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Criminal Law - When Bad Is Bad: Prosecutorial Misconduct in Closing Arguments

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CRIMINAL LAW—WHEN BAD IS BAD: PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENTS

United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996)

I. FACTS

Defendants Keith Cannon and Stephanie Cannon sold cocaine base to undercover officer Charles Sherbrooke on four separate occasions.[1] The first transaction was recorded on audio tape, and the other three transactions were videotaped.[2]

The first transaction occurred in Alexandria, Minnesota.[3] The defendants sold Sherbrooke cocaine base and told him that they were interested in buying guns.[4] Arrangements were made to meet again in Alexandria within a week for another drug transaction.[5]

During the second transaction, the defendants sold Sherbrooke more cocaine base.[6] Sherbrooke asked whether the defendants still wanted to buy guns, and the defendants said yes.[7] Sherbrooke said his supplier could provide the firearms and offered to get anything else the defendants wanted.[8] He also explained that the firearms transaction would have to take place in North Dakota because his supplier had an arrest warrant out on him in Minnesota.[9]

Two days later, the parties met for the third transaction in Alexandria.[10] Again, Sherbrooke purchased cocaine base from the defendants.[11] After the sale, the conversation immediately turned to the plans for the next transaction.[12] Stephanie said she was interested in acquiring five handguns, and Sherbrooke responded that his supplier

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1. United States v. Cannon, 88 F.3d 1495, 1499 (8th Cir. 1996). Agent Sherbrooke was an agent of the West Central Minnesota Drug Task Force. *Id.*

2. *Id.* At trial, the audio tape and video tape of the transactions were entered into evidence. Appellant's Brief at 5-6, United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996) (No. 95-1997).

3. *Cannon*, 88 F.3d at 1499. The defendants were introduced to Sherbrooke by a confidential informant on September 14, 1994. Brief for Appellee/Cross Appellant at 2, *Cannon* (No. 95-1996NDF).

4. *Cannon*, 88 F.3d at 1499.

5. *Id.*

6. *Id.*

7. *Id.* The defendants specified that they wanted two .38 caliber snub-nosed revolvers, two derringers, and one .25 caliber automatic pistol. *Id.* When Sherbrooke joked about their reasons for wanting the weapons, the defendants said they were "'desperate' because they had drugs stolen from them in the past." *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *See id.*

could get the handguns and anything else she wanted.[13] Keith offered to trade the cocaine base for the guns.[14] After the discussion, the parties agreed to meet the following week in Fargo, North Dakota.[15]

The fourth and final transaction occurred in a Fargo motel.[16] Special Agent John Keating posed as Sherbrooke's supplier.[17] The parties were introduced and made small talk for a few minutes, then discussed the terms of sale for the cocaine base the defendants had brought.[18] Keating opened his bag and produced ten firearms of varying design.[19] The defendants inspected the guns, and some discussion about the weapons followed.[20] The defendants eventually selected three of the handguns.[21]

After more discussion, Sherbrooke asked if the defendants wanted any of the remaining guns.[22] Keith said no, but that he would want to purchase an "Uzi or some type of automatic weapon" later.[23] Keith explained the dangers of street business, and said he wanted a machine gun with fifty rounds for protection.[24] He wanted to purchase such a gun at the next meeting.[25]

At this point, Sherbrooke asked Keating whether the machine guns would be available for sale in the future.[26] Keating replied that he expected to sell them to another buyer if the defendants did not purchase them.[27] Keith repeated that he wanted to buy a machine gun at the next meeting.[28] Stephanie then asked if drugs could be traded for a machine gun.[29] After some negotiating, three ounces of cocaine base were traded for three handguns, a MAC-type .380 caliber machine gun, and $4,600

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13. *Id.* Three times during the transaction Sherbrooke stated that defendants would have a selection of fifteen weapons from which to choose. *Id.*

14. *See id.*

15. *Id.*

16. *Id.*

17. *Id.* Keating was an agent with the Bureau of Alcohol, Tobacco, and Firearms. *Id.*

18. *Id.*

19. *Id.* at 1500. As Keating described the larger of the two machine guns, referring to it as being capable of holding thirty rounds, Sherbrooke called it a "neat item." *Id.*

20. *Id.* During this time, the defendants were served alcohol by the undercover officers. Appellant's Brief at 9, *Cannon* (No. 96-1997).

21. *Cannon*, 88 F.3d at 1500.

22. *Id.*

23. *Id.* At that point, Stephanie pointed to the machine gun and said, "[T]hat's it." *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* Keith's exact words were, "I believe in sprayin' everything that's moving." *Id.*

29. *Id.*

in cash.[30] After the exchange, the defendants left and were arrested by law enforcement officials waiting outside.[31]

The defendants were charged in a nine-count indictment.[32] At trial, the prosecutor referred to the defendants as "bad people" during his closing argument.[33] The defense counsel objected to this as an improper reference to the defendants' character.[34] The district court overruled, stating that closing arguments can be argumentative.[35] The prosecutor then continued by saying, "[T]here are bad people in the world, ladies and gentlemen. We are lucky where we live not to come in contact with as many as there may be in other parts of the country. But there are still some around here."[36]

The jury found the defendants guilty of all counts, rejecting the defendants' entrapment defense.[37] The defendants appealed their convictions and sentences on several grounds, and the government cross-appealed the sentences.[38]

The Eighth Circuit Court of Appeals *held* that the prosecutor's referral to the defendants during closing arguments as "bad people" constituted prosecutorial misconduct.[39] The court reversed the convictions and remanded on all counts.[40] The government's petition for a rehearing was also denied.[41]

The scope of this case comment is limited to the Eighth Circuit's holding of prosecutorial misconduct during closing argument. The court gave an advisory opinion concerning the other issues brought up on appeal by the defendants, including artificially created venue and change

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30. *Id.*

31. *Id.*

32. *Id.* The court rejected the defendants' pre-trial motion to dismiss. Defendants based their motion on a violation of the defendants' due process rights by artificially creating venue in the District of North Dakota. *Id.* at 1501. The defendants' motion for transfer of venue was also denied. *Id.* The defendants then moved to dismiss the counts relating to receiving and possessing the machine gun on the grounds of due process and entrapment as a matter of law. *Id.* The district judge also denied this motion. *Id.* at 1501.

33. *Id.* at 1502.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1500. The defendants raised the entrapment defense again in a post-trial motion. *Id.* at 1501. The district judge denied the motion and held that as a matter of law the defendants were not entrapped. *Id.* At sentencing, the court did find that the government had employed sentencing entrapment and sentencing manipulation, and did not impose the mandatory, consecutive 30 year sentence for knowingly using and carrying a machine gun during and in relation to a drug trafficking offense. *Id.*

38. *Id.*

39. *Id.* at 1503.

40. *Id.*

41. Telephone interview with Gene Doeling, attorney for Stephanie Cannon on appeal (Oct. 1996).

of venue motions and due process claims;[42] challenges to Rule 21 of the Federal Rules of Criminal Procedure;[43] admission of evidence;[44] rule of lenity;[45] entrapment;[46] the outrageous government conduct defense;[47] jury instructions on entrapment;[48] and Commerce Clause questions.[49]

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42. *See Cannon*, 88 F.3d at 1501. The defendants, African-Americans, claimed that the government attempted to create venue by crossing the state line into North Dakota, which has a lower minority population than Minnesota. *Id.* The court found no evidentiary support and ruled that the variance in minority population from Minnesota (2.17%) to North Dakota (.6%) was not sufficient to support an allegation of outrageous government conduct which violated their due process rights. *Id.*

43. *Id.* The defendants claimed the court abused its discretion by denying their motion for change of venue. *Id.* The Eighth Circuit found no evidentiary support for the motions and therefore found no abuse of discretion by the district court. *Id.* at 1502.

44. *Id.* at 1503. The defendants claimed the cocaine base was improperly admitted as evidence because the government failed to prove a proper chain of custody. *Id.* The *Cannon* court found the evidence properly admitted, stating that the district court operates under a "presumption of integrity for the physical evidence" if no showing of tampering, bad faith, or ill will is made by the defendant. *Id.* (quoting United States v. Miller, 994 F.2d 441, 443 (8th Cir. 1993)). The defendants failed to rebut the presumption of integrity, so the evidence was properly admitted. *Id.*

45. *Cannon*, 88 F.3d at 1503-04. The defendants claimed the harsher statutory sentence for cocaine base should be ignored under the rule of lenity because cocaine and cocaine base are basically the same. *Id.* at 1504. The Eighth Circuit observed the repeated rejection of challenges to penalties based on the distinction between cocaine and cocaine base, and said that the district court did not abuse its discretion by not applying the rule of lenity. *Id.*

46. *Id.* The defendants claimed they were entrapped by the law enforcement officials. The defendants had the burden of showing some evidence that the government officials implanted the "criminal design" in their minds and induced them to commit the crime. *Id.* (citing United States v. Eldeeb, 20 F.3d 841, 843 (8th Cir. 1994)). The government then has the duty to show the defendant was predisposed to commit the crime. *Id.* (citing Jacobson v. United States, 503 U.S. 58, 63 (1988)). The *Cannon* court found the evidence overwhelming as to the drug charges based upon the defendants' own statements about being robbed of sizable quantities of drugs in the past. *Id.* at 1505. The court also found the defendants were predisposed to purchase handguns, based upon their interest in acquiring firearms, the specificity of the request, as well as the fact that they drove to North Dakota for the purpose of purchasing handguns in conjunction with a drug transaction. *Id.* Finally, the Court found that a reasonable jury could have found the defendants were predisposed to buy a machine gun based upon the circumstantial evidence presented. *Id.* Therefore, the district court did not abuse its discretion in not finding entrapment as a matter of law. *Id.*

47. *Id.* at 1506. The defendants claimed that the officers selling a machine gun to them was outrageous conduct aimed solely at increasing their sentence. *Id.* A 30 year mandatory consecutive sentence exists for using or carrying a machine gun in relation to a crime of drug trafficking, while a five year sentence exists for handguns. *Id.* (referring to 18 U.S.C. § 924(c) (1994)). The defendants claimed that the government conduct (selling the machine gun to increase their sentences) was outrageous conduct. *Id.* In order for government conduct to be outrageous, it must "shock the conscience of the court." *Id.* (quoting United States v. Jensen, 69 F.3d 960, 911 (8th Cir. 1995)). The *Cannon* court found that the conduct of the government officers did not shock the court. The court considered the individual actions of the officers (offering a selection of firearms other than the type the defendants had requested and informing defendants that several varieties of firearms would be brought to the transaction for the defendants to select from) in making its decision. *Id.* at 1507. Coupled with the defendants' statements about protecting their business and the magazine size requested, the court concluded that the officers did not act outrageously when they offered or described the weapons. *Id.*

48. *Id.* at 1508. The *Cannon* court disposed of the jury instruction challenge by stating that the court has the liberty to choose whatever jury instruction it wishes as long as the law is accurately stated, even if an instruction has been submitted by either party. *Id.* The court also held that the jury instruction given regarding the definition of "use" was proper under the Supreme Court's interpretation of the word. *Id.* at 1509.

49. *Id.* at 1510. The court, citing *United States v. Brown*, 72 F.3d 96 (8th Cir. 1995), summarily dismissed the defendants' contention that Congress had exceeded its power under the Commerce

II. LEGAL HISTORY

The history of prosecutorial misconduct spans several decades.[50] The United States Supreme Court first addressed the standard of conduct for prosecutors during closing arguments in 1935.[51] The Eighth Circuit has expanded the Supreme Court's definition of what constitutes prosecutorial misconduct, culminating in its decision in *United States v. Cannon*.[52]

A. PROPRIETY OF PROSECUTOR'S REMARKS

The United States Supreme Court initially addressed prosecutorial misconduct in 1935 in *Berger v. United States*.[53] In *Berger*, the United States Attorney engaged in improper cross-examination of witnesses and misconduct during his argument to the jury.[54] The Court acknowledged

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Clause when it enacted 21 U.S.C. §§ 841, 924(c).

50. *See* Berger v. United States, 295 U.S. 78 (1935) (addressing for the first time the issue of what constitutes prosecutorial misconduct); Thomas J. Oliver, Annotation, *Supreme Court's Views as to What Courtroom Statements Made by Prosecuting Attorney During Criminal Trial Violate Due Process or Constitute Denial of Fair Trial*, 40 L. Ed. 2d 886 (1996) (giving extensive treatment of improper prosecutorial behavior).

51. *See Berger*, 295 U.S. at 85.

52. 88 F.3d 1495 (1996).

53. 295 U.S. 78 (1935). The court found that the prosecutor engaged in misconduct during cross examination and closing argument when his argument to the jury was undignified, intemperate, contained improper insinuations and assertions, and was calculated to mislead the jury. *Berger v. United States*, 295 U.S. 78, 84 (1935).

54. *See id.* The court characterized the prosecutor as "conducting himself in a thoroughly indecorous and improper manner." *Id.* The following excerpt is an example of the continuous harassment of witnesses during the trial:

Q: Now Mr. Berger, do you remember yesterday when the court recessed for a few minutes and you saw me out in the hall; do you remember that?
A: I do, Mr. Singer.
Q: You talked to me out in the hall?
A: I talked to you?
Q: Yes.
A: No.
Q: You say you didn't say to me out in the hall yesterday, 'You wait until I take the stand and I will take care of you'? You didn't say that yesterday?
A: No; I didn't, Mr. Singer; you are lying.
Q: I am lying, you are right. You didn't say that at all?
A: No.
Q: You didn't speak to me out in the hall?
A: I never did speak to you outside since this case started, except the day I was in your office, when you questioned me.
Q: I said yesterday.
A: No, Mr. Singer.
Q: Do you mean that seriously?
A: I said no.
Q: That never happened?
A: No, Mr. Singer, it did not.
Q: You did not say that to me?
A: I did not.
Q: Of course, I have just made that up?
A: What do you want me to answer you?

that the nature of the prosecutor's job is not to convict, but rather is to serve justice.[55] In so holding, the Supreme Court used language which has become the landmark of prosecutorial duty:

> [H]e 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 every legitimate means to bring about a just one.[56]

The Court set the standard for appropriate and inappropriate remarks made by the prosecutor with the *Berger* decision.[57] It held that an improper argument by the prosecutor may prejudice the jury and result in a verdict not based upon the evidence.[58] Similarly, improper suggestions, insinuations, and assertions of personal knowledge by the prosecutor were also clearly rejected because of the weight such remarks may carry with the jury.[59] The Court also considered the weakness of the evidence against the defendant, finding that if there had been overwhelming evidence it may have resulted in a different conclusion by the Court.[60] The Court's analysis in this early decision focused on the persistent nature of the prosecutor's improper remarks and stressed the prejudicial effect such repeated improper behavior would have on the jury.[61]

The Supreme Court continued to formulate the standard defining improper prosecutorial behavior in 1945 when it decided *Viereck v. United States*.[62] In *Viereck*, a case taking place during an era of heightened patriotism resulting from World War II, the prosecutor likened the jury to the soldiers in the Bataan Peninsula.[63] He analogized the jury's duty to protect the American public from criminals to that of the soldiers protecting world freedom from the Japanese.[64] The Supreme Court found these remarks prejudicial to the petitioner's right to a fair trial.[65] The Court said that the remarks were irrelevant to the facts or issues of the case and had the "purpose or effect of arousing passion

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Q: I want you to tell me I am lying is that so?

Id. at 86-7.

55. *Id.* at 88.

56. *Id.*

57. *See id.* at 84.

58. *Id.* at 89.

59. *Id.* at 88. The pertinent part of the record from the *Berger* trial is reproduced in the opinion at pages 84 through 85.

60. *Id.* at 89.

61. *See id.*

62. 318 U.S. 236 (1943).

63. Viereck v. United States, 318 U.S. 236, 247-48 (1943).

64. *Id.* at 247 n.3.

65. *Id.* at 247.

and prejudice."[66] This decision altered the standard of prosecutorial impropriety established in *Berger* by shifting the focus to the intended effect of the remarks on the jury.[67]

In 1985 the Supreme Court again addressed the boundaries of prosecutorial impropriety in *Young v. United States*.[68] The Supreme Court held that the prosecutor may not express "personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."[69] The holding of *Young* requires the prosecutor to prosecute to the fullest extent of his or her ability but present no opinion as to his or her personal belief of the defendant's guilt.[70]

The *Young* decision also highlighted the ABA Standard for Criminal Justice guidelines defining improper prosecutorial conduct.[71] The ABA's standard provided that the prosecutor may not misstate evidence; mislead the jury as to the inferences it may draw; express a personal belief or opinion about testimony or a witness; or make arguments calculated to inflame the passions or prejudices of the jury.[72] Additionally, the standard prohibits arguments which would inject issues beyond guilt or innocence into the jury's attention, as well as arguments that would focus the jury's attention upon the consequences of its verdict beyond the determination of guilt or innocence.[73] Violation of any of the guidelines may cause the jury to become prejudiced and result in reversible error.[74]

In addition to implementing the ABA standard in the *Young* decision, the Court went on to explain that improper prosecutorial

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66. *Id.* The remarks found prejudicial were quoted by the court, as follows:

> In closing, let me remind you ladies and gentlemen that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.
>
> This is war. It is a fight to the death. The American people are relying upon you, ladies and gentlemen for their protection against this sort of crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.

Id. at 247-48 n.3.

67. *See, e.g.*, United States v. Solivan, 937 F.2d 1146, 1151 (6th Cir. 1991) (discussing *Viereck* and explaining that the Sixth Circuit rule that appeals to the jury's community interests are not per se impermissible, but that instead the prosecutor's intent to inflame or prejudice the jury must be considered).

68. United States v. Young, 470 U.S. 1, 7 (1985).

69. *Young*, 470 U.S. at 7 n.3 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1984)).

70. *Id.* at 9.

71. *See id.* n.7 (quoting the A.B.A. STANDARDS CRIM. JUST. § 4.97 (2d ed. 1980)).

72. *Id.*

73. *Id.*

74. *Id.*

remarks alone do not justify a reversal.[75] Instead, the remarks must be viewed within the context of the trial to determine whether the jury was prejudiced.[76]

The Eighth Circuit Court of Appeals faithfully followed the Supreme Court's guidelines when it decided *United States v. Splain*.[77] The court in *Splain* found that the prosecutor must prosecute both vigorously and fairly, and may not express partisan or personal positions because such expressions are not evidence and may prejudice the jury.[78] The court concluded that referring to defendant Splain and his testimonies as "slick" was improper prosecutorial conduct.[79] The court also embraced the position that the courts had yet to adopt a per se rule requiring reversal of a conviction where prosecutorial impropriety has occurred.[80]

In *Splain*, the court viewed the prosecutor's referral to the defendant as "slick" in the light most favorable to the government, reasoning that "slick" does not necessarily have an inherently criminal or sinister connotation.[81] The court focused on the criminal intent implicated by the characterization of the defendant.[82] In support of their decision, the court cited several other circuit court cases where questionable words were used to characterize defendants but no reversible error was committed.[83] The characterizations followed a trend: if a plausible

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75. *See id.* at 11.

76. *See id.* A line of cases has also developed focusing on prosecutors using their closing argument to respond to improper remarks by the defense attorney. This doctrine, referred to as "invited response," has achieved some acceptance by the Supreme Court. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 242 (1940) (finding that within the context of the trial, both the defense counsel's conduct and the prosecutor's conduct are relevant to determine whether the prosecutor's behavior amounted to prejudicial error). The Court in *Young* generally accepted that sometimes improper prosecutorial remarks could act as a balancing mechanism to off-set improper remarks by the defense attorney, finding that such balancing may prevent the jury from being led astray. *Young*, 470 U.S. at 12.

77. 545 F.2d 1131 (8th Cir. 1976).

78. United States v. Splain, 545 F.2d 1131, 1134 (8th Cir. 1976).

79. *Id.*

80. *Id.* at 1135. This idea was adopted from WHARTON'S CRIMINAL LAW AND PROCEDURE § 2084 (1957). *Id.* at 1134; *see also* United States v. Green, 497 F.2d 1068, 1085 (7th Cir. 1974) (holding that the facts of each case must be independently reviewed to determine whether the comment prejudiced the jury); United States v. Tortora, 464 F.2d 1202, 1207 (2d Cir. 1972) (holding that reversal is only justified if the jury verdict could reasonably have been affected by the improper argument).

81. *Splain*, 545 F.2d at 1134.

82. *See id.* The Eighth Circuit found that although "slick" has a negative connotation, it does not necessarily have a criminal one. *Id.*

83. *Id.; see also* United States v. Cook, 432 F.2d 1093, 1106 (7th Cir. 1970) (calling defendant a "true monster" and a "subhuman man" with a "rancid, rotten mind" was improper but not prejudicial); United States v. Hoffman, 415 F.2d 14, 21 (7th Cir. 1969) (characterizing the defendant with words such as "liar, crook, wheeler and dealer and similar terms" was not reversible error). But note, while the prosecutor's comments towards the defendant in *Splain* were clearly improper, the conviction was upheld because the defendant's substantive trial rights were not infringed upon. *See Splain*, 545 F.2d. at 1135-36 (holding that the evidence against defendant Splain was strong enough to preclude a

definition of the questionable word(s) did not imply criminal activity, and substantial evidence supported the defendant's guilt, the descriptive reference probably did not constitute reversible error.[84]

Eight years after the *Splain* decision, the Eighth Circuit Court of Appeals again had the opportunity to address prosecutorial misconduct in *United States v. Johnson*.[85] The *Johnson* court's decision defined the difference between proper and improper remarks by the relevance of the remark to the evidence.[86] The court held that the prosecutor may not appeal to the jurors' sense of morality or localism.[87] Remarks referring to such emotions were found to be improper.[88]

Other circuits have defined prosecutorial misconduct in different ways. One relevant decision is from the Sixth Circuit's 1991 decision, *United States v. Solivan*.[89] While the language from this decision has not been expressly adopted by the Eighth Circuit, it provides a workable framework for analysis. The *Solivan* court explained that appealing to a national or local community interest of the juror is not per se misconduct.[90] Instead, the context of the remark must be appraised and the correlation between the community interest appealed to and the likelihood the remark will inflame or prejudice the jury must be considered.[91] The *Solivan* court emphasized that appeals to the jury to act as the community conscience are not impermissible per se.[92] Only when the remarks are used for the purpose of arousing the jury's passion and prejudice do they become improper.[93] The court must consider the nature of the community interest being appealed to, and the context of

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finding of prejudice resulting from the prosecutor's improper remarks).

84. *See Splain*, 545 F.2d at 1134 n.1 (referring to Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969), where the defendant's conviction was reversed because the prosecutor called him a "hoodlum" in closing argument, and the word "hoodlum" implies that one has engaged in previous illicit conduct).

85. 968 F.2d 768 (8th Cir. 1992).

86. United States v. Johnson, 968 F.2d 768, 771-72 (8th Cir. 1992). The language adopted by the Eighth Circuit attempts to clarify improper prosecutorial behavior and is as follows:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

Id. (citing United States v. Hawkins, 595 F.2d 751, 754 (D.C. Cir. 1978)).

87. *See, e.g.*, United States v. Solivan, 937 F.2d 1146, 1152 (6th Cir. 1991). The court found that the prosecutor may not urge the jury to "tell [the defendant] and all of the other drug dealers like her that we don't want that stuff in Northern Kentucky." *Id.* at 1148. Such comments were found to arouse feelings of localism in the jury about their part in the war on drugs. *Id.* at 1152.

88. *Id.*

89. 937 F.2d 1146 (1991).

90. United States v. Solivan, 937 F.2d 1146, 1151 (6th Cir. 1991).

91. *Id.* at 1152.

92. *Id.* at 1151.

93. *Id.*

the appeal.[94] In this framework, the court can determine whether the remark is meant solely to inflame the jury, or whether it is an unintentional appeal.[95] A prosecutor is not allowed to urge conviction to "protect community values, preserve civil order, or deter future lawbreaking."[96] To allow such remarks would condone convictions based upon emotional appeal, not evidence.[97] The defendant cannot be convicted because the jury believes it will be assisting in the solution of a social problem.[98] The conviction must rest on the weight of the evidence.[99] Furthermore, the prosecutor should be especially wary of comments which may appeal to community interests when the case deals with a particular social problem.[100]

Again, the Eighth Circuit has not formally adopted this framework. It is included in this case comment because it appears to be the same analytical process utilized by the Eighth Circuit when considering whether the prosecutor's remarks are intended to inflame the jury or appeal to a community interest.

Because of the fact specific nature of a prosecutor's conduct, the impropriety of his or her remarks must be decided on a case-by-case basis.[101] The Eighth Circuit has followed the standards enunciated by the Supreme Court, which give the circuit courts plenty of latitude to define prosecutorial impropriety within each jurisdiction, and has increasingly expanded its own definition of what constitutes improper prosecutorial conduct.[102] When looking at the prior decisions of both the United States Supreme Court and the Eighth Circuit Court of Appeals, as well as relevant decisions from the other circuits, it becomes obvious that determining the impropriety of a prosecutor's remarks during closing argument is not an exact science.

The judicial response to the problem has been to create a laundry list of improper remarks.[103] The prosecutor may refer to any properly

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94. *Id.* at 1152.

95. *See, e.g.*, United States v. Barlin, 686 F.2d 81, 93 (2d Cir. 1982) (finding that the prosecutor's remarks were designed to divert the jury from the evidence).

96. *Solivan*, 937 F.2d at 1153 (citing United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1994)).

97. *Id.*

98. *Id.*

99. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (finding that the jury's attention may not be directed to facts which are not in evidence and may be prejudicial).

100. *See Solivan*, 937 F.2d at 1154.

101. *See* United States v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992).

102. *See, e.g.*, Mack v. Caspari, 92 F.3d 637, 643 (8th Cir. 1996) (holding that the defendant must preserve his right to appeal by timely objection to the prosecutor's improper comments or that right is waived); *Johnson*, 968 F.2d at 771 (finding that a single instance of prosecutorial misconduct can require the reversal of a conviction).

103. *See* Rose Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1307 (1996).

admitted facts, including the probative value of the evidence, the credibility of any witnesses, and the application of law,[104] as well as reasonable inferences which can be drawn from the facts.[105] A prosecutor may not include misstated testimony; interpretations of the law; facts or evidence not already in the record (unless it is a common fact); personal beliefs or opinions as to the weight of the evidence; and, perhaps most importantly, statements to inflame or prejudice the jury.[106]

B. PREJUDICIAL EFFECT OF IMPROPER PROSECUTORIAL CLOSING REMARKS

The Eighth Circuit prosecutorial misconduct test requires that two separate, but related, issues be examined.[107] First, it must be determined whether the prosecutor's remarks during the closing argument were improper, as discussed above.[108] Second, if impropriety is found, then the reviewing court must decide whether the impropriety prejudicially affected the substantive trial rights of the defendant.[109] To aid in its evaluation, the Eighth Circuit Court of Appeals has established three criteria to evaluate the prejudicial effect of the prosecutor's improper remarks: (1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the trial court.[110]

Though the Eight Circuit has utilized a three part test to determine whether the substantive trial rights of the defendant have been violated, the United States Supreme Court has yet to expressly define criteria to consider when evaluating the prejudicial effect of the prosecutor's remarks. The Supreme Court has been reluctant to create a per se reversal standard and has instead mandated a case-by-case examination in deciding whether the jury has been prejudicially affected by the improper remarks of the prosecutor.[111] In accord with this standard, the Court has considered the weight of the evidence and the remarks in the context of the trial when determining whether the improper remarks warranted a new trial.[112]

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104. *Id.*
105. *See* United States v. Boyce, 797 F.2d 691, 694 (8th Cir 1996).
106. *See* Nidiry, *supra* note 103, at 1311.
107. *See* United States v. Hernandez, 779 F.2d 456, 458 (8th Cir. 1985).
108. *Id.*
109. *Id.*
110. *Id.* at 460-61.
111. United States v. Young, 470 U.S. 1, 12 (1985) (finding that the court must determine whether the improper conduct resulted in prejudice to the jury on a case-by-case basis).
112. *See Young*, 470 U.S. at 15 (finding the prosecutor's remarks must be examined within the context of the trial to determine whether they prejudicially affected the jury); United States v. Socony-Vacuum Oil Co., 310 U.S. 15, 239 (1940) (holding that the prosecutor calling the defendant

In short, the determination of prejudicial effect upon the jury from improper prosecutorial remarks is up to the trial court, which is given much discretion.[113] The court of appeals may only reverse the lower court decision if there is a showing of clear abuse of discretion.[114] The reasoning behind this required showing is that the trial judge is better able than an appellate court to determine the prejudicial effect of the prosecutor's remarks upon the jury.[115]

III. ANALYSIS

In *United States v. Cannon*,[116] the defendants claimed that the Assistant United States Attorney's remarks during closing argument constituted prosecutorial misconduct and improperly prejudiced the jury.[117] In assessing this claim, the Eighth Circuit noted that only in cases of clear abuse of discretion will the lower court's decision be overturned.[118]

The Eighth Circuit, following the *Hernandez* test, looked first at the impropriety of the prosecutor's remarks in the context of the trial.[119] The court found the prosecutor's remarks to be improper for several reasons.[120] First, the reference to the defendants as "bad people" did not further the aims of justice or aid in the search for truth.[121] Instead, the remarks directed the jury's attention to the race and residency of the defendants.[122] Regardless of the alleged crimes committed by the defendants, the court felt that the prosecutor crossed the line of propriety by characterizing the defendants as bad people.[123] Since the prosecutor had a certain level of credibility because of his profession[124] and his

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"slick" was not prejudicial because the evidence against the defendant was overwhelming).

113. United States v. Powell, 771 F.2d 1173, 1175 (8th Cir. 1985) (holding that the trial judge has broad discretion in determining whether the prosecutor's improper remarks prejudiced the jury's verdict).

114. *See* United States v. Greene, 497 F.2d 1068, 1085 (7th Cir. 1974) (finding clear abuse existed because the prosecutor's remarks were "unduly prejudicial"); Mellor v. United States, 160 F.2d 757, 765 (8th Cir. 1947) (holding that clear abuse is found when a prosecutor's remarks are "plainly unwarranted and clearly injurious").

115. United States v. McBride, 862 F.2d 1316, 1320 (8th Cir. 1988). This is because the reviewing court would most likely be working from a cold record. *Id.*

116. 88 F.3d 1495 (8th Cir. 1996).

117. United States v. Cannon, 88 F.3d 1495, 1502 (8th Cir. 1996).

118. *Id.*

119. *Id.* (citing United States v. Hernandez, 779 F.2d 456, 460 (8th Cir. 1985)).

120. *Id.*

121. *Id.*

122. *Id.* The Eighth Circuit referred to the prosecutor's comments as a "thinly veiled appeal to parochial allegiances." *Id.* However, the government disputes this allegation in its brief petitioning for a rehearing, arguing that the "statements by the Assistant United States Attorney have been grossly misinterpreted, improperly characterized and not properly evaluated in the context of the entire record." Pet. Reh'g at 9, *Cannon* (No. 95-1997).

123. *Cannon*, 88 F.3d at 1502.

124. *See* United States v. Berger, 295 U.S. 78, 88 (1935) (referring to the two-fold duty of the prosecutor to both further justice and aid in the search for truth).

closing argument closely preceded the jury's deliberation, the court determined that the remarks were designed to elicit a feeling of localism in the jury.[125] In fact, the court found that the words of the prosecutor gave the jury a "hook to hang their verdict upon" which was irrelevant to the evidence admitted for determining guilt or innocence.[126]

In addition, the timing of the remarks was particularly pertinent in the court's evaluation.[127] The remarks occurred during rebuttal of the closing argument.[128] The only option available to the defense attorney was an objection, subsequently denied by the trial judge.[129] The trial judge stated that the closing arguments could be argumentative and that the prosecutor was not out of line.[130] The Eighth Circuit Court of Appeals disagreed with the trial judge's perception of the remarks.[131] The court of appeals thought that the insinuation behind the remark, as well as the timing, was particularly damaging, although the impropriety occurred only twice.[132]

After finding the prosecutor's remarks to be improper, the *Cannon* court next considered whether the comments prejudicially affected the jury and, as a result, denied the defendants a fair trial.[133] In reaching an affirmative answer to this question, the court's analysis began by evaluating the cumulative effect of the misconduct.[134] The remarks occurred close to the end of the trial, and characterized the defendants in a way that was most likely to remain in the jury members' minds during deliberation.[135] Furthermore, the content of the words could arouse a feeling of protection towards North Dakota in general, or Fargo in particular, both of which have relatively few drug dealers.[136] After considering these factors and the context of the remarks, the court decided that the cumulative effect of the improper remarks was significant even though the impropriety was limited to two remarks.[137]

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125. *Cannon*, 88 F.3d at 1502.
126. *Id.* at 1503.
127. *Id.* (stating that since the remarks came during rebuttal arguments, the defense was unable to respond except by objecting to the statements).
128. *Id.* at 1502.
129. *Id.* at 1503.
130. *Id.*
131. *Id.*
132. *Id.* The Eighth Circuit perceived the prosecutor's remarks as a "thinly veiled appeal to parochial allegiances." *Id.* at 1502.
133. *Id.*
134. United States v. Hernandez, 779 F.2d 456, 458 (8th Cir. 1985).
135. *Cannon*, 88 F.3d at 1502.
136. *Id.* at 1503.
137. *Id.*

The court then proceeded to evaluate the strength of the properly admitted evidence, the second criterion of the *Hernandez* test.[138] The court found that the evidence concerning the drug and handgun charges was overwhelming.[139] The evidence concerning the defendants' predisposition to buy a machine gun, however, was more questionable.[140] The court believed a reasonable jury, without the bias caused by the improper references to the defendants, may have found that the defendants were not predisposed to buy a machine gun, therefore the evidence did not meet the strength requirement of the *Hernandez* test.[141]

Finally, the lack of curative instructions by the trial court judge was considered by the court.[142] Under the *Hernandez* criteria, misconduct can be cured by an instruction to the jury to ignore the improper remarks.[143] In this case, no curative instruction was given. In fact, the trial court judge overruled the objection to the prosecutor's remarks and indicated that closing arguments can be argumentative.[144]

The weakness of the evidence of the defendants' predisposition to buy a machine gun, coupled with the lack of a curative instruction, resulted in the *Cannon* court finding reversible error.[145] The court found the improper nature of the prosecutor's remarks made it easy for the jury to separate themselves from the Cannons by characterizing them as foreigners.[146] It opened the door to a decision based upon personal feeling instead of properly admitted evidence.[147]

After finding improper prosecutorial remarks and a violation of the Defendants' substantive trial rights, the court held that the Defendants were entitled to a new trial on all counts.[148]

IV. IMPACT

The Eighth Circuit's decision in holding the prosecutor's characterization of the defendants as "bad people" to be improper and prejudicial may alter how prosecutors argue within the Eighth Circuit. While it is unknown whether the decision will influence other circuits, the precedent has been set for prosecutors in the Eighth Circuit.

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138. *Id.* at 1502 (citing *Hernandez*, 779 F.2d at 458).
139. *Id* at 1503.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* (using the criteria set out in *Hernandez*, 779 F.2d at 458).
144. *Id.* at 1502-03.
145. *Id.* at 1503.
146. *Id.*
147. *Id.*
148. *Id.*

First of all, the Eighth Circuit is sending a message to prosecutors. This decision is a definite constriction upon the latitude available to prosecutors during their closing argument. Instead of reversing and remanding only the counts dealing with the questionable evidence of predisposition to buy a machine gun, the court remanded the entire case.[149]

While it has long been accepted that the prosecutor may not blatantly appeal to the emotions of the jury, the court has now rejected even unintentional appeals to the jury members' emotions.[150] In effect, this seems to be a harsh message to prosecutors practicing within the Eighth Circuit not to overstep the established boundaries. Arguments appealing to the jurors' local or community interests are not acceptable, even if the reference is unintentional. Overzealous, or even moderately zealous, prosecutors will certainly need to rethink their strategy before arguing in the jurisdiction of the Eighth Circuit.

This decision also demonstrates the court's tightening of its authority over the district court. In finding that the trial court erred, the court of appeals is showing that its window of propriety is much narrower than that of the district court's. This reversal may result in a trial bench that listens to arguments with a more critical ear. It could be that the first hint of impropriety, including an unintentional appeal to juror emotion, may soon become grounds upon which to reprimand the prosecutor. Similarly, it may also result in a bench that pays particular attention to potentially argumentative statements by prosecutors.

Although this decision could have harsh repercussions, it will depend upon the enforcement of the new, stricter standard by the Eighth Circuit itself. In a case decided after *Cannon*, the Eighth Circuit found a prosecutor's remarks improper but not prejudicial.[151] The court's decision in that case hinged upon the failure of defense counsel to object to the improper remark, and therefore, preserve the grounds for appeal.[152] In light of that decision, perhaps the Eighth Circuit's decision in *Cannon* will not be as far reaching. Only the Eighth Circuit itself can define the impact of its holding in the *Cannon* case, deciding for itself if "bad" is always bad, and how "bad" is too bad.

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149. *Id.*

150. *See id.* at 1502.

151. Mack v. Caspari, 92 F.3d 637, 643 (8th Cir. 1996) (finding that the prosecutor calling the defendant a "killer" during a trial for assault, robbery, and armed criminal action, was improper but not prejudicial).

152. *Id.* at 643.