel in closing argument'.").

(7) The prosecutor must not argue that facts are true if s/he knows that they are not, even when there is evidence of their truth and no evidence of their falsity in the record. *See State v. Garcia*, 245 N.J. 412, 436, 246 A.3d 204, 218 (2021), summarized in § 30.04(b)(2) *supra* ("In this case, in the technical sense, the prosecutor may have limited his remarks to the evidence of record, but in the fullest sense, he pursued a course that he knew was not consistent with the truth. Our system of justice places checks on the propagation of falsehood. An object or a video

[belying facts argued by the prosecutor in closing but which was] excluded from evidence does not become imaginary or non-existent. . . . Even in our adversarial system, the notion that a trial is a search for truth is not an empty anachronism.").

§ 36.11(b) Objecting to Improper Arguments by the Prosecutor

Some judges consider it a matter of courtesy for opposing counsel not to interrupt one another's closing arguments to the jury by making objections *in media res*. If this is a matter of the individual judge's courtroom etiquette rather than a documentable jurisdiction-wide rule, counsel should elicit the judge's statement on the record that s/he wants objections to opposing counsel's argument to be withheld until the argument is finished. In the absence of such a statement, an appellate court may treat counsel's post-argument objections as untimely.

Even where this courtesy is expected, counsel should not hesitate to interrupt the prosecutor's argument by objecting if the prosecutor plainly goes beyond allowable bounds – for example, by disparaging the respondent's character when no good-character defense has been presented; by arguing from struck evidence or from facts outside the record; by asserting the prosecutor's personal belief in the respondent's guilt; or by implying that there is additional incriminating evidence against the respondent that the prosecutor has not bothered to present. See § 36.11(a) *supra*. Less egregious improprieties should be noted down on counsel's pad or computer. After the prosecutor has concluded, counsel should approach the bench, describe each impropriety, object to each, and request corrective instructions.

In other localities, contemporaneous objection to improper argument is accepted or required. Counsel should be prompt to make it. Failure to object will preclude appellate review except under the characteristically onerous plain-error standard. *See*, *e.g.*, *State v. Kipple*, 310 Neb. 654, 968 N.W.2d 613 (2022); *People v. Saulsberry*, 2021 IL App (2d) 181027, 191 N.E.3d 730, 455 Ill. Dec. 423 (2021).

Sometimes counsel will wish to let objectionable arguments go without objection so as to treat them as opening the door to rebuttal. But in considering this tactic s/he must keep in mind who has the last word. See § 36.10 *supra*. When the prosecutor has made a number of factually unsupportable statements, it is often effective for counsel in his or her own closing argument to demonstrate that each of these is belied by the record, then to use the misstatements to portray the prosecution theory as, part and parcel, made up out of whole cloth.

§ 36.12 DEFENSE ARGUMENT

§ 36.12(a) General Considerations

The defense closing argument is the place for counsel to connect everything that has happened during the trial and to weave it into the story that presents the respondent's theory of the case. Counsel presumably will have developed that story line prior to trial and used it to guide

all of counsel's actions throughout the trial: – conducting the *voir dire*; opening statement; objections; cross-examination of prosecution witnesses; and the presentation of any defense witnesses and exhibits. *See* Chapter 6. Closing argument provides the opportunity to drive home the messages counsel has been sending throughout the trial. Sometimes that will best be done with explicit, linear, logical reasoning, but often it will be more effective to use rhetorical and narrative devices that shape the jurors' thinking in a subtler manner. Counsel will want to think carefully about the best macrostructure, verbal formulations, and metaphors, along with a host of other factors that go into effective storytelling in closing argument. *See generally* Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. SCH. L. REV. 55 (1992); PHILIP N. MEYER, STORYTELLING FOR LAWYERS (2014).

In general, defense counsel should focus on arguments that will make the jury affirmatively *want* to acquit the respondent. When possible, counsel should attempt to persuade the jury that the respondent is innocent – unjustly accused; a victim of circumstances or of the complainant's malevolence or of police ineptitude; someone entitled to vindication. However, arguments demonstrating innocence should always be combined with a reminder to the jury that it needs not find that the defense has proven the respondent innocent, merely that the prosecution has failed to prove the respondent guilty beyond a reasonable doubt.

The heaviness of the prosecutor's burden is often the most important factor favoring the defense, and in these cases it is crucial for counsel to convey it to the jury. Unfortunately, "reasonable doubt" is also one of the most difficult concepts for a juror to understand. Counsel can help to explain the concept by describing the rationale for the prosecutor's burden: that the law cannot tolerate the risk of error or mistake in a decision that can affect an individual's life or liberty; therefore, the law has established an extremely high standard of certainty which the prosecution must satisfy. Counsel can also link the concept of reasonable doubt to the gravity of the jury's task when sitting in judgment on a fellow human being, and can emphasize the seriousness of the jury's decision by pointing out that once the jurors have given their verdict, it will be too late for second thoughts and doubts that may occur later, when the jurors think back about what they have done. See also § 36.06 subdivision (4) *supra*.

§ 36.12(b) Structure and Content of the Defense Argument

The following points should be considered for inclusion in counsel's closing. In the order in which they are set out below, they provide the logical structure for an argument that gathers momentum.

(1) An expression of appreciation for the attention and interest of the jurors throughout the trial, and a recognition that jury service is not convenient.

(2) The assertion that the only reason for calling the jurors away from their own affairs and making them sit through a delinquency trial is the vital importance of seeking the judgment of twelve impartial and responsible members of the community when there are questions of fact

to be resolved in a delinquency case that could have extremely serious consequences for the life or liberty of a fellow human being.

(3) The assertion that the law recognizes both the difficulty and the importance of that judgment by requiring that the guilt of the accused be proved by the prosecution beyond a reasonable doubt and to the moral satisfaction of every juror; that because there should not be any risk of error or mistake in convicting someone of a crime [even when appearances may be against him or her], the law insists that every juror must be satisfied beyond a reasonable doubt that no mistake is being made.

(4) A succinct summary of the substantive legal rules governing the offenses charged and the defenses presented and, in particular, governing the theory of the defense. (This should ordinarily be preceded by the phrase "As [His] [Her] Honor will tell you in instructing you on the law after the prosecutor and I have completed our arguments" or some equivalent recognition that the jury is expected to get its legal education from the court. Defense counsel is not supposed to instruct the jury on the law but is, of course, permitted to outline the legal principles on which s/he will rely. Ordinarily s/he should do this – even when the law is relatively simple and has been covered unobjectionably by the prosecutor – because counsel does not want it to appear that the defense is less well situated than the prosecutor to draw support for its position from the law. Counsel's statement of the legal rules should track as closely as possible the verbal formulations that counsel expects the judge to charge. Counsel's aim in proposing jury instructions and in attempting to learn in advance exactly what the judge will say to the jury (see §§ 36.02, 36.08 *supra*) was to enable counsel to lay out the law in terms that will be recognizably endorsed by the court's jury charge.)

(5) A statement of the specific, critical questions that the jury must decide, in light of the law and the evidence. (This may boil down to the credibility of one witness or to the reasonableness of one inference – wherever the defense is strongest. It is usually best to reduce the number and complexity of issues on which the jury will focus, unless the defense is relatively weak on all issues.)

(6) A statement of the answers that the defense is confident the jury will find in considering those questions when it scrutinizes the evidence critically during its deliberations.

(7) A dissection of the prosecution evidence at its weakest points (or of the prosecutor's summary of it if that is as, or more, vulnerable), and a summary of the defense evidence (if there was any), connecting the pieces of defense evidence together and stating what they combine to show. (An important judgment call, which must be made on the facts of each case, is whether counsel should (a) focus discussion of the evidence on the prosecution's theory and use defense evidence solely to poke holes in that theory; (b) focus discussion of the evidence on the defense theory and criticize the prosecution's evidence as insufficient to overcome that theory; or (c) invite an explicit comparison of the prosecution's theory of the case with the defense theory and argue that the defense theory is more plausible.)

(8) A criticism of the logic or fairness of the prosecutor's summary (if this has not been done in connection with the preceding item).

(9) A prediction of the points that the prosecutor will probably make in rebuttal and a statement of the reasons why they should not be viewed as persuasive. (In this connection it is usually helpful to point out that the prosecutor is given the last word under the rules of procedure and that defense counsel will have no chance to reply. The prosecutor should be made to appear unfair insofar as s/he abuses this favorable position to partisan advantage.)

§ 36.12(c) Techniques to Consider Using in Closing Argument

In structuring final argument, counsel should be selective in the choice of materials so that his or her reasoning is easy to follow. A shotgun approach in final argument should be avoided. Useful devices in argument include:

(1) Defining reasonable doubt, giving a hypothetical situation from everyday life ("If the man across the street came over and said he saw your child throw a brick through his window and that your child should be punished, and maybe the man's wife also said that she saw your child throw the brick, but your child denied doing it, and then a neighbor down the block said he saw the person who threw the brick and it didn't look like your child, it looked like the Jones kid . . . ."), and then identifying the weak points in the prosecution's case and the strong points in the defense case that combine to compel a reasonable doubt.

(2) Stressing the heavy burden of proof that the prosecution bears in criminal and delinquency cases and comparing it to the lesser burden in a civil case. (For example: "A party who brings a civil claim into court only needs to carry the ball over the 50-yard line, but the prosecutor in a criminal or delinquency case has to carry it all the way down the field and over the goal line.") See § 36.06 subdivision (4) *supra*.

(3) Using common, daily experiences to support factual arguments by analogy.

(4) Emphasizing the technical, dryly logical, many-step nature of the prosecution's case, as opposed to the immediacy and common-sense position of the defense. (The prosecution's case ordinarily *is* more complex than a good defense because the prosecutor needs to win on more points.)

(5) Quoting verbatim from the prosecutor's closing argument and pointing out exaggerations and unsupported assertions.

(6) Quoting legal rules in the same language that the court will use in its charge and showing how these rules support the defense position.

The devices may be used in varying combinations, depending upon the evidence, but the

case is rare in which all of them could be put together effectively.

§ 36.12(d) Limits on Defense Argument

There are, of course, limits to permissible defense argument, just as there are limits to permissible prosecutorial argument. Defense counsel is usually forbidden to rely upon facts that have no basis in the evidence, to urge the jury to disregard the law, to mention matters (such as the sentence facing the respondent if convicted) which it is improper under local practice for the jury to consider, and to express a personal opinion of the client's innocence or of the mendacity of prosecution witnesses. The relevant rules vary considerably from jurisdiction to jurisdiction.

Nevertheless, "[c]losing arguments are a crucial part of trial" (*Kelsey v. Garrett*, 68 F.4th 1177, 1183 (9th Cir. 2023)), and the Supreme Court of the United States has held that the Sixth and Fourteenth Amendments guarantee the accused "a right to be heard [through counsel] in summation of the evidence" (*Herring v. New York*, 422 U.S. 853, 864 (1975) (invalidating a state statute that empowered trial judges to refuse entirely to hear closing arguments in nonjury trials)). This decision necessarily implies that state-law limitations on defense summation are subject to federal constitutional review. The *Herring* opinion emphasizes that the "presiding judge . . . is given great latitude in controlling the duration and limiting the scope of closing summations" (422 U.S. at 862); but plainly that latitude does not extend to the imposition of restrictions upon counsel which would frustrate the basic functions of summation that led the Supreme Court to recognize it as a constitutional right: to "argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions" (*id*.). Counsel who find themselves thus frustrated should reserve objections on Sixth and Fourteenth Amendment grounds as well as on the ground that the court has abused its discretion under state law.

§ 36.12(e) Wrapping Up

The last sentences of the defense closing argument should be the crest of the speech, after which counsel should quickly express confidence that the jury will see the logic of the respondent's position, thank the jurors for their considerate attention, and stop. Stopping promptly after delivering the thrust of an argument leaves the prosecutor little time to collect his or her thoughts and to frame a strong rebuttal.

Part D. The Judge's Charge to the Jury

§ 36.13 TAKING OBJECTIONS TO THE COURT'S CHARGE

Whether or not the court's charge has been thoroughly picked over at a conference on instructions (see § 36.02 *supra*), and whether or not counsel entered objections to it in the course of that conference (see *id*. penultimate paragraph and § 36.09 *supra*), counsel must give it careful attention as it is delivered. What is clear when written may not sound clear when spoken. Even if the judge has agreed to give certain instructions requested by the defense and appears simply to

be reading them to the jury, counsel cannot afford to relax. Judges sometimes slip or ad lib, and counsel must be alert to object if the judge does not follow the script. If the judge offsets a defense instruction by charging an inconsistent or countervailing principle or theory elsewhere in the charge – as is quite common – counsel should object to the offsetting portion of the charge. *See Francis v. Franklin*, 471 U.S. 307, 322-25 (1985); *Cabana v. Bullock*, 474 U.S. 376, 383-84 n.2 (1986).

Various kinds of restrictions imposed on the charge in many jurisdictions are noted in § 36.03 *supra* or can be extrapolated from §§ 36.04-36.06. These should be researched under local law and kept in mind.

Even jurisdictions that permit the judge to comment on the evidence impose some limitations on his or her power to do so in ways that are likely to overbear the independence of the jury as the ultimate trier of fact or to sway the jury's judgment by misstating how the jurors should or may evaluate particular evidentiary matters. *See, e.g.*, *Quercia v. United States*, 289 U.S. 466 (1933); *Wheeler v. United States*, 930 A.2d 232 (D.C. 2007); *State v. Hernandez*, 218 Conn. 458, 590 A.2d 112 (1991) (although "[a] trial court has broad discretion to comment on the evidence adduced in a criminal trial" (218 Conn. at 461, 590 A.2d at 114) "the one-sided rendition of the case given by the court was prejudicially unfair" (*id*. at 465, 590 A.2d at 115), requiring that the conviction be reversed and the case remanded for a new trial: the trial judge "extensively detailed the state's claims and its evidence in support thereof, and little or no reference was made to the defendant's exculpatory evidence and his theory of defense" (*id*. at 465, 590 A.2d at 115); "despite the court's disclaimers, . . . the jury was likely to have interpreted the partisan rehearsal of the case as an indication that the court in this 'simple case' believed that the defendant's claims and evidence, seemingly not worthy of comment, likewise were not worthy of consideration." (*id*. at 465, 590 A.2d at 115)); *cf. State v. J.S.*, 222 N.J. Super. 247, 255-57, 536 A.2d 769, 773-74 (1988). Counsel might do well to clock how much time the judge spends summarizing the prosecutor's case and how much time the judge devotes to the defense. This is a helpful bit of raw data that can be used if counsel decides to approach the bench at the end of the charge and request additional instructions on some aspects of the defense case.

If the judge expresses an opinion on issues of credibility and guilt (as s/he is permitted to do in some jurisdictions), counsel should note the exact phrasing. When comment of this sort is allowed, it is nevertheless required to be qualified so as to leave clear that these issues are ultimately for the jury. The accused "is entitled to have the credibility of his testimony, or that of witnesses called on his behalf, judged by the jury." *United States v. Bailey*, 444 U.S. 394, 415 (1980) (dictum). *A fortiori*, a jury instruction that relieves the prosecution from the burden of proving an element of its case by telling the jurors that the element has been established as a matter of law is constitutionally impermissible. *See*, *e.g.*, *Powell v. Galaza*, 328 F.3d 558 (9th Cir. 2003).

When the judge has completed his or her charge, s/he will ask whether counsel has any objections. (If the judge neglects to ask and counsel has objections, counsel should request leave

to come to sidebar. Some fair opportunity must be given to the parties to record objections to the court's charge out of the hearing of the jury. *See Hamling v. United States*, 418 U.S. 87, 132 (1974) (dictum).) In most jurisdictions objections to the charge as given must be made at the bench at this time, before the jury goes out, or they are lost. *See, e.g.*, FED. RULE CRIM. PRO. 30(d). Counsel should state with particularity the portions of the judge's charge to which s/he objects and all of the legal grounds of objection to each of them, and s/he should be sure that the proceedings at the bench are being recorded. Failure to object leaves the respondent's prospects of appellate review at the mercy of the prosecution-friendly "plain error" standard (*see*, *e.g.*, *United States v. Cantwell*, 64 F.4th 396, 405-09 (1st Cir. 2023); *United States v. Burnette*, 65 F.4th 591, 599, 601-04 (11th Cir. 2023)) and any lack of specificity in stating the grounds for an objection is likely to have the same disastrous effect (*see*, *e.g.*, *United States v. Abraham*, 63 F.4th 102, 109-10 (1st Cir. 2023)).

Even if the court's instructions include some misstatement that is harmful to the defense, counsel may not want the court to correct itself because that would once again draw the jury's attention to an aspect of the case that counsel would just as soon have the jury forget. In these circumstances counsel should note this point on the record, explain that the defense has already been prejudiced either way, and let the court cut the Gordian Knot if it chooses. The judge will predictably insist that counsel take a position: "Do you or don't you want additional instruction on the subject?" Counsel should then choose whichever appears to be the lesser evil, but should state that the chosen alternative is an insufficient corrective and that s/he is preserving for consideration on post-trial motions and on appeal the contention that the court's initial instructions were erroneous and prejudicial and that the defense should not be put to the forced choice between leaving the error unremedied and endorsing a purported remedy that will exacerbate the problem.

Should counsel have some objection to the court's demeanor in presenting the charge, counsel must describe the offending behavior in concrete detail. Obviously, this should be done only in extreme cases.

Counsel should always state specifically every objection s/he may have to the charge rather than taking a "general exception." If a general exception or no exception is taken to the charge, the charge will be upheld unless there was "plain error." See § 36.03 *supra*.

In addition to, or instead of, objecting to any portion of the charge as erroneous, counsel may request additional instructions amplifying or clarifying those given. Trial judges often grant these requests in their discretion, even though there was nothing objectionable in the original charge.

Part E. The Jury's Deliberations and Verdict

§ 36.14 CONDUCT OF THE JURY DURING DELIBERATIONS

In many jurisdictions, once the jury's deliberations have begun, the jurors are not permitted to separate until a verdict has been reached. If a verdict cannot be reached before a normal mealtime or day's end, deliberations may be stopped with the permission of the court, and the jury will be fed or housed under the supervision of court attendants. Although the jury is kept together during these recesses, it is not permitted to deliberate outside the jury room. There is a movement among the States to relax the requirement of sequestration during deliberations in noncapital cases (*compare* FLA. RULE CRIM. PROC. 3.370(b), promulgated by *Amendment to Rules of Criminal Procedure – Rule 3.370(b)*, 596 So.2d 1036 (Fla. 1992), *with Livingston v. State*, 458 So.2d 235 (1984), and cases cited in *id*. at 238; *and compare* N.Y. CRIM. PRO. LAW § 310.10(2) (effective May 30, 2001), *with People v. Coons*, 75 N.Y.2d 796, 551 N.E.2d 587, 552 N.Y.S.2d 94 (1990)). But whereas sequestration of the jury prior to the submission of the case is an increasingly rare practice (see § 27.05(a)(1) *supra*), post-submission sequestration remains widespread. *See* Allan E. Korpela, Annot., *Separation of jury in criminal case after submission of cause – modern cases*, 72 A.L.R.3d 248 (1976 & Cum. Supp.). Some States that continue to require it do give the trial judge discretion to permit the jurors to go home overnight or to separate briefly for other purposes if the accused waives the right to keep the jury cloistered. *See, e.g.*, *Pope v. State*, 569 So.2d 1241, 1244 (Fla. 1990). Unless counsel has reason to worry that jurors released from confinement will be exposed to prejudicial media or social-media material or to blandishments by pro-conviction family members and acquaintances, s/he should ordinarily agree to separation of the jury. When jurors have been deliberating for a substantial length of time without returning to court, they are probably at loggerheads to some extent; a hung jury is ordinarily a significant defense victory; and captive jurors are under pressure from each other and their own everyday needs to reach a unanimous verdict.

In some jurisdictions the jury is routinely given a written copy of the court's charge to take into the jury room; in others this procedure is permitted in the court's discretion; elsewhere it is not permitted at all. The jurisdictions also vary on whether exhibits are sent out with the jury routinely, may be delivered to the jury room if specially requested by the jurors, or may not go to the jury room under any circumstances. *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-5.1 (3d ed. 1996) ("Materials to Jury Room"). *Cf. State v. Hines,* 173 Wis. 2d 850, 496 N.W.2d 720 (Wis. App. 1993) (reversing a conviction because the trial judge permitted a police report to be sent to the jury room at the request of the jurors (who had previously advised the court by eight successive notes that they could not reach a verdict) over defense counsel's objection that the report contained inadmissible hearsay: "A trial court's decision whether to send exhibits to the jury during deliberations is guided by three considerations: (1) whether the exhibit will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury. *State v. Jensen*, 147 Wis. 2d 240, 260, 432 N.W.2d 913, 921-22 ([Wis.] 1988). ¶ The trial court erred when it did not consider these three factors before sending the exhibit to the jury" (173 Wis. 2d at 860, 496 N.W.2d at 724)). *Cf. People v. Hollahan,* 2020 IL 125091, 181 N.E.3d 691, 450 Ill. Dec. 339 (2020) (approving the conduct of a trial judge who, in response to a deliberating jury's request to re-view a videotape of the defendant's field sobriety test that had been played during

the trial, brought the jury back into the courtroom and replayed the tape in the presence of the defendant and counsel).

Some courts allow the jurors during trial to take notes for use during their deliberations (*see*, *e.g.*, *People v. Hues*, 92 N.Y.2d 413, 704 N.E.2d 546, 681 N.Y.S.2d 779 (1998) (giving trial judges discretion to allow jurors to take notes and setting out instructions that should be given when note-taking is allowed); *Price v. State*, 887 S.W.2d 949 (Tex. Crim. App. 1994) (same); *Murphy v. United States*, 670 A.2d 1361 (D.C. 1996); *State v. Flournoy*, 232 W. Va. 175, 751 S.E.2d 280 (2013)); others do not. *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-3.5 (3d ed. 1996) ("Note Taking by Jurors"); Sonja Larsen, Annot., *Taking and use of trial notes by jury*, 36 A.L.R.5th 255 (1996 & Supp.).

During their deliberations, jurors are forbidden to receive extra-record information or materials regarding the case under consideration. "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States,* 146 U.S. 140 150 (1892). If counsel has a basis for believing that any juror may have been exposed to a violation of this prohibition, counsel should consider requesting a hearing at the earliest opportunity – whether before or after verdict, as soon as the ground for counsel's belief arises – to explore whether a motion for a mistrial or (after verdict) for a new trial on the ground of jury contamination is advisable. *See, e.g., Parker v. Gladden*, 385 U.S. 363 (1966); *State v. Watkins*, 526 N.W.2d 638 (Minn. App. 1995) (reversing a conviction when at least one bailiff, possibly two, referred to defense counsel as "a darky" in the presence of the jury during its deliberations; "A court bailiff's statements about the merits of a criminal case in the presence of the jury create a rebuttable presumption of prejudice. . . . The presumption arises because the official character of the bailiff, as an officer of the court and the state, indisputably carries great weight with a jury." *Id*. at 640. "We think the state's argument [that "the disparaging racial term 'darky' or 'that darky' . . . do[es] not go to the merits of this case"] focuses on too narrow a definition of 'merits' and overlooks the constitutional dimensions of the misconduct. *Id*. at. 641. "When racial considerations are injected into jury deliberations, the Sixth Amendment guarantee of a fair trial is defeated." *Id*.); *Batiste v. State*, 184 So.3d 290 (Miss. 2016) (granting leave to file a post-conviction petition raising a claim of violation of "Batiste's fundamental constitutional right to a fair trial by an impartial jury" (*id*. at 293); "In the present case, affidavits from jurors who convicted Batiste and sentenced him to death support Batiste's claim that bailiffs made improper comments which affected his right to a fair trial. The affidavits substantiate that the bailiffs 'explained the law' when the jurors had questions about it. Furthermore, according to one juror, the bailiff explained that the reason no African Americans were serving on the jury was because 'blacks and whites are different in their opinion about the death penalty'and 'black people will not consider the death penalty.' Another juror agreed that 'someone' had 'explained that you have to be comfortable with the death penalty, and blacks don't feel as comfortable with it." *Id*.); *Oliver v. State*, 25 Md. App. 647, 334 A.2d 572 (1975) (reversing a conviction when the jury foreperson during deliberations asked a bailiff what was the difference between illegal entering and breaking and entering, and the bailiff replied that he thought there was no

difference); *State v. Duplissey*, 550 So.2d 590 (La. 1989) (reversing a conviction because "a presumption of prejudice, combined with the testimony of two witnesses that the bailiff told the foreperson that the jurors were to show Juror Smith [who had indicated that he did not know how to read or write] how to vote and the admission of the bailiff that he entered the jury room, was not overcome by the bailiff's testimony that he merely told the foreperson that Juror Smith had to make up his own mind about how to vote"); *United States v. Jordan*, 958 F.3d 331, 338 (5th Cir. 2020) (affirming the action of a trial judge in granting the defendant a new trial after learning that a court security officer had privately consoled a distressed juror during jury deliberations: "In urging Juror #11– whose comments to the district court evinced her great distress at the prospect of conviction – to vote 'without regard to the punishment that may be imposed,'. . . the CSO arguably conveyed a preference for a guilty verdict. The same goes for the CSO's similar comment to the unidentified juror when that juror voiced an intention to vote "with reservation." Worse, the CSO's statement that the jury should return a guilty verdict 'if they thought the Defendants committed the crimes' can be reasonably understood as urging a standard for conviction that is lower than the correct one, which 'requires proof beyond a reasonable doubt.'"); *Godoy v. Spearman*, 861 F.3d 956 (9th Cir. 2017) (en banc) (defense counsel's motion for a new trial – which "alleged that a juror (Juror 10) had communicated about the case while it was ongoing with a 'Judge up North,'" and which was supported by "an uncontroverted declaration from alternate juror 'N.L.,' [who stated that] Juror 10 'kept continuous communication' with the 'judge friend' 'about the case' and passed the judge's responses on to the rest of the jury" (*id*. at 958) – should have resulted in the trial court's presuming prejudice and conducting an evidentiary hearing to determine whether the state could show that the contact was actually harmless); *People v. Plowden*, 150 A.D.3d 896, 897-98, 55 N.Y.S.3d 74, 76 (N.Y. App. Div. 2d Dep't 2017) (reversing a conviction because "a preponderance of the evidence adduced at the hearing conducted on the defendant's motion to set aside the verdict established that one of the jurors improperly shared the views of her husband, who was a retired assistant district attorney, by telling the other jurors that he told her that everything the prosecutors said was true, that law enforcement officers would not lie, that the accomplice could never have come up with such an extravagant story in such a limited amount of time, and that crime scene videos didn't show everything. Moreover, the evidence established that the juror's comments regarding her husband's statements influenced one juror who testified at the hearing. Additionally, another juror testified that during deliberations she sent a text message to her uncle, a retired police officer, and asked him if a nine millimeter bullet could fit into a.40 caliber gun. Her uncle told her 'no,' and the following day she shared that information with the jury."); *State v. Grant*, 254 N.J. Super. 571, 604 A.2d 147 (1992) (reversing convictions for attempted armed robbery, felony murder, and related offenses because the foreperson of the jury had discussed the case with her husband, a corrections officer, and she told the other jurors during deliberations that he had said something to the effect that if the defendants had a particular kind of handgun, it was because they were going to commit a robbery.); *Tarango v. McDaniel*, 837 F.3d 936, 939-40 (9th Cir. 2016) ("[A] police vehicle followed Juror No. 2, a known holdout against a guilty verdict, for approximately seven miles, on the second day of deliberations, in a highly publicized trial involving multiple police victims. . . . ¶ We hold that the Nevada Supreme Court's decision was contrary to *Mattox* . . . because the court improperly limited its inquiry to whether the external

contact amounted to a 'communication' and did not investigate the prejudicial effect of the police tail. . . . Because the trial court prevented Tarango from offering certain evidence to demonstrate prejudice, we remand for an evidentiary hearing and further fact finding."); *State v. Hartley*, 656 A.2d 954, 958 (R.I. 1995), quoted in § 27.05(a)(2) *supra*; *Hall v. Zenk*, 692 F.3d 793 (7th Cir. 2012); *Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014), *and Barnes v. Thomas*, 938 F.3d 526 (4th Cir. 2019); *United States v. Johnson*, 954 F.3d 174 (4th Cir. 2020); *cf. Remmer v. United States*, 347 U.S. 227 (1954); *Turner v. Louisiana*, 379 U.S. 466 (1965). See also §§ 27.0, 27.05(a)(2) *supra*. Similar procedures should be used if counsel learns about jury misconduct of the sort discussed in § 27.05(a)(2) *supra*.

Following a verdict convicting the respondent on all charges, a new trial motion on grounds of jury contamination or misconduct will ordinarily be advised if there is any factual basis for it, because there is seldom any downside. If counsel learns about possible jury contamination or misconduct before verdict, on the other hand, a tactical calculus will have to inform the decision whether to move for a mistrial. Counsel needs to consider the factual and legal strengths of the claim for a mistrial that might be established at a hearing, the likelihood that the respondent will do better before a new jury than before the present jury on the record to date, and the possibility that a hearing directed at the jurors' behavior will itself embarrass or anger them, particularly if it is impossible to conduct the hearing without revealing to the juror[s] that its impetus was a defense claim of jury misbehavior.

If the jury, after a period of deliberation, is irreconcilably divided, it is supposed to report that fact to the court. The court in its discretion may discharge the jurors or have them return to the jury room for further deliberations.

§ 36.15 JURY REQUESTS FOR SUPPLEMENTAL INFORMATION OR INSTRUCTIONS

After a jury has retired to deliberate, it may request leave of the court to return to the courtroom for a re-reading of a portion of the testimony, or for renewed examination of exhibits, or for a repetition of part or all of the court's charge, or for further instructions on questions of law. *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-5.2 (3d ed. 1996) ("Jury Request to Review Testimony"). The court, in its discretion, grants or denies these requests. *See*, *e.g.*, *People v. Williams*, 37 N.Y.3d 314, 316, 177 N.E.3d 1283, 1284, 156 N.Y.S.3d 129, 130 (2021) ("When a deliberating jury requests supplemental instruction, Criminal Procedure Law § 310.30 requires the court to provide a meaningful response. When the jury's request concerns a relevant criminal statute, the law also permits the court to provide the jury with copies of the statutory text, but only with the consent of both parties. This case asks us to decide whether consent of the parties is required before the court, during a readback of the requested law and relevant definitions, may simultaneously display the corresponding text using a visualizer. We conclude that consent is not required . . . ."); *compare Torres v. State*, 361 Ga. App. 149, at 149-50, 863 S.E.2d 399, 401 (2021) ("'A trial court has a duty to recharge the jury on issues for which the jury requests a recharge.' . . .

However, 'it [is] within the court's discretion whether to recharge the jury in full or only upon the point or points requested by the jury.' . . . 'The necessity, extent, and character of any supplemental instructions to the jury are matters within the discretion of the trial court and appellate review is limited to determining whether that discretion was abused.'"), *and Commonwealth v. Graham*, 394 Pa. Super. 453, 459-60, 576 A.2d 371, 374 (1990) ("the decision of whether to accede to a jury request for further instructions during deliberations is left to the discretion of the trial court . . . [and] the scope of such supplemental instructions, when given, is within the sound discretion of the lower court"), *with Ramirez v. State*, 174 N.E.3d 181 (Ind. 2021) (while holding that under a 1998 statute, trial judges have discretion to provide supplemental instructions requested by a deliberating jury, the Indiana Supreme Court recognizes that "[g]iving a supplemental jury instruction can inadvertently overemphasize an issue, potentially 'tell[ing] the jury what it ought to do concerning that issue' . . . [and that s]upplemental jury instructions also have 'a special potential for prejudice' because, by the time they are given – after closing arguments and the initial instructions – a defendant has already chosen one theory of the case and it is too late to change course and adopt another one that would be in line with the new instruction. (*id*. at 197). Therefore, the court notes that "supplemental jury instructions should be given cautiously due to their prejudicial potential" (*id*. at 198) and directs that the following procedure be followed: "When giving a supplemental instruction, the trial court must reread the entire set of final instructions in the presence of the jury and parties. . . . And when a new instruction is added, it should not be inserted first or last, 'where it would stand out,' but it should rather be assigned 'a natural and logical position amongst the other instructions.' . . . Again, this is because giving a supplemental jury instruction runs the risk of inadvertently emphasizing that particular point of law 'as being of primary importance' or telling the jury how it ought to decide the issue." *Id*.), *and State v. Bircher*, 446 Md. 458, 132 A.3d 292 (2016) (surveying the caselaw dealing with a wide range of issues raised by supplemental instructions, the Maryland Court of Appeals endorses trial judge discretion to give or refrain from giving supplemental instructions but expresses concern for the sorts of problems recognized in *Ramirez*), *and Foreman v. United States*, 114 A.3d 641 (D.C. 2015) (in the same vein). In some jurisdictions any supplemental instructions given by the court are required to be restricted to the questions the jury has asked. *See generally id*., Commentary to Standard 15-5.3 ("Additional Instructions"). *Cf. Witherspoon v. Stonebreaker*, 30 F.4th 381 (4th Cir. 2022) (during the defendant's trial, the prosecution projected a surveillance video of a drug buy, playing the recording through nonstop; during its deliberations, the jury requested that a single freeze-frame from the video be displayed and then further requested that the defendant be ordered to stand up next to the freeze-frame; the trial judge complied with both requests; the jury convicted; and in federal habeas, the Fourth Circuit finds defense counsel ineffective for failing to object to the presentation of new evidence after both parties had rested).

Supplemental instructions are given in open court in the presence of counsel and the respondent. They are subject to the same requirements of fairness and legal adequacy as the main charge (see §§ 36.03-36.06, 36.13 *supra*; *and see, e.g.*, *People v. Lamb*, 37 N.Y.3d 1174, 182 N.E.3d 1080, 162 N.Y.S.3d 288 (2021); *Ardoin v. Arnold*, 653 Fed. Appx. 532, 534-35, 536 (9th Cir. 2016) (summarized in § 36.02 third paragraph *supra*); *People v. Telesford*, 149 A.D.3d 170,

176-83, 49 N.Y.S.3d 414, 420-25 (N.Y. App. Div., 1st Dep't 2017)), and counsel may object to them at sidebar after they are given. In addition to – or in lieu of – objecting, counsel may ask that additional clarifying or qualifying instructions be given. Similarly, if the jury requests a re-reading of part of the testimony, counsel may object or may ask that additional parts of the testimony be re-read. The same discretion is ordinarily afforded to the court, and the same options are ordinarily available to counsel, if the jury requests that exhibits not previously sent to the jury room be shown to them or sent out with them. Whenever a jury interrupts its deliberations to make some request of the court, counsel should be trying to fathom what the request suggests about the directions of the jury's thinking, and counsel should respond with whatever objections or proposals for giving the jurors additional information seem likely to steer that thinking into productive defense channels.

The judge is ordinarily forbidden to send supplemental instructions or other communications or materials out to the jury, in either written or oral form, through the medium of a bailiff or other messenger.*See*, *e.g.*, *Strachan v. State*, 279 So.3d 1231 (Fla. App. 2019) (alternative ground); and see § 27.02 second paragraph *supra*. The only allowable response to a jury's request for information of any sort is to bring the jurors back into open court and deal with the matter in the presence of the respondent and counsel. *See, e.g.*, *People v. Parker*, 32 N.Y.3d 49, 58-59, 109 N.E.3d 1138, 1144-45, 84 N.Y.S.3d 838, 844-45 (2018) (reversal of a conviction was required because the trial court failed to inform defense counsel of "the precise contents" of two substantive notes sent by the jury to the judge; the court explains that defense counsel must be afforded "an opportunity to participate in the formation of a response to the jury's substantive inquiry," that "'departures from th[is] . . . procedure[ ] are not subject to preservation rules,'" and that, "[c]ontrary to the People's suggestion, [defense] counsel's awareness of the existence of the . . . notes did not effectuate the court's proper discharge of its statutory duty"). In some jurisdictions this rule is so strict that it is held reversible error for a court to convey to the jury out of the presence of the parties even a brief note refusing the jury's request for additional instructions.

Since counsel's presence will be promptly required if the jury asks for supplemental instructions or for the reading of testimony or if the jury reports itself deadlocked, counsel should either stay in the courtroom or tell the courtroom clerk where counsel can be reached while the jury is out. Counsel should never be more than a few minutes from the courtroom without obtaining prior permission of the court. Tardiness in returning to deal with any matters that arise during the jury's deliberations will incur the judge's wrath.

§ 36.16 INABILITY OF THE JURY TO AGREE; THE "DYNAMITE CHARGE"

If the jury has deliberated for a considerable time and has reached no agreement, the court may call it back to the jury box and inquire about the prospects of its reaching a verdict. The judge usually asks the foreperson to state, without revealing the current vote or majority position of the jury, whether further deliberations appear likely to produce agreement or whether the jury seems firmly deadlocked. The court may also give the jury additional instructions, although no

request is made by the jury for them. The jurisdictions vary widely with regard to the amount of pressure that the judge may apply to the jury at this point by way of instructions admonishing the jurors to give consideration to the reasonable views of others, and so forth. *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-5.4 (3d ed. 1996) ("Length of Deliberations; Deadlocked Jury").

The so-called "dynamite charge," or *Allen* charge (after *Allen v. United States*, 164 U.S. 492 (1896)), is still permissible in many jurisdictions, although a number of appellate courts have come to condemn it as too strong. "The United States Supreme Court continues to approve *Allen*-type charges, *see Jones v. United States*, 527 U.S. 373, 382 n.5 . . . (1999), but many states have banned the original *Allen* charge, with some embracing a charge developed by the American Bar Association (ABA) that must be given to juries before deliberation begins. . . . ¶ Although labelled the 'dynamite' because of its proven ability to 'blast a verdict out of a jury otherwise unable to agree,' . . . the label could just as well describe the *Allen* charge's success in blowing up otherwise error-free trials by introducing volatile elements into the fluid and emotionally charged atmosphere prolonged jury deliberations often create. Like dynamite, the charge must be handled with extreme care." *State v. Taylor*, 427 S.C. 208, 214, 829 S.E.2d 723, 726-27 (S.C. App. 2019). *See generally* the ABA STANDARDS Commentary just cited; Wayne F. Foster, Annot., *Instructions Urging Dissenting Jurors in State Criminal Case to Give Due Consideration to Opinion of Majority (Allen Charge) – Modern Cases*, 97 A.L.R.3d 96 (1980 & Supp.). If the judge's charge prods the jury heavily to reach a verdict and if counsel guesses that the majority of the jurors are inclined to convict, counsel should object to the charge – noting with specificity any especially coercive language (*compare Jenkins v. United States*, 380 U.S. 445 (1965) (per curiam), *and United States v. United States Gypsum Co*., 438 U.S. 422, 462 (1978), *with Lowenfield v. Phelps*, 484 U.S. 231, 237-41 (1988)) – on the ground that its effect is to deprive the respondent of the right to an "uncoerced verdict" (*id.* at 241 (dictum)), and thus of the respondent's statutory right to jury trial, see § 21.01 *supra*, and due process right to "accurate factfinding," *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (plurality opinion); see § 21.01 *supra. See*, *e.g.*, *Smith v. Curry*, 580 F.3d 1071, 1080 (9th Cir. 2009) ("An analysis of the Supreme Court's decisions, dating back to 1896, requires us to conclude that the California Court of Appeal's approval of the instruction in this case, directing the jurors to the evidence the judge believed supported conviction, crossed the boundary from appropriate encouragement to exercise the duty to deliberate in order to reach a unanimous verdict, and went into the forbidden territory of coercing a particular verdict on the basis of the judge's selective view of the evidence"); *United States v. Haynes*, 729 F.3d 178, 193-94 (2d Cir. 2013) ("the modified *Allen* charge . . . was coercive in the circumstances and context in which it was given" because "the Court had already given a modified *Allen* charge" and "[r]epeating a modified *Allen* charge . . . could reasonably be perceived by the jurors as the Court communicating its insistence on the jury reaching a unanimous verdict"; the court's statement that it "'believe[d]' that the jury would 'arrive at a just verdict' on Monday" could have been viewed by a reasonable juror "as lending the Court's authority to the incorrect and coercive proposition that the only just result was a verdict"; and the judge did not give a "balancing, cautionary instruction that no juror should give up conscientiously held beliefs."); *Brewster v. Hetzel*, 913 F.3d 1042, 1054-55 (11th Cir. 2019)

("Pressure on jurors, especially on holdout jurors, is increased when the instructions to keep trying to reach unanimity come from a judge who knows how split the jury is and in which direction. . . . ¶ . . . The problem exists whether the judge asked for the information or the jury disclosed it without any prompting. If the jury is aware that the court knows it is divided in favor of convicting the defendant, and the court repeatedly instructs the jury to continue deliberating, the jurors in the minority may feel pressured to join the majority in order to placate the judge."); *People v. Aponte*, 2 N.Y.3d 304, 308, 810 N.E.2d 899, 901, 778 N.Y.S.2d 447, 449 (2004) ("[l]imited in scope to the importance of returning a verdict and suggesting that the jurors were failing in their duty to reach a decision, the court's supplemental instruction as a whole was unbalanced and coercive"); *Workman v. State*, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015) ("In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel. . . . Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views."); *United States v. Driscoll*, 984 F.3d 103, 110-11 (D.C. Cir. 2021) ("In *United States v. Thomas*, this Court sought to prevent undue coercion on jurors by exercising its supervisory authority to mandate the use of standardized language in the anti-deadlock instruction given in this Circuit. *See* 449 F.2d 1177, 1184–86 (D.C. Cir. 1971) (en banc). We explained that 'appellate courts should no longer be burdened with the necessities and niceties – and the concomitant uncertainties – of gauging various *Allen*-type renditions in terms of the coerciveness of their impact.' *Id*. at 1186. In the years since *Thomas*, we have repeatedly cautioned district courts against 'expanding on the *Thomas* script after a jury indicates deadlock.' . . . ¶ One of the central concerns of the *Thomas* Court was the potential for coercion by 'prying individual jurors loose from beliefs they honestly have.' . . . The *Thomas* charge thus cautions jurors to 'consult with one another . . . with a view to reaching an agreement,' but 'do not surrender honest conviction . . . solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.' Criminal Jury Instructions for D.C. Instruction 2.601(III)(A). 'Any substantial departure from the language approved in *Thomas* is presumptively coercive.'"); *State v. Figueroa*, 190 N.J. 219, 221, 919 A.2d 826, 827 (2007) ("In 1980, we announced guidelines to govern trial courts faced with the questions of whether and how to direct juries that had reported themselves to be deadlocked to continue their deliberations. . . In particular, we concluded that the charge then generally utilized was inherently coercive, and we directed trial courts to use instead an alternate form of the charge that would avoid pressuring dissenting jurors into surrendering their 'honest convictions' about guilt or innocence merely to reach a unanimous verdict. . . .The concerns that supported that decision motivated us to direct that our model charges be revised to include a general charge that would advise jurors of their obligations to consult and deliberate with each other and would authorize them to re-examine and change their own views when appropriate, but which would also remind them not to reach an agreement that would do 'violence to individual judgment.' . . . We left whether, in an individual trial, that [modified] charge could be given or repeated to the discretion of the trial court." ¶ . . . [A] supplemental charge to the jury reporting a deadlock that did not repeat those admonitions, and that suggested that deliberations would continue until unanimity was achieved, constitutes reversible error. . . . [W]e have concluded that the language used by the trial court [here]. . . had the effect of coercing the dissenting juror or jurors into agreeing with the verdict announced shortly thereafter, [so] we direct that defendant be afforded a new trial."); *and*

compare Almeida v. State, 157 So.3d 412, 416 (Fla. App. 2015) ("this court [has] adopted a per se rule that a trial court commits reversible error by giving an *Allen* charge more than once"), *with Wright v. Commonwealth*, 590 S.W.3d 255, 264 (Ky. 2019) ("the Ninth Circuit finds itself alone amongst the Federal Circuit Courts in having . . . a [per se] rule [against giving two *Allen* charges]. . . . ¶ . . . [We] hold no purpose would be served by the adoption of a *per se* rule. Instead, our appellate courts should address the issue of whether giving multiple *Allen* charges in any given case was coercive, and therefore reversible error, based on the totality of the circumstances surrounding the instructions given."), *and Britt v. State*, 402 A.2d 808, 810 (Del. 1979) ("[w]hile the giving of multiple "Allen" charges is to be avoided and may constitute reversible error, we find that under the facts before us it was not error"). *Cf. United States v. Banks*, 982 F.3d 1098 (7th Cir. 2020) (reversing a conviction because the trial judge conducted a jury poll in such a way as to exert coercive pressure on the lone juror who indicated discomfort with a guilty verdict).

§ 36.17 MISTRIAL FOR FAILURE TO AGREE

If the court is satisfied that the jurors are unable to agree after reasonable deliberations, it may declare a mistrial and discharge the jury. Should the respondent not object to the mistrial, s/he can be tried again on the same charge. If a mistrial is declared over the objection of the respondent, s/he may challenge the propriety of the court's action by pleading former jeopardy against a new trial. See § 17.08 *supra.* The validity of the double jeopardy claim will hinge on whether the court abused its considerable discretion in declaring the mistrial. In *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), the seminal case allowing retrial after the declaration of a mistrial for failure of the jury to agree, the Court cautioned that trial judges' power to discharge the jury on this account is not unlimited. "They are to exercise a sound discretion on the subject; and . . . the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Id.* at 580. See §§ 17.08(e), 34.11(d)(2) *supra*, discussing *Perez*'s "manifest necessity" standard for a mistrial. *And see United States v. Razmilovic*, 507 F.3d 130 (2d Cir. 2007) (double jeopardy barred a retrial where the trial judge abused his discretion in finding prematurely that the jury was hung: "The discretion afforded a trial judge in declaring a mistrial is, of course, not boundless." *Id.* at 137. "We . . . turn to the record to determine if it supports the trial judge's conclusion that he was confronted with a genuinely deadlocked jury and, therefore, that there was a manifest necessity to declare a mistrial." *Id.* "[W]e are not persuaded that the jury was genuinely deadlocked when the trial court declared a mistrial. The single piece of evidence in the record that supports the trial judge's conclusion is the twenty-nine-word note from the jury that it was 'at a deadlock' and had 'exhausted all [its] options.' The trial judge did not discuss the extent of the deadlock referred to in the note with the members of the jury and did not ask them whether there was any chance that further deliberations might produce a verdict." *Id*. at 139.); *United States v. Candelario-Santana*, 977 F.3d 146, 161-62 (1st Cir. 2020) (alternative ground) ("Because it is not evident from the record that further deliberation would have been futile, the original trial court's declaration of a mistrial was not manifestly necessary under the circumstances. ¶ The jury gave the district court no indication that it was unable to reach a unanimous verdict before the verdict was delivered; the jury's note to the

court says only that it '[has] concluded deliberations.' After reviewing the verdict form, the district court did not consult with counsel, remind the jury of its obligation to reach a unanimous verdict or give an *Allen* charge [see § 45.3 *supra*]; or even ask the jurors whether they genuinely believed they had reached an impasse. . . . ¶ Though we do not require the district court to take any specific step before announcing the jury's verdict, we do require something more than what the district court did here. . . . At the very least, we require the district court to consider other options to ensure that the jury is genuinely deadlocked before discharging it."); *accord*, *United States v. Lara-Ramirez*, 519 F.3d 76, 85 (1st Cir. 2008) (alternative ground); *United States v. Horn*, 583 F.2d 1124 (10th Cir. 1978); *People v. Wilson*, 163 A.D.3d 104, 980 N.Y.S.3d 539 (N.Y. App. Div. 3d Dep't 2018) (alternative ground); *State v. Hart*, 449 Md. 246, 276-83, 144 A.3d 609, 626-30 (2016) (alternative ground); *State v. Fennell*, 431 Md. 500, 516, 519-26, 66 A.3d 630, 640, 642-46 (2013); *Commonwealth v. Bartolomucci*, 468 Pa. 338, 362 A.2d 234 (1976); *and see United States v. Castellanos*, 478 F.2d 749, 752 (2d Cir. 1973) ("Had Castellanos here claimed that one or both of the mistrials were improperly declared, his double jeopardy claim would be within the analytical framework of the 'manifest necessity' formulation. *Perez* warns that such mistrials should be declared only 'with the greatest caution . . .' . . . . If it appeared here that there was no 'manifest necessity' for the mistrials – that the trial judge acted too quickly, or that it seemed that the jury was not really deadlocked – we might well be able to hold that the Double Jeopardy Clause barred retrial."); *McDaniels v. Warden Cambridge Springs SCI*, 700 Fed. Appx. 119, 121 (3d Cir. 2017) (criticizing a "trial judge [who] failed to step back and take the time necessary to 'scrupulous[ly]' consider whether 'manifest necessity' required the declaration of a mistrial" when confronted with reports from the jury which clearly indicated some inability to agree upon a verdict but left unclear whether the disagreement applied to all degrees of the offense charged); *State v. Tate,* 256 Conn. 262, 284-85, 773 A.2d 308, 323-24 (2001) (finding no "manifest necessity" for a mistrial when it appeared that the jurors may have unanimously agreed to acquit the defendant on murder and first-degree manslaughter charges and was deadlocked only on second-degree manslaughter or lesser offenses but the judge refused defense counsel's request to inquire whether the jury had reached a partial verdict; "we are persuaded that. . . (1) it is a valid verdict for the jury to acquit the accused of a greater offense and only thereafter to reach a deadlock on a lesser offense; (2) such a valid verdict must be accepted; and, finally, (3) the failure to accept that valid verdict would violate the constitutional protection against double jeopardy"); *Commonwealth v. Young*, 2011 PA Super 277, 35 A.3d 54 (Pa. Super. 2011) (double jeopardy barred retrial of a charge as to which the jury reported that it had reached a unanimous verdict while deadlocking on other charges; although a mistrial was properly declared as to the latter charges, it was not manifestly necessary as to the former); *but see Blueford v. Arkansas*, 566 U.S. 599 (2012) (indicating that the federal Double Jeopardy Clause is not violated by a retrial on all charges when a trial judge declares a mistrial because the jury deadlocks on a lesser offense but appears to have acquitted the defendant of more serious charges in a jurisdiction where state practice does not require the acceptance of partial verdicts); *Commonwealth v. Ross*, 437 Mass. 777, 794-95, 776 N.E.2d 437, 450 (2002) (holding that trial judges in Massachusetts "should not initiate any inquiry into partial verdicts premised on lesser included offenses within a single complaint or count of an indictment").

§ 36.18 RETURN OF THE VERDICT; POLLING

The jury usually returns its verdict, that is, its finding of guilt or innocence, by the announcement of its foreperson in open court in the presence of counsel and respondent. Local practice may also call for the foreperson to endorse the verdict on the Petition, or the foreperson or all the jurors may be required to sign written verdict forms that have been sent out with the jury.

If the verdict is not guilty, the trial is concluded, the jury is dismissed, and the respondent is discharged. If the verdict is guilty, the prosecutor ordinarily requests that it be recorded. Before it is recorded, defense counsel usually has the right to poll each juror on each count of the Petition. *See, e.g., Government of the Virgin Islands v. Hercules,* 875 F.2d 414 (3d Cir. 1989); *State v. Wright*, 432 S.C. 365, 369-73, 852 S.E.2d 468, 470-72 (2020) ("The right to poll the jury is not in itself a constitutional right but a procedural protection of the defendant's constitutional right to a unanimous verdict. . . . ¶ . . . [P]erson-by-person inquiry best advances the prime reason for individual polling. . . ¶ Because of the importance of the polling right and the difficulty of deciphering the harm its denial has caused, many federal circuits and state appellate courts have deemed the denial reversible *per se*. . . . We are persuaded by the sound reasoning of these decisions and therefore hold the denial of the defendant's substantial right to an individual poll of each juror in open court – where each juror must express his or her continued assent in the announced verdict – is reversible error *per se*, not subject to a harmless error analysis."); *State v. Wojtalewicz*, 127 Wis. 2d 344, 345-49, 379 N.W.2d 338, 339-40 (Wis. App. 1995) ("After reading the guilty verdicts aloud, the trial court stated to the jury: ¶ I want to ask you all if this is the verdict of each of you and if there is any member of the jury panel who dissents from either one of the two verdicts that I've just read, I want you to raise your right hand at this time. ¶ The record should reflect that none of the jurors responded to that question. ¶ Appellant's trial counsel immediately requested that the jurors be individually polled, to which the court responded: 'I just polled the jury and I don't intend to poll the jury any differently than I have.' Appellant argues that this decision constitutes reversible error, and we agree. ¶ The Wisconsin Supreme Court addressed the issue more than a century ago and held that a defendant in a criminal case 'the right to poll the jury . . . and a refusal to permit him to do so is error, for which the verdict will be set aside.' . . . ¶ The question thus becomes whether the trial court's question to the jurors satisfies the polling requirement. . . . [W]e adhere to the majority rule that it does not. . . . ¶ Calling each juror by name and asking whether the announced verdict is his or her verdict is said to meet 'the minimum requirements of [a] defendant's right to a poll of the jurors.'"); *cf. People v. Ramunni*, 203 A.D.3d 1076, 1079, 166 N.Y.S.3d 27, 31 (N.Y. App. Div., 2d Dept. 2022) (the trial judge committed reversible error by conducting an insufficient poll of the jury and thereafter accepting the verdict: "when the jury was polled and asked if the verdict was theirs, juror number nine stated, 'Um, I'm not sure, with some, but most of them, yes.' Although the . . . [trial court] thereafter inquired of juror number nine if the verdict announced to the court was her own, it did so by asking her 'is that a yes or a no' in the presence of the remaining jurors, despite evidence before the court suggesting that juror number nine may have succumbed to pressure to vote with the majority even though she did not agree with the verdict as

to certain counts. The court's inquiry was therefore not sufficient to resolve the uncertainty of whether the verdict announced to the court was the individual voluntary verdict of juror number nine"); *and see* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 15-5.6 (3d ed. 1996) ("Polling the Jury").

The crier or clerk of court commonly conducts the poll of the jury. Each count is read to each juror, and the juror is asked to state his or her verdict on it. In complicated cases involving multiple charges, defense counsel should request at sidebar that when polling the jurors, the crier should read the counts in a different order from the order in which they were originally submitted to the jury. Counsel should impress upon the court that s/he is not using this procedure as a strategem but is requesting it because it is a more accurate method of polling than the normal one of reading all the counts in order. The latter procedure lends itself to a rote response by the jurors.

The jury is only polled on those counts on which counsel requests a poll. The poll of a jury can be interrupted by counsel's stating that s/he is satisfied that the jury has agreed as the foreperson stated. Polling is then halted, and the verdict is recorded.

"[Federal Criminal] Rule 31(d) 'specifically grants the trial judge a measure of discretion in determining either to require the jury to deliberate further or to grant a mistrial if it appears [through polling] that the verdict was not unanimous.' . . . 'Whether . . . [sending the jury back for further deliberations] constitutes error depends on whether it is likely that the proceedings conducted by the trial court coerced . . . [a] juror [or jurors] in arriving at . . . [a] final verdict.' . . . ¶ ['We [have] note[d] a distinction between a case where the trial judge interrogates the jury to clarify the confusion engendered by a juror's response to a poll which is inconsistent with the foreman's announcement of the verdict, as in the present case, and one in which the court requires a jury to reveal its decision when no verdict has been returned['] . . . . '[I]n the former,' the district court is afforded 'some latitude in polling of the jury to clear up an apparent confusion.' . . . But '[i]n the latter circumstances, the court's actions will be deemed coercive.'" *United States v. Blake*, 66 F.4th 1165, 1175-76 (8th Cir. 2023). If a juror's poll reply indicates that s/he is not fully in accord with the verdict announced by the foreperson but s/he then accepts the verdict after being pressed by the judge regarding her position, a guilty verdict is held to be coerced and the conviction reversible. *United States v. McCoy*, 429 F.2d 739 (D.C. Cir. 1970); *United States v. Sexton*, 456 F.2d 961 (5th Cir. 1972); *Jones v. United States*, 779 A.2d 357 (D.C. 2001).

In most jurisdictions, logically inconsistent jury verdicts do not entitle an accused to a new trial or other relief as a matter of right. *See, e.g., United States v. Powell*, 469 U.S. 57 (1984). *But see People v. Jones,* 2017 WL 127735 at *5-*7 (Mich. App. 2017) ("While facial inconsistency [between a jury's verdicts on one count and on another] alone does not support reversal of a conviction, such a conviction may be set aside if there is other evidence that the verdict was improper. . . . [I]n circumstances where there was evidence that such inconsistency was the result of compromise or confusion, such verdicts should be set aside. . . . ¶ There is ample evidence that the facially inconsistent verdicts in this case were the product of juror

confusion and possible juror compromise. . . . ¶ The jury's notes to the court document multiple requests to examine the testimony and for instructions on the law that were either ignored or responded to in a dilatory fashion. The questions from the jury do not illustrate that the jury exercised compassion or leniency in not convicting defendant . . . [on the counts on which it acquitted him]. . . . The jury's questions in this case demonstrate confusion and/or compromise. . . . ¶ After three days of deliberations, one juror urged the court to release him because he thought this jury was never going to reach a verdict. Hours after this juror's urging, the seemingly conflicted jury, without receiving the clarification it sought, pronounced a facially inconsistent verdict. Consequently, the conviction . . . must be set aside."); *compare State v. Moore,* 458 N.W.2d 90 (Minn. 1990) (jury verdicts convicting the defendant of first-degree premeditated murder and of second-degree culpable negligent manslaughter were legally inconsistent and could not be allowed; appellate relief might be afforded by striking the first-degree conviction and leaving only the negligent manslaughter conviction to stand; but because defense counsel's concessions in closing argument deprived the defendant of a fair jury determination of his accidental-death defense to the lesser charge, a new trial on all charges was required), *with State v. Leake,* 699 N.W.2d 312, 326 (Minn. 2005) ("We recognize that the language of *Moore* . . . does not explicitly limit its holding to situations where a defendant is convicted on multiple counts which contain conflicting elements. Nonetheless, *Moore* . . . relies on our decision in [*State v.*] *Juelfs*[, 70 N.W.2d 873, 873-74 (Minn. 1978)] which states that a defendant is not entitled to a new trial if the verdicts returned [by a jury convicting on one count and acquitting on another] are logically inconsistent. . . . Further, the majority of states do not reverse inconsistent verdicts when there is one acquittal and one conviction. . . . Because the instant case involves only logical inconsistencies – between a verdict of acquittal on one count and a verdict of guilty on another count – we hold that the verdicts are not legally inconsistent and Leake is not entitled to a new trial."); *and cf. People v. DeLee*, 24 N.Y.3d 603, 608-11, 26 N.E.3d 210, 213-15, 2 N.Y.S.2d 382, 385-87 (2014) ("New York's repugnancy jurisprudence," which "affords defendants greater protection than the Federal Constitution requires," provides for the alternative remedies of dismissal of the repugnant count (where the nature of the repugnancy signifies that "'the jury has actually found that the defendant did not commit an essential element [of the repugnant charge], whether it be one element or all'") or affording leave to the prosecution to initiate a new prosecution of the repugnant charge by indictment or information ("where a repugnant charge was the result, not of irrationality, but mercy")). Even in those jurisdictions that do not provide for a remedy as a matter of right, the inconsistency of verdicts may be considered by the trial judge in exercising his or her discretion to grant a new trial in the interests of justice (see § 37.02(d) *infra*); and counsel who requests a new trial on this ground should urge that the jury's conviction on counts that should not logically have been treated differently from other counts on which the jury acquitted demonstrates jury confusion, the marginal nature of the prosecution's proof of guilt, or both.