

IN THE CIRCUIT COURT OF MAYCOMB COUNTY, ALABAMA

STATE OF ALABAMA,

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v.

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Case No. CC-00-0000

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JOE CLIENT.

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MOTION TO BAR IMPROPER PROSECUTORIAL ARGUMENT

Joe Client respectfully moves this Court to prohibit the State from engaging in improper argument or other misconduct before the jury at Mr. Client’s trial. In support of this motion, Mr. Client submits the following:

1. Joe Client is charged with capital murder and the State is seeking the death penalty. If Mr. Client is found guilty of capital murder, the trial will proceed to the sentencing phase where the State will have an opportunity to present and argue evidence in support of a death sentence. Ala. Code § 13A-5-45(a).

2. A person on trial for his life is entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments to fundamental fairness, Caldwell v. Mississippi, 472 U.S. 320, 340 (1985); a reliable determination of punishment, Monge v. California, 524 U.S. 721, 732 (1998) (citing Gardner v. Florida, 430 U.S. 349, 358 (1977) and Lockett v. Ohio, 438 U.S. 586, 604 (1978)); and an individualized determination of the appropriate sentence guided by clear, objective, and evenly-applied standards, Gregg v. Georgia, 428 U.S. 153, 198 (1976).

3. Improper argument by the prosecutor violates these constitutional rights. See, e.g., Caldwell, 472 U.S. at 341 (reversing capital conviction and death sentence where prosecution’s argument led jury to believe responsibility for determining appropriateness of death sentence rested elsewhere); see also Romine v. Head, 253 F.3d 1349 (11th Cir. 2001); Hill v. Turpin, 135 F.3d 1411 (11th Cir. 1998); Ex parte Smith, 581 So. 2d 531 (Ala. 1991); Ex parte Wilson, 571 So. 2d 1251 (Ala. 1990).

4. Public prosecutors owe a special duty to the justice system. See, e.g., National District Attorneys Association, The Prosecutor’s Deskbook 3-4 (Healy & Manak, eds. 1971) (as voice of community, prosecutors must have unquestioned integrity); American Bar Association, Criminal Justice Standards § 3-1.2(b) (4th Ed. 2015) (“[T]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”); Ala. R. Prof’l Conduct 3.8.

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he 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.

Arthur v. State, 575 So. 2d 1165, 1186 (Ala. Crim. App. 1990) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

5. In a capital trial, improper prosecutorial argument can be especially prejudicial during opening and closing statements. During the opening statement, the prosecutor's role is quite narrow. She is limited to a brief statement of the issues and an outline of evidence she intends to introduce. The prosecutor must avoid any utterance that cannot later be supported by evidence.

The prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible. A prosecutor should not allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

American Bar Association, Criminal Justice Standards § 3-5.5 (1993).

6. Similarly, the role of a prosecutor in closing argument is particularly well defined. The prosecutor should assist the jury in analyzing the evidence and state her contentions about what conclusions the jury should draw from the evidence. United States v. Morris, 568 F.2d 396, 401-02 (5th Cir. 1978). It has long been established that the prosecutor's closing argument may not vary from the law as given by the court, the evidence introduced at trial, or reasonable deductions from the evidence. "The prosecutor, in addressing the jury, should limit his comments to the evidence and reasonable inferences

therefrom.” Arthur, 575 So. 2d at 1186.

7. At the sentencing phase of a capital trial, it is especially important that the prosecutor’s closing argument stay within proper bounds.

At the sentencing phase of trial, the jury must not be influenced by any arbitrary factors. A prosecutor may not incite the passions of a jury when a person's life hangs in the balance.

Brooks v. Francis, 716 F.2d 780, 788 (11th Cir. 1983).

8. Improper prosecutorial argument does not merely offend the Constitution. It may be so offensive as to raise a double jeopardy bar to retrial. See, e.g., United States v. Jorn, 400 U.S. 470, 485 (1971). For this reason, what might not otherwise be constitutional error should result in reversal where the prosecutor is specifically warned pretrial of potential error and where the error “*might have* affected the outcome of the trial.” United States v. Agurs, 427 U.S. 97, 104 (1976) (emphasis added); see also Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984).

9. Improper argument may infect a capital case by injecting into it material that the defense has no opportunity to rebut. In Skipper v. South Carolina, 476 U.S. 1 (1986), the Supreme Court explained:

Where the prosecution specifically relies on a [factor] in asking for the death penalty, it is not only the rule of Lockett [v. Ohio], 438 U.S. 586 (1978) and Eddings [v. Oklahoma], 455 U.S. 104 (1982) that requires that the defendant be afforded an opportunity, to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death *on the basis of information which he had no opportunity to deny or explain*.

Id. at 5 n.1 (emphasis added) (quoting Gardner v. Florida, 430 U.S. at 362). This problem is particularly apparent in a state such as Alabama that permits the prosecution to make a second closing argument after the defense has made its argument. As set forth in this motion, therefore, Mr. Client also specifically asserts his right to introduce evidence in rebuttal of any extra-record argument made by the prosecutor.

10. A district attorney is precluded from relying on an imaginary “right to reply” policy — that is, allowing the defense to make an argument without objection, then in closing

argument claiming the argument is improper and “responding” to it with inflammatory remarks. In United States v. Young, 470 U.S. 1 (1985), the Supreme Court rejected the notion of “invited responses,” holding that “[r]eviewing courts ought not be put in the position of weighing which of two inappropriate arguments was the lesser.” Id. at 13. The Court admonished trial courts to require prompt objections by the prosecutor and curative instructions to the jurors.

11. Curative instructions, however, often are insufficient to remedy improper argument.

The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.

Bruton v. United States, 391 U.S. 123, 129 (1968) (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)); see also Ex parte Wilson, 571 So. 2d at 1265 (curative instruction inadequate to remove taint from improper prosecutorial argument).

12. Any after-the-fact correction has little applicability to “the evaluation of the consequences of an error in the sentencing phase of a capital case . . . because of the [broad] discretion that is given to the sentencer.” Satterwhite v. Texas, 486 U.S. 249, 258 (1988). Because life itself is at stake, and the jury’s prerogative of mercy is so boundless, it is much more “important to avoid error in capital sentencing proceedings.” Id. at 258. This Court should therefore enter an order barring the prosecution from engaging in the types of misconduct identified herein, and requiring it to abide by the requirements imposed on prosecutors by the state and federal constitutions, law, and canons.

13. This list is merely representative of improper arguments and is by no means exhaustive. Mr. Client offers these arguments for the purpose of informing the Court of his unequivocal objection to them.

A. Misleading the Jury as to the Law

14. A prosecutor may not attempt to mislead jurors as to any aspect of the law at any stage of the proceedings. Ivery v. State, 686 So. 2d 495, 507 (Ala. Crim. App. 1996) (“It is improper for the prosecutor either to misstate to the jury, the applicable law, or to otherwise mislead or confuse the jury as to the law applicable to the case.”).

(1) Misstating the Law on Intent

15. In order to convict a defendant of capital murder in Alabama, the jury must properly find that the defendant had the specific intent to kill. Ala. Code § 13A-5-40(b). Misstatements on the law of intent have resulted in the reversal of a large number of capital convictions. See, e.g., Francis v. Franklin, 471 U.S. 307 (1985) (affirming grant of habeas relief where jury instructions improperly shifted to defendant burden of disproving intent to kill); Sandstrom v. Montana, 442 U.S. 510 (1979) (reversing state court proceedings where jury instructions improperly shifted to defendant burden of disproving intent to kill); Manuel v. State, 711 So. 2d 507, 511 (Ala. Crim. App. 1997) (same). When a jury has been confused or misled about the law on intent — particularly with regard to what the State must prove — a capital conviction cannot stand. See Brown v. State, 72 So. 3d 712, 718-19 (Ala. Crim. App. 2010) (reversal where jury was not adequately informed that defendant had to have specific, particularized intent to kill to be guilty of capital murder). The prosecution cannot be permitted to misstate the law in such a manner at Mr. Client’s trial.

(2) Misstating the Law Concerning the Corroboration of Accomplice Testimony

16. The law on corroboration requires that corroborating evidence do more than merely enhance the credibility of an accomplice. The corroborating evidence must, *independently* of the accomplice’s testimony, link the defendant to the crime. See Ala. Code § 12-21-222.

17. To determine the sufficiency of corroborative evidence under Alabama law, a court must engage in a process of subtraction. Ziegler v. State, 886 So. 2d 127, 143 (Ala. Crim. App. 2003); Herring v. State, 540 So. 2d 795, 799 (Ala. Crim. App. 1988). “First, the evidence of the accomplice must be eliminated.” Ziegler, 886 So. 2d at 143 (citing Taylor v. State, 808 So. 2d 1148, 1175 (Ala. Crim. App. 2000)). After subtracting that evidence, the Court must evaluate all the remaining evidence and determine whether there is incriminating evidence “tending to connect the defendant with the commission of the offense.” Ala. Code § 12-21-222; see also McGowan v. State, 990 So. 2d 931, 987 (Ala. Crim. App. 2003) (citations omitted); Steele v. State, 512 So. 2d 142, 143 (Ala. Crim. App. 1987); McCoy v. State, 397 So. 2d 577, 585 (Ala. Crim. App. 1981). If there is none, the conviction cannot stand.

18. The evidence in corroboration “must be of some fact tending to prove the guilt of the accused.” Caldwell v. State, 418 So. 2d 168, 170 (Ala. Crim. App. 1981). “It ‘must be of substantive character, must be inconsistent with the innocence of a defendant and must do more than raise a suspicion of guilt.’” McGowan, 990 So. 2d at 987 (quoting McCoy, 397

So. 2d at 588). In addition, the corroborating evidence “may not depend for its weight and probative value on the testimony of the accomplice and it is insufficient if it tends to connect the accused with the offense only when given direction or interpreted by, and read in conjunction with, the testimony of the accomplice.” Ex parte Stewart, 900 So. 2d 475, 478 (Ala. 2004) (quoting Mills v. State, 408 So. 2d 187, 191-192 (Ala. Crim. App. 1981)); McCoy v. State, 397 So. 2d at 587.

19. Because corroborating evidence must independently incriminate the accused, this Court should bar the prosecution from making any statements indicating that such evidence need only “match up” with the accomplice’s testimony.

(3) Reducing the State’s Burden of Establishing Guilt
Beyond a Reasonable Doubt

20. The Supreme Court has condemned any language equating reasonable doubt with “substantial doubt” or “moral certainty” as well as any other definition that would confuse jurors or lead them to believe that the State’s burden is less significant than it is. Sullivan v. Louisiana, 508 U.S. 275 (1993) (Cage error can never be harmless); Cage v. Louisiana, 498 U.S. 39, 41 (1990). The State must be precluded from misstating the law on reasonable doubt at Mr. Client’s trial.

B. Inflaming the Passions of the Jury

21. Appeals to passion and prejudice and other inflammatory remarks to the jury are impermissible. Viereck v. United States, 318 U.S. 236, 247-48 (1943); United States v. Gainey, 111 F.3d 834, 836 (11th Cir. 1997); Thomas v. State, 766 So. 2d 860, 946 (Ala. Crim. App. 1998).

22. While limited victim impact evidence is admissible at the penalty phase of a capital trial, Payne v. Tennessee, 501 U.S. 808 (1991), inflammatory information about the suffering of the victim’s family, the personal worth or characteristics of the victim himself, or the victim’s family’s opinions about the appropriate sentence has no place at any stage of a capital proceeding. Ex parte Rieber, 663 So. 2d 999, 1005 (Ala. 1995); Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016); Ex parte Washington, 106 So. 3d 441, 445-45 (Ala. 2011).

23. The sentencing hearing must focus instead on the defendant as a “uniquely individual human being.” Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Information about the grief of the family or personality of the victim creates an unacceptable risk of a biased sentencing decision. See, e.g., Rogers v. State, 157 So. 2d 13, 18 (Ala. 1963) (reversal where prosecutor’s argument about victim’s family’s suffering “calculated to

engender unduly the sympathies of the jury on the one hand, or to inflame their minds with prejudice and passion upon the other hand”); Wimberly v. State, 759 So. 2d 568, 573-74 (Ala. Crim. App. 1999) (reversing sentence where victim’s daughter characterized defendant and asked jurors to return death sentence); Arthur, 575 So. 2d at 1184-85 (chastising prosecutor for victim impact argument); McGahee v. State, 554 So. 2d 454, 469-70 (Ala. Crim. App. 1989) (reversing death sentence where victim’s brother testified he went to crime scene to kill defendant); Lowman v. State, 91 So. 2d 697, 699 (Ala. Ct. App. 1956) (overturning conviction due to improper prosecutorial argument about deceased’s children).

24. Additionally, arguments regarding the heinous nature of the crime have nothing to do with the “individualized determination” of sentence required by the Eighth Amendment, see Woodson, 428 U.S. 280, where the State does not argue, and the court does not instruct the jury to consider, the aggravating circumstance that the offense was “especially heinous, atrocious, or cruel compared to other capital offenses,” Ala. Code § 13A-5-49(8). Remarks about the gruesome nature of the crime would be improper references to a nonstatutory aggravating factor and/or gratuitous remarks intended to inflame the passions of the jurors, both of which are improper. Such arguments do not in any measure help the jury reach a principled decision or aid in distinguishing those cases in which the offender should be sentenced to death from those in which he should be sent to prison for life. Zant v. Stephens, 462 U.S. 862 (1983).

25. As the courts have noted, improper evidence and argument can take a variety of forms, including live testimony about the victim’s character or reputation; prosecutorial argument about the family left behind or the victim himself; information about the family’s suffering included in a presentence report; involvement of the family in the prosecution, such as by seating them at the prosecution table; and other inflammatory references to the family. See Ex parte McWilliams, 640 So. 2d 1015 (Ala. 1993) (remanding where trial court shown document containing victim’s relatives’ opinions about punishment); Arthur, 575 So. 2d 1165; McGahee, 554 So. 2d at 469-70; Lowman, 91 So. 2d at 699. Such references to the victim at the guilt phase are entirely inappropriate and serve only to inflame the minds of the jurors. The State must be precluded from making similar improper arguments at trial.

26. Another area of prejudice is a prosecutor’s inclination to “stomp his feet” and incite the jury to return a guilty verdict or a death sentence. The courts have not minced words when condemning such practices:

The interest of the State . . . is best served by the orderly rational lawful presentation of the facts and the law. That is the way the criminal justice system is designed to operate. Justice is not served by attorneys who use closing argument to express

inflammatory personal ideas or engage in personal vilification. The purpose of . . . argument is to enlighten the jury, not to enrage it. Where counsel lacks the self-discipline necessary to avoid arguments such as these, that discipline should be imposed by the trial judge from the bench. An otherwise orderly and fair trial can be instantly destroyed by such unprepared intemperate argument. The price that all of us must pay for these untimely flights of oratorical fancy is far too high.

Bridgeforth v. State, 498 So. 2d 796, 801 (Miss. 1986).

27. Similar admonitions have emanated from other courts, prohibiting the emotional flights of fancy in which this District Attorney's office commonly indulges. See, e.g., Tucker v. Zant, 724 F.2d 882, 888 (11th Cir. 1984) (“[T]he Constitution will not permit arguments on issues extrinsic to the crime or the criminal aimed at inflaming the jury's passions, playing on its fears, or otherwise goading it into an emotional state more receptive to the call for imposition of death.”), vacated on other grounds, 474 U.S. 1001 (1985); Arthur, 575 So. 2d at 1184 (prosecutor may not imply that this case, above most other cases, warrants death penalty).

C. Misleading the Jury as to its Responsibility

28. Any argument that encourages the jury to place the ultimate responsibility for a death sentence elsewhere is inconsistent with Eighth Amendment standards. The Supreme Court has made clear that “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.” Caldwell, 472 U.S. at 328-29; Ex parte McGriff, 908 So. 2d 1024, 1038 (Ala. 2004) (stating that “[a]t no time during [a capital trial] should the jury be told that its decision on the issue of whether the proffered aggravating circumstance exists is ‘advisory’ or ‘recommending’”).

D. Arguing Facts Not in Evidence

29. It is entirely improper for a prosecutor to argue facts not in evidence or to misstate the facts. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); United States v. Countryman, 758 F.2d 574 (11th Cir. 1985). This is particularly important in a capital case because “the elemental due process requirement that a defendant not be sentenced to death ‘on the basis of information which he [or she] had no opportunity to deny or explain.’” Skipper, 476 U.S. at 7 n.1 (quoting Gardner, 430 U.S. at 363). The Constitution prohibits the prosecution from arguing facts that have not been subject to proof.

30. The prohibition against the State arguing facts not in evidence also rests on the principle that a prosecutor cannot act as both an advocate and a witness. See Walker v. Davis, 840 F.2d 834, 838 (11th Cir. 1988) (“[a]rguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury” (citation omitted)); Gajewski v. United States, 321 F.2d 261, 268 (8th Cir. 1963) (stating that courts are reluctant to allow prosecutors “to be called as witnesses in trials in which they are advocates”); Tarver v. State, 492 So. 2d 328 (Ala. Crim. App. 1986) (holding that district attorney may not act as both witness and advocate).

E. Asserting Prosecutorial Expertise

31. Courts have expressly condemned references by prosecutors to their expertise, such as statements regarding their “careful practices” in seeking death and the infrequency with which they have sought it, and their assessment of the evidence based on their experience with other cases. Romine, 253 F.3d at 1367; Tucker v. Kemp, 762 F.2d 1496, 1505 (11th Cir. 1985). The prosecutor must not argue to the jury that this particular case is the most deserving, the most atrocious, or the best suited for capital punishment. A variation on this theme is the argument that because the grand jury saw fit to charge a capital crime, the jury’s verdict of death has already been ratified by that decision. Due to the prosecutor’s position of authority, “improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.” Berger, 295 U.S. at 88.

32. Similarly, prosecutors may not attest to the credibility of their witnesses. See Arthur, 575 So. 2d at 1181 (citation omitted) (finding that prosecutorial statements “arguing the witness’ credibility from his official position or occupation . . . are quite regularly construed as reversible error”); King v. State, 518 So. 2d 191 (Ala. Crim. App. 1987).

F. Expressing Personal Opinions

33. A prosecuting attorney may not express any personal opinions during a criminal proceeding, as such expressions may deny the accused a fair trial. See, e.g., Young, 470 U.S. at 8; Berger, 295 U.S. at 85-88 (statement of prosecutor carries with it governmental imprimatur); United States v. Garza, 608 F.2d 659 (5th Cir. 1979). The result of any expression of personal belief is to convey “the unspoken message [] that the prosecutor knows what the truth is and is assuring its revelation.” Stringer v. State, 500 So. 2d 928, 936 (Miss. 1986) (citation omitted).

G. Commenting — Expressly or By Implication — on the Defendant’s Failure to Testify

34. It is well established that the State may not make any reference — either explicitly or implicitly — to the fact that the defendant did not testify.

Alabama law clearly holds that “[w]here there is the possibility that a prosecutor’s comment could be understood by the jury, as reference to failure of the defendant to testify, Art. I, § 6 of the Alabama Constitution is violated.”

Ex parte Wilson, 571 So. 2d at 1262 (quoting Ex parte Tucker, 454 So. 2d 552, 553 (Ala. 1984)); Ex parte Dobard, 435 So. 2d 1351, 1359 (Ala. 1983) (quoting Beecher v. State, 320 So. 2d 727, 734 (Ala. 1975)).

35. Alabama law could not be clearer that it is unconscionable for a prosecutor to comment on the failure of a defendant to take the stand.

On the trial of all indictments, complaints or other criminal proceedings, the person on trial shall, at his own request but not otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him nor be the subject of comment by counsel. *If the district attorney makes any comment concerning the defendant’s failure to testify*, a new trial must be granted on motion filed within 30 days from entry, of the judgment.

Ala. Code § 12-21-220 (emphasis added); see also Ex parte Yarber, 375 So. 2d 1231, 1233 (Ala. 1979); Whitt v. State, 370 So. 2d 736, 738-39 (Ala. 1979); Ala. Const. art. I, § 6. Such comments violate the Fifth, Sixth, Eighth, and Fourteenth Amendments. See Griffin v. California, 380 U.S. 609 (1965); accord Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (“Griffin prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant’s silence as substantive evidence of guilt”); Solomon v. Kemp, 735 F.2d 395, 401 (11th Cir. 1984); United States v. Griggs, 735 F.2d 1318 (11th Cir. 1984).

36. The prosecutor must be barred from commenting on Mr. Client’s silence during police interrogation, and from attributing testimonial meaning to Mr. Client’s demeanor in court. Qualls v. State, 927 So. 2d 852, 855-56 (Ala. Crim. App. 2005) (citing Doyle v. Ohio, 426 U.S. 610 (1976)); Bestor v. State, 96 So. 899 (Ala. 1923) (where defendant does not testify, “highly improper and erroneous” for prosecutor to comment on defendant’s

appearance and physical expressions); see also Hall v. State, 13 S.W.3d 115, 119 (Tex. App. 2000) (prosecutor's contention that defendant never showed remorse necessarily refers to defendant's in-court demeanor and is "clearly a direct comment" on defendant's right to silence).

H. The Question of Parole

37. A sentencing jury in Alabama is faced with two alternatives: life imprisonment without parole or death. It is therefore reversible error for the State to imply that, should the jury not return a death sentence, the defendant will be out walking the streets. A sentencing jury is entitled to know that life without parole means precisely that, and any attempt to lead it to believe otherwise cannot be tolerated. See Simmons v. South Carolina, 512 U.S. 154, 161-62, 168-69 (1994) (reversing sentence where jury misled about defendant's eligibility for parole); Ex parte Rutledge, 482 So. 2d 1262 (Ala. 1984) (reversible error for prosecutor to argue that so long as parole boards and federal courts exist, there is chance defendant may get out on parole); Thomas v. State, 766 So. 2d 860, 956-57 (Ala. Crim. App. 1998) (prosecutor may not comment on parole).

I. Deterrence or Arguments that Jury Has a Duty to Impose Death

38. The State cannot properly argue that Mr. Client should be sentenced to death in order to "send a message" or serve as a deterrent. These extraneous concerns have nothing to do with the "individualized determination" that the jury is called upon to make. Woodson, 428 U.S. 280. The prosecutor is not allowed to introduce evidence or argument regarding deterrence. Nor can the prosecutor argue that the jury has a "duty" to impose death, as such arguments have no place in the administration of justice. See Young, 470 U.S. at 6, 8-9.

J. Other Improper or Misleading Arguments

39. There are numerous other arguments the State could make that would violate Mr. Client's constitutional rights. For example, a prosecutor's selective use of Gregg, 428 U.S. at 183, to argue that the Supreme Court found that capital punishment "is essential in an ordered society" has been condemned. Additionally, a death sentence following the State's denigration of mercy cannot stand because mercy is a relevant factor in capital sentencing. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); Nelson v. Nagle, 995 F.2d 1549, 1555-58 (11th Cir. 1993).

40. Similarly impermissible are prosecutorial exhortations to the jury that it should sentence Mr. Client to death because the jurors are soldiers fighting in a war on crime. Hance v. Zant, 696 F.2d 940, 951-53 (11th Cir. 1983).

41. Any improper references to prior crimes or bad acts would be reversible error. Ex parte State (Towles v. State), 168 So. 3d 133, 154-56 (Ala. 2014). The introduction of such evidence against a defendant is both inherently and presumptively prejudicial. Ex parte Minor, 780 So. 2d 796, 802-04 (Ala. 2000) (quoting Ex parte Cofer, 440 So. 2d 1121, 1124 (Ala. 1983) (stating that “[e]vidence of prior bad acts of a criminal defendant is presumptively prejudicial to the defendant”)).

42. The State must be precluded not only from making inflammatory or inadmissible arguments but also from conducting improper cross-examinations of Mr. Client’s witnesses to prejudice the defendant. See Ex parte State (Berard v. State), 486 So. 2d 476 (Ala. 1985) (solicitation from psychologist about whether capital defendant could have recurrent psychotic episode and kill again highly prejudicial and reversible error).

For these reasons, Mr. Client respectfully moves this Court to enter an order granting the motion and prohibiting the State from making improper opening or closing statements or other improper remarks in this case.

Respectfully submitted,

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[CERTIFICATE OF SERVICE]

[MOTION UPDATED ON 10/05/17]