IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

STATE OF OREGON, PLAINTIFF, -VS- CONAN WAYNE HALE, DEFENDANT.	CASE NO. 10-96-04830 MOTION IN LIMINE TO PROHIBIT CERTAIN COMMENTS OR ARGUMENTS BY THE PROSECUTION TO THE JURY (Oral Argument Requested)

Defendant, by and through his undersigned attorney, moves the Court for an Order prohibiting the prosecution from making certain comments or arguments to the jury as more particularly set forth below, by way of opening statement, closing argument, objections or otherwise during the course of trial, pursuant to the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 1, 2, 3, 8, 10, 11, 12, 15, 16, 20 and 21 of the Oregon Constitution, and further supported by all points and authorities set forth below and as may be offered at hearing on this motion.

In particular, but not exclusively, the Court should prohibit the prosecution from making comments or arguments touching upon the following matters:

A. Arguing Facts Not In Evidence

1. It is improper for a prosecutor to argue facts not in evidence or to misstate the facts. *Donnelly v. De Christoforo* 416 U.S. 637 (1974). The American Bar Association's Standards provide:

> It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record . . . unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.
> ABA Standards Relating to the Prosecutor Function, Section 3-5.9.

State v. Bolt, 108 OrApp 746 (1991)(commenting on other crimes and events reported in the newspaper); see also *State v. Wederski*, 230 OR 57, 6l (error was prejudicial regarding state's reference to evidence it "might have produced" but it did not; court found the remark an open "invitation for the jury to speculate").

2. This is particularly important in a capital case, since the Eighth Amendment comes into play in addition to 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. *Skipper v. South Carolina*, 476 U.S. 1, 7n.1, 106 SCt 1669, 90 L.Ed. 2d 1 (1986) (citing *Gardner v. Florida*, 430 U.S at 363). Therefore, the federal Constitution absolutely prohibits the prosecution from arguing "facts" that have not been subject to proof.

3. Examples of "facts" not in evidence include such diverse matters as what the victims must have been thinking or feeling during commission of the crimes, what the defendant was thinking or feeling at that time, the cost of life imprisonment versus the cost of the death penalty, that the death penalty is a deterrent, etc. See, e.g., *State v. Smith*, 310 Or 1, 26-27 (1990)(prosecutor's obvious speculation about what the victim might have been thinking properly stricken by trial court).

B. Arguing Prosecutorial Expertise.

4. The courts have expressly condemned references by prosecutors to their expertise, such as statements regarding their "careful practices" in seeking the death penalty and the infrequency with which they have sought it. E.g., *Brooks v. Kemp*, 762 F2d 1383, 1410 (11th Cir. 1985)(en banc), *vacated on other grounds*, 478 US 1016 (1986). The practices or policies of the prosecutor's office in terms of seeking the death penalty are not facts in evidence, nor are these "facts" relevant to the individualized determination of sentence which the law requires.

5. A closely related type of argument which courts have consistently condemned concerns references by prosecutors regarding their own veracity for truthfulness. See *State v.*

Lundbom, 96 OrApp 458, 461 (1989), where the prosecutor, immediately before calling a defense expert witness and the defense lawyer "pimps," said, "With all respect, I'm someone who tells it like it is."

6. A variation on this theme is the argument that because the grand jury saw fit to charge a capital crime, a death sentence has already been ratified by the grand jury's decision. *See State v. Flores*, 31 Or App 187 (1977), where mistrial was granted after the prosecutor remarked: "Probably over 90 percent of the persons that are indicted actually plead guilty . . . and that the rest . . . probably 70, 80 percent, or 90 percent . . . are convicted." The impetus of the prosecutor's comments was that the grand jury was nearly always correct in its accusations and therefore, statistically, the trial jury would probably be correct in a finding of guilty.

7. Another variation on the "I'm the Prosecutor and I know it all, so you can Trust Me" argument is to denigrate the defense, by comments along the lines of "you rejected the defense at the guilt phase and there's no good reason to start listening to them now."

C. Personal Opinions

8. A related area of argument also prohibited by the Code of Professional Responsibility concerns expressing one's personal opinion about the justness of a cause, the credibility of a witness or the guilt of an accused. In a capital case, this prohibition logically extends to expression of personal opinions regarding the appropriateness of a particular sentence.

9. Of course, the most obvious example of this is when prosecutors improperly "express personal opinions on the facts of the case or give unsworn testimony about an essential aspect at any time and especially before the jury," *Jefferis v. Marzano*, 298 Or 782, 792 n.5 (1985)(opinions expressed as part of objection; "trial courts must restrict counsel's objections to a statement of the antiseptic legal grounds without argument and without comment").

The same principle applies to any assertion that the prosecutor "thinks" or "believes" or "can't believe". Prejudice results when such remarks imply "that the prosecutor knows something

not in evidence which is damning to the defendant." *State v. Miller,* 1 Or App 460, 463 (1970). What the prosecutor thinks, or what he imagines, or what “irks” him, has nothing to do with the case at hand.

10. Vouching for witnesses brings to bear the same principles as when a prosecutor expresses personal opinions. In *US v. Wallace*, 848 F.2d 1464, 1473 (9th Cir. 1988), the court defined vouching as "either plac[ing] the prestige of the government behind the witness through personal assurances of the witness's veracity, or suggest[ing] that information not presented to the jury supports the witness's testimony." For example, in *State v. Snider*, 296 Or 168 (1983), the court admonished the prosecutor for arguing that the witness had every reason to tell the truth because if he failed a polygraph, he would lose his plea agreement with the State.

11. To the extent that prosecutor’s assertions that the death penalty is a deterrent, or is required in a case like this, are opinions versus facts not in evidence, these types of comments are prohibited under the rule against expression of personal opinions.

D. Accusing the Defendant or Defense Witnesses of Lying, or Attacking Defense Counsel

12. Categorical and conclusory opinions by the prosecutor regarding "lies" by the defense make the prosecutor an unsworn witness and invade the province of the jury. In *State v. Seeger* 4 OrApp 366 (1971), the prosecutor criticized the defendant for delaying his opening statement, objecting to it as a “tactic” that allowed the defendant to "make up a story" as the case proceeded. The appellate court reversed and remanded, finding that the prosecutor had breached his “duty . . . to see that the defendant has a fair trial” by creating “an inference that the prosecutor believed the defendant was going to falsely manufacture and tailor a defense.” 4 OrApp at 338-39.

13. The appellate court in *Lundbom, supra*, 96 OrApp at 461-62, opined: “Attempts to establish a defendant's guilt by making unwarranted personal attacks on his attorney and the witness is not only unfair, but it impugns the integrity of the system as a whole. Such comments dangerously overshadow what a defendant's case is really about, and we presume that they prejudice a defendant.”

The federal courts have chastised prosecutors and reversed convictions for remarks during summation, distorting the roles of prosecutors and defense counsel, which inferred that everyone the Government accused was guilty, that justice was done only when conviction was obtained, and that defense counsel was willing to make unfounded arguments. E.g., *US v. Friedman*, 909 F2d 705, 709-10 (2d Cir. 1990); *US v. Frederick*, 78 F3d 1370, 1379-81 (9th Cir. 1996)(improper to attack defense counsel in general, and “absent specific evidence in the record, no particular defense counsel can be maligned”).

14. When a prosecutor expresses his personal opinions as to the worthlessness of the accused in a capital trial, the error is clear, since any good character traits or virtues, or even human frailties which may be apparent to the jury must be considered in mitigation of sentence. *Eddings v. Oklahoma,* 102 SCt. 869 (1982). This would include any comments by the prosecutor regarding whether any observable emotion by the defendant is “an act” or “feigned remorse” or "no remorse."

15. It is highly improper for the prosecutor to level personal attacks on defense counsel. See *State v. Halford*, 101 OrApp 660 (1990), remanded due to improper remarks by the prosecutor. In dicta, the Court quoted EC 7-37, which provides, in relevant part: "A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system." 101 OrApp at 663 n3. This prohibition includes suggestions that defense counsel has fabricated a defense or set out to mislead the jury or is putting on an act for the jury. *US v. Frederick*, *supra.; US v. Kessi,* 868 F2d 1097, 1107 (9th Cir. 1989)(error to claim defense "invented" by counsel).

E. Asserting a Duty to Impose Death

16. In a capital case, the danger of prejudice is heightened. As a result, appeals to a duty to impose death or to the results of not "killing" the defendant are prohibited. At the sentencing phase of a capital trial, it is particularly important the prosecutor's closing argument be within proper bounds. *Hance v . Zant*, 696 F.2d 940, 951 (11th Cir. 1983).

17. Accordingly, the courts have prohibited arguments which portray the jury as the last line of defense against continuing crimes of violence by the defendant, that any future victim would be on the jury's conscience, or that the jurors were the only people who could stop the defendant from killing again. See, e.g., *Tucker v. Kemp*, 762 F2d 1496, 1508 (11th Cir. 1985)(en banc), *cert. denied*, 478 US 1022 (1986)(noting such arguments derogated the role that others would have in seeing to it that the defendant, if given a life sentence, would be effectively incapacitated).

18. Related to arguments that suggest the jury has a duty to impose the death penalty is the argument that people in the community want or expect a certain outcome. In *State v. Wilson* , 221 Or 602, 608 (1960), the prosecutor told the jury that "if [they] failed to convict they might expect cattlemen of the area to resort to the rope and the .30-.30." The Court found that improper,

noting "arguments which tend to inflame, threaten the community with mob violence, or to coerce a jury into conviction are improper and reversible error when properly preserved in the record." *Id*.

19. References to problems in the community unrelated to the case at bar or community sentiment are extremely improper. In *State v. Bolt*, 108 Or App 746 (1991), the court ruled that allusion to unrelated notorious crimes was reversible error: "leading the jury's attention to the specific facts of other unrelated, particularly heinous crimes, as the prosecutor did here, creates the very strong likelihood that the jury's disgust and fear about those unrelated crimes will improperly influence its decision about the facts of the case then under consideration." *Id.*, at 750-751.

F. Commenting--Expressly or Impliedly--on the Defendant's Failure to Testify or to Present Evidence

20. The defendant has a Fifth Amendment right to remain silent. It is improper for the prosecution to use the exercise of that right against the defendant in any way. *Griffin v. California*, 380 US 609, 85 S.Ct. 1229,14 L.Ed. 2d 106 (1965). Comments by the prosecutor implicating the defendant's right in violation of state law and the Fifth and Fourteenth amendments to the U.S. Constitution are prohibited. The Fifth Amendment applies to the sentencing phase of capital trials. *Estelle v. Smith*, 451 US 454, 101 SCt. 1866 (1981). Thus, commenting on the defendant's failure to express remorse or sorrow is an unconstitutional comment on failure to testify. See, e.g., *Owens v. State,* 656 SW2d 458 (Tex. 1983). Comments on the defendant's failure to accept responsibility for these crimes or to ever "come clean" with the police are likewise improper when the defendant did not testify, and the State elected to not offer some of defendant's statements to police.

21. Indeed, Oregon has codified this rule with a section in the Oregon Constitution. Article I, Section 12, does not permit the State to draw the jury's attention to a defendant's exercise of his right to remain silent. *State v. White,* 303 Or 333 (1987). This rule prohibits

comments to the effect that the State's case is unrefuted when the defendant is the only witness in a position to provide rebuttal. See, *Griffin v. California*, 380 US 609 (1965).

22. Where a prosecutor comments, even inadvertently to a defendant's failure to take the stand or present defense witnesses, Oregon courts have overwhelmingly ruled the references as prejudicial. See *State v. Wederski ,* 230 Or. 57 (1962); *State v. Mullenberg* 112 Or. App. 518 (1992). Any comment by the prosecution inviting an adverse inference regarding the failure of the defendant to call a witness or witnesses equally available to both parties is erroneous, particularly if the issue has not been addressed to the court in advance of such argument. *Forsberg v. United States*, 351 F2d 242, 249 (9th Cir. 1965).

23. Related arguments include those which disparage some, or all, of the accused constitutional rights. E.g., *Thompson v. Aiken*, 315 SE2d 110 (S.C. 1984)(insinuation that "not guilty" plea shows lack of remorse improper); see *State v. Grenawalt ,* 86 Or App 96 (1987)(advising jury that co-defendant had already been found guilty suggests that defendant should be found guilty, as well). One way to denigrate constitutional rights is to comment about how the victims in the case did not enjoy the same rights as the defendant when the decision was made to kill the victim. Arguments comparing the defendant's constitutional rights which were protected, to the "victims' rights" which were violated, should be prohibited.

G. Arguing Religion To the Jury

24. The jury may not rely on the Bible or religion as a basis for imposing the death penalty. *Jones v. Kemp*, 706 F.Supp. 1534, 1559 (N.D. Ga. 1989)(collecting cases)(death sentence set aside where capital sentencing jury allowed to consider Bible; error for jury to rely on an extra-judicial [biblical] code of conduct); *accord, Cunningham v. Zant*, 928 F2d 1006, 1020 (11th Cir. 1991)("the prosecutor made numerous appeals to religious symbols and beliefs . . . . By these comments the prosecutor improperly appealed to the jury's passions and prejudices.").

The defense, however, may argue that mercy is appropriate, and that the Judeo-Christian ethics underlying this Nation fully support the notion of mercy. *Caldwell v. Mississippi,* 105 SCt 2633, 2640 & 2644 (1985)(recognizing defense counsel's argument as a "mercy plea" which may discuss "Christian, Judean or Buddhist philosophies, quote Shakespeare or refer to the heartache suffered by the accused's mother").

25. Whether based on religion or not, it is improper for the prosecutor to urge that the jury should do to the accused what he did to the victims--the principle of lex talionis.

H. Misstating the Law as to Sentencing

26. It is improper for the prosecution to mislead the jury as to its function in sentencing, since the law is in such delicate balance. As the sentencer, the jury may show mercy towards the defendant, and spare his life; arguments that mercy is not an appropriate consideration in deciding punishment misstate the law. *Wilson v. Kemp*, 777 F2d 621, 625 (11th Cir. 1985); *Presnell v. Zant*, 959 F2d 1524 (11th Cir. 1992)(error to condemn mercy). Similarly, sympathy for the defendant, if based on the evidence, is also a proper consideration in deciding punishment, although the court need not give a special instruction to this effect. *State v. Moore*, 324 Or 396, 427-28 (1996).

27. Additionally, the prosecutor should be prohibited from telling the jury that particular evidence offered by the defense "is not mitigating," or otherwise mischaracterizing the concept of mitigation as something that must "excuse" a crime, or relate explicitly to the time that the crime occurred. Under Oregon law, each juror is empowered to determine what evidence is mitigating. See, *State v. Wagner,* 309 Or 5, 19 (1990)("jury must be able to consider *any* aspect of the defendant's character and record or *any* circumstances of his offense as an *independently* mitigating factor")(emphasis original); UCrJI No. 1314.

Thus, the prosecutor's opinion about what is mitigating is irrelevant and invades the province of the jury. *Cf., State v. Tucker*, 315 Or 321, 333 (1993)(court should not instruct jury that

various factual circumstances proven by the defense constitute mitigating circumstances). Consequently, the prosecutor should not be allowed to argue along the lines that a defendant's "bad childhood" or "rough life" should not be considered by the jury because lots of people have bad childhoods and rough lives and don't become murderers.

Similarly, the prosecution should be prohibited from suggesting that the mitigating circumstances mentioned in the statute and jury instructions constitute some sort of checklist to be applied to the case at bar, and/or that failure to establish any of those specific circumstances supports a determination that death is the appropriate penalty. See, *People v. Davenport*, 719 P2d 861 (Cal. 1985)(error to argue "absence of mitigation is aggravation").

28. It is not proper for the prosecution to argue that defendant's convictions on all counts of the indictment eliminates all questions concerning the degree of defendant's culpability for the crimes from the case, particularly when the prosecution argued an "aid and abet" theory. This is a misstatement of the law, for the United States Supreme Court has made clear that the jury must consider, "as a mitigating circumstance, any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 98 SCt 2954 (1978)(jury must be allowed to consider and give effect to defendant's role in a multi-defendant homicide, when proffered as mitigation).

29. The prosecution may not tell jurors to impose a death sentence if they find aggravating circumstances outweigh or out-number mitigating circumstances. That Oregon law fails to provide such a specific procedure or formula for jurors to use in considering mitigating evidence does not invite *ad hoc* arguments by the prosecution suggesting various methods the jurors may utilize to reach a decision. See, *State v. Dyer*, 16 Or App 247 (1974)(If the prosecutor states the law incorrectly, possibly confusing the jury, the court must either instruct the jury so as to remove the confusion or grant a mistrial).

30. Any argument that misleads the jury with regard to the law and its role is improper and may deny the defendant a fair trial. For example, in *Caldwell v. Mississippi,* 472 U.S. 320,

105 S. Ct 2633, 86 L. Ed 2d 231 (1985), the Court found that any argument referring to the right of appeal for the defendant, which misleads the jury into thinking that its decision was reviewable on the merits, was impermissible because it was inaccurate and misleading in its description of the role of the Mississippi Supreme Court in reviewing the death sentence. The same is true in Oregon. See also, *ABA Standard for Criminal Justice ,* Section 3.90 (2d ed. 1980)("References to the likelihood that other authorities will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision.").

31. Thus, "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, supra*, 105 SCt at ___, 86 LEd2d at 239. Accordingly, the prosecutor may not tell the jury that its job is simply to answer the statutory questions, and that it is the Court which will impose the sentence; nor may the prosecutor comment about the Governor's pardon power. It is essential that jurors recognize "the truly awesome responsibility of decreeing death for a fellow human [so that they] will act with due regard for the consequences of their decision." *McGautha v. California*, 402 US 183, 208 (1971).

32. The prosecution may not denigrate the seriousness of a true life sentence, by suggesting the possibility of a pardon or future changes in the law which might affect release. *State v. Smith,* 310 Or 1, 24-25 & n.11-12 (1990).

33. The prosecution should be prohibited from suggesting that a true life sentence is not serious punishment, or that defendant will have "beaten the system" if a life sentence is imposed. This includes the false and improper "Life of Riley" speech that tells the jury that life in the penitentiary is great, e.g., no work, three meals a day, cable TV, exercise equipment, a free college education, "freeload for the rest of his life," etc.

34. The prosecution should also be prohibited from arguing the costs of incarceration, misspent tax dollars, future escapes, more killings by the defendant if given life imprisonment, as these matters are not in evidence, are speculation, and are calculated to appeal to prejudice.

I. Inflaming the Passions and Prejudices of the Jury

35. Appeals to passion and prejudice and other inflammatory appeals to the jury are also impermissible. See, e.g., *Moore, supra,* 324 Or at 428 (emotionalism has no place in a capital sentencing decision); *State v. Wilson*, 221 Or 602 (1960); *Brooks v. Francis*, 716 F2d 780, 788 (11th Cir. 1983), *reh'g granted and vacated*, 728 F2d 1358 (11th Cir. 1984)("A prosecutor may not incite the passions of a jury when a person's life hangs in the balance"); *Wallace v. Kemp*, 757 F2d 1102 (11th Cir. 1985)("the fears and passions of a jury cannot be excited by speculation as to what might happen if the death penalty is withheld").

36. Any reference to the sexual preference or sexual proclivities of a defendant when neither is an issue in the case constitutes error. *Beam v. Paskett,* 966 F2d 1563, 1572-73 (9th Cir. 1992)(long history of deviant sexual behavior, not indicative of propensity for violence, cannot be considered by sentencing jury); *cf.*, *State v. Moore*, 324 Or 396 at 415-16 (1996)(evidence of defendant's violent sexual conduct with teenaged girls relevant to issue of future dangerousness, indicating defendant may act violently towards women in the future).

37. Prejudice arises in prosecutorial argument that the defendant constitutes a threat to the prison population or guards, *Hance v. Zant, supra*, and is contrary to the presumption that official duty will be followed, ORS 41.135, and the official duty to keep inmates safely, ORS 421.105.

36. One particular example of an argument designed to inflame the jury is the violation of the "golden rule," where prosecutors ask the jurors to place themselves or others in the position of the victim and imagine the victim's fear, terror and suffering at the time of death.

37. The prosecution is prohibited from arguing that the victims' families deserve a particular sentence by this jury. See, *Brandley v. State*, 691 SW2d 699 (Tex.Cr.App. 1985)("Put yourself in shoes of victim's parents . . ." error).

This motion is made in good faith, is well-founded in law, and not made for the purpose of delay.

MOVED this _____ day of May, 1998.

TERRI WOOD OSB 88332
Attorney for Defendant

CERTIFICATE OF SERVICE

I CERTIFY that on May __, 1998, I served a true, exact and full copy of the within MOTION on the Lane County District Attorney, attorney of record for the plaintiff, by leaving a copy at his/her office at the Lane County Courthouse with his/her clerk or person apparently in charge thereof, or, if there was no one in charge, by leaving it in a conspicuous place therein.

Dated: May __, 1998.

TERRI WOOD, OSB 88332