

[CAPTION]

MOTION IN LIMINE TO EXCLUDE IMPROPER PROSECUTORIAL ARGUMENT AND QUESTIONING

The Defendant, by counsel, respectfully requests this Court to enter an Order requiring the State, by the prosecuting attorney, to refrain from mentioning in the presence of the jury during voir dire, opening argument, presentation of evidence, and closing argument, any and all references to the following, either directly or indirectly:

1. Any reference to the fact that the Defendant did not testify at the trial of this cause and that he remained silent during questioning by law enforcement officers during all stages of these proceedings. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1985); Dooley v. State, 393 N.E.2d 154 (Ind. 1979); Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995); Doyle v. Ohio, 426 U.S. 610 (1976).
2. Any comment on the Defendant's failure to present evidence. Mitchell v. State, 455 N.E.2d 1131 (Ind. 1982); Chubb v. State, 640 N.E.2d 44 (Ind. 1994); Lainhart v. State, 916 N.E.2d 924 (Ind.Ct.App. 2009).
3. Any comment to the Defendant's exercise of his right to counsel. Johnson v. State, 901 N.E.2d 1168 (Ind.Ct.App. 2009).
4. Any comments about counsel for the defense that constitute a personal attack on the defense attorneys or comments on the role of the defense attorney. Washington v. State, 902 N.E.2d 280 (Ind.Ct.App. 2009); Johnson v. State, 453 N.E.2d 365 (Ind.Ct.App. 1983); Craig v. State, 267 Ind. 359, 370 N.E.2d 880 (1977); Bardonner v. State, 587 N.E.2d 1353 (Ind.Ct.App. 1992); Flynn v. State, 379 N.E.2d 548 (Ind.Ct.App. 1978); Lainhart v. State, 916 N.E.2d 924 (Ind.Ct.App. 2009).

5. Any comment which constitutes the personal opinion of the prosecutor about any evidence, witness, outcome or penalty. Ind. R. Prof. Conduct 3.4(e); Hossman v. State, 473 N.E.2d 1059 (Ind.Ct.App. 1985); U.S. v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d (1985). For instance, a prosecutor cannot vouch for the truthfulness or competency of any of the State's witnesses, including police officers. Lainhart v. State, 916 N.E.2d 924 (Ind.Ct.App. 2009); Gaby v. State, 949 N.E.2d 870 (Ind.Ct.App. 2011) (the following were improper comments: prosecutor was "confident" that the jury would "come to the same conclusion" that she and the police detectives had come to, that "I cannot and would not bring charges that I believe were false" and that "I can tell you with a guilty verdict on this case I will be able to sleep fine tonight. Just fine. In fact, better than fine. You will be able to also.").
6. Any arguments by the prosecutor appealing to the sense of law and order of the members of the jury and/or persuading the jury through sympathy or prejudice rather than through the evidence. Maldonado v. State, 265 Ind. 492, 355 N.E.2d 843 (1976); Limp v. State, 431 N.E.2d 784 (Ind. 1982); Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 477 U.S. 168, 91 L.Ed.2d 144 (1986); Johnson v. State, 453 N.E.2d 365, 368-69 (Ind.Ct.App. 1983); Messer v. State, 509 N.E.2d 249, 253 (Ind.Ct.App. 1987); Gasaway v. State, 547 N.E.2d 898, 902 (Ind.Ct.App. 1989); Woolston v. State, 453 N.E.2d 965, 970 (Ind. 1983).
7. Any argument referred to the defendant as a "criminal" or "career criminal." Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562 (1972).

8. Any innuendo or inference that is not supported by admissible evidence.
Ind.R.Prof.Conduct 3.4(e); U.S. v. Elizondo, 920 F.2d 1308, 1313 (7th Cir. 1990);
U.S. v. Wolf, 787 F.2d 1094, 1098 (7th Cir. 1986); Benson v. State, 762 N.E.2d
748 (Ind. 2002) (prosecutor cannot assert unsubstantiated allegations on collateral
matters); Bagnell v. State, 413 N.E.2d 1072, 1076-77, n. 4 (Ind.Ct.App. 1980) (a
prosecutor may not comment or allude to inadmissible evidence during trial);
Flynn v. State, 177 Ind.App. 360, 379 N.E.2d 548 (1978) (prosecutor's reference
to the Defendant as "drug dealer" required reversal); Donnelly v. DeChristoforo,
416 U.S. 637 (1974).
9. Any argument or inference that the Defendant's family was part of a cover-up of
the crime. Scifres-Martin v. State, 635 N.E.2d 218, 220 (Ind.Ct.App. 1994);
Gaines v. State, 456 N.E.2d 1058 (Ind.Ct.App. 1983).
10. Any reference, innuendo or argument inferring the Defendant is of bad character.
Oldham v. State, 779 N.E.2d 1162 (Ind.Ct.App. 2002); Camm v. State, 812
N.E.2d 1127 (Ind.Ct.App. 2004).
11. Any reference, innuendo or argument concerning firearms or ammunition not
used in the crime. Oldham v. State, 779 N.E.2d 1162 (Ind.Ct.App. 2002);
Meadows v. State, 785 N.E.2d 1112 (Ind.Ct.App. 2003); Tynes v. State, 650
N.E.2d 685 (Ind. 1995).
12. Any attempt to indoctrinate the jury during voir dire by exposing the jury to
substantive issue in the case. Von Almen v. State, 496 N.E.2d 55 (Ind. 1986).
13. Any attempt during voir dire to inflame the prejudices of the jury and condition
the jury to convict on factors other than the evidence. Perryman v. State, 830

N.E.2d 1005 (Ind.Ct.App. 2005) (prosecutor's voir dire concerning the "ongoing war on drugs" was improper); Gregory v. State, 902 N.E.2d 205 (Ind. 2009) (Rucker and Dickson, J.J., dissenting from denial of transfer from 885 N.E.2d 697 (Ind.Ct.App. 2008) on basis that the courts disapprove of the prosecutorial tactic of "brainwash[ing] jurors or attempting to condition them to receive evidence with a jaundice eye by discussing the war on drugs).

14. Any attempt during voir dire to have the jury pre-judge the credibility of a witness. Hawn v. State, 565 N.E.2d 362 (Ind.Ct.App. 1991); Lainhart v. State, 916 N.E.2d 924 (Ind.Ct.App. 2009).
15. Any attempt to have the Defendant, or any defense witness, judge the credibility of a State's witness. Ind.R.Evid. 704(b); State v. Suarez-Bravo, 864 P.2d 426 (Wash. 1994) (it is even more prejudicial when the defendant is forced to characterize police officers as liars in order to maintain his innocence); Liggett v. People, 135 P.3d 725 (Colo. 2006).
16. Any attempt to have a State's witness, such as a police officer, vouch for the credibility of another State's witness, such as a jail house informant. Neither a lay or expert witness is competent to testify that another witness is or is not telling the truth. Shepard v. State, 538 N.E.2d 242 (Ind. 1989).

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to grant the following relief:

- A. Order the State, through its prosecuting attorney or deputies, to refrain from mentioning, commenting, or making any reference whatsoever, either directly or

indirectly, to any of the above matters without first obtaining permission of the Court outside the presence and hearing of the jury;

B. To further order said persons to make no reference to the fact that this motion has been filed and granted; and

C. Grant all other relief just and proper in the premises.

(Signature)

REFERENCES

Miller v. State, 916 N.E.2d 193 (Ind.Ct.App. 2009) (trial court committed reversible error when it allowed State in closing argument to show a YouTube video which was not based on evidence presented in the case).

Emerson v. State, 952 N.E.2d 832 (Ind.Ct.App. 2011) (prosecutor's requests that the jury should "stand up to this bully" by convicting was improper; harmless error).