TOP TEN MISTAKES in COMPLEX HOMICIDE and CAPITAL CASES (Bulletproofing Your Case)

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Top Reasons For Reversals:

- ❑#1: Ineffective Assistance of [Defense] Counsel*
- ❑#2: *Brady* Violation
- ❑#3: *Batson* Violation
- ❑#4. Excluding Mitigation
- ❑#5: Prosecutorial Misconduct
- ❑#6: Instructional Error

Top Ten Mistakes in Handling Homicide Cases:

- #1: Ineffective Assistance of [Defense] Counsel*
- #1a: Failure of DA to Make a Record of Defense Counsel's Adequacy: Efforts/Tactics
- #2: ***Brady*** Violation by Prosecutor
- #2a: Failure to Make a Complete Record of Discovery (to defend *Brady* claim)
- #3: ***Batson*** Violation (or ***Witt*** violation)
- #3a: Failing to Excuse a Bad Juror
- #4: Excluding Mitigation (Guilt or Penalty)
- #5: Prosecutorial Misconduct
- #6: Instructional Error
- #7: Failure to Prevent Juror Misconduct

Opportunities For Error

Investigation
Charging
Pretrial
Jury Selection
Guilt Phase
Guilt Argument
Penalty Phase
Penalty Argument
Jury Instructions
Post-Conviction
Ineffective Assistance of Counsel

Your Worst Nightmare

- "Because we find that **prosecutorial misconduct** during the closing arguments affected the jury's fair consideration of the evidence in the record, **we REVERSE and remand for a new trial**."

United States of America v. Weatherspoon
410 F.3d 1142 (2005)
United States Court of Appeals, Ninth Circuit

Your Worst Nightmare

- We conclude that **prosecutorial misconduct** was clearly involved, both because (1) the prosecutor **vouched** for the credibility of the witnesses and (2) because **he also made arguments designed to encourage the jury to convict in order to alleviate social problems …** (we **REVERSE** and remand for a new trial)"
- ***United States of America v. Weatherspoon***
  410 F.3d 1142, 1146 (2005)
  United States Court of Appeals, Ninth Circuit

Your <u>OTHER</u> Worst Nightmare

- "**DISPOSITION**: The judgment is **REVERSED *and***
  - **<u>The clerk of the court is directed to forward a copy of this opinion to the California State Bar for review and further proceedings, if appropriate.</u>**"

Opportunities For Error

- Investigation
- Charging
- Pretrial
- Jury Selection
- Guilt Phase
- Guilt Argument
- Penalty Phase
- Penalty Argument
- Jury Instructions
- Post-Conviction
- Ineffective Assistance of Counsel

Investigation

- Accused of Rush to Judgment
- Not pursuing realistic leads/other suspects
- Making deals with accomplices
- Using Informants
- Not investigating alibis
- Not investigating affirmative defenses
- Not investigating toxicology of victim and suspect
- Not investigating criminal history of victim
- Ignoring mitigating evidence
- Not collecting physical evidence
- Not preserving all evidence
- Bad Tactics in Taking Statements

Opportunities For Error

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- Ineffective Assistance of Counsel

Charging

- A separate presentation
- Seeking the Death Penalty should be reserved only for the “Worst of the Worst”
- In using your prosecutorial discretion, consider running the case by someone with homicide/capital experience to get feedback on charges or seeking death
- Charge all theories/specials that are applicable and provable – leave options open for trial attorney
  - Caveat: Lying in Wait as the *only* special
  - (*AMBUSH!*)
  - Feel free to run the charges/theories by someone else before charging

Opportunities For Error

- Investigation
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- Pretrial
- Jury Selection
- Guilt Phase
- Guilt Argument
- Penalty Phase
- Penalty Argument
- Jury Instructions
- Post-Conviction
- Ineffective Assistance of Counsel

Pretrial

- ***Faretta***: Death penalty **REVERSED**, case remanded because of insufficient record to show whether defendant was properly advised and waived his rights when the trial court granted defendant's Faretta motion.

- A defendant seeking to represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and that his choice is made with his eyes open."
  People v. Beccera (2016) 2016 WL 3471102
  People v. Burgener (2009) 46 C.4th 231
  Faretta v. California (1975) 422 U.S. 806
  Burton v. Davis (9th Cir. March 10, 2016) 816 F.3d 1132 – 3 days before trial/**not** ready – REVERSED!!! (33 years later, DP case)

Pretrial

- ***Faretta***: Death penalty **REVERSED**, case remanded because of insufficient record to show whether defendant was properly advised and waived his rights when the trial court granted defendant's Faretta motion.

- *A Faretta motion made **before** the jury is empaneled **must** be granted **unless** it is shown that the motion was made for the purpose for securing delay.*

Burton v. Davis (9th Cir. 2016) 816 F.3d 1132

Issue: was the defendant's reason for wanting to represent himself made for the purpose of delaying the trial or dissatisfaction with the attorney's trial strategy? Must make a record!

Pretrial

- ***Faretta***: Multiple Murder Special Circumstance, Death Penalty and the CONVICTION in its entirety **REVERSED**,
  HELD: The court's reason for terminating self-**representation – that the defendant had been "dilatory" and "stalling" was NOT supported by the record.** ***People v. Beccera*** **(2016) 63 Cal.4th 511**
  California Supreme Court (Los Angeles County):
  DA met with D. on the record and discussed **73 ADDITIONAL** discovery requests…

Later, but before prelim., D. said a lot of items were missing. Met again with his requested investigator.

4 months and 6 continuances and still no prelim. set.

Court terminated without warning

Issue: "Everything you have done is dilatory… all you are doing is stalling!" - REVERSED!!!
Defendant made a record!!!!
(INCOMPLETE DISCOVERY! p.9)

Court did NOT. DA AND COURT must make a record!

Pretrial

- ***Faretta***: Multiple murder Special Circumstance, Death Penalty **and the CONVICTION** in its entirety, **REVERSED**, (reversible PER SE)
  HELD: The court's reason for terminating self-representation – that the defendant had been "stalling" was **NOT** supported by the record.

People v. Beccera (6/27/2016) 63 Cal.4th 511
In determining whether termination is necessary and appropriate…the court should consider

1) Availability and suitability of alternative sanctions
2) Whether D. has been **warned** that particular misconduct will result in termination of *Faretta*
3) Whether D. has intentionally sought to disrupt and delay his trial

The Record should include the precise misconduct on which the court based its decision to terminate and how the misconduct threatened to impair the core integrity of the trial

Opportunities For Error

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BRADY obligations

- **RULES TO LIVE BY:**
- **[old] BRADY:**
  Anything exonerating
  (Anything that helps the defendant prove his innocence) - material to guilt or to punishment
  ***Brady v. Maryland* 373 U.S. 83 (1963)**
- **[middle-age] BRADY: Anything that helps the defendant prove his innocence OR helps him prove an affirmative defense**
  ***Cone v. Bell* 129 S. Ct. 1769 (2009) - defense of acute drug psychosis caused by drug addiction**

BRADY obligations

- **RULES TO LIVE BY:**
- **[old] BRADY: Anything exonerating (Anything that helps the defendant prove his innocence)**
- **[new-age] BRADY: Anything that helps the defendant OR HURTS THE PROSECUTION: impeaches the prosecution witnesses or questions the prosecution evidence**
- **ANYTHING HELPFUL TO Defendant!**

BRADY obligations

- **RULES TO LIVE BY:**

Current BRADY: Anything that helps the defendant OR HURTS THE PROSECUTION: impeaches the prosecution witnesses or questions the prosecution evidence

- **ANYTHING HELPFUL TO Defendant!**
- **Marilyn Mosby in Freddie Gray case in Baltimore:**
  1. provided a SCRIPT to Detective to read to the Grand Jury that was inconsistent with the evidence & withheld her notes! Prosecutor refused to take the notes from Detective!
- **2. failed to reveal Gray had previous back injury a month earlier**
- **3. failed to turn over 2nd interview of percipient witness in the van who said Gray self-inflicted injuries – a criminal defense attorney disclosed the exculpatory interview!!!**
- **4. failed to disclose coroner's first finding: "a freakish accident!"**

Prosecutors Are Held to A Higher Standard of Conduct

- **"As the United States Supreme Court has explained, the prosecutor represents '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."**

People v. Hill **(1998) 17 C.4th 800 at 820**

Justice Sutherland in Berger v. United States (1935) 295 U.S. 78

BRADY obligations

- **RULES TO LIVE BY:**
- **INFORMANTS:**
  - **Any co-defendant charged with the crime**
  - **An accomplice who could have been charged with the crime**
  - **A jail-house informant who was at one time a cell-mate of defendant**

BRADY obligations

- **RULES TO LIVE BY:**
  - **INFORMANTS:**
    - They are not your friend
    - Treat them as though you are speaking with the actual killer
    - Tape-Record everything
    - Have all agreements in writing
    - Do not try to exclude any dirt on them
      - Paid informants
    - Be sure to research (and turn over) every case they have worked on *anywhere*
      [P. v. Dekraai (2016) 5 Cal.App.5th 1110 – Orange County DA office recused – 8 murders in Seal Beach]

BRADY obligations

- Proof that you DID meet your Brady obligations:
- Discovery
- Control Packet
- Bates-Stamped all copies
- Signed Receipts
- Last minute Discovery – put on the Record
- Keep Control Packet Pristine
- Post-conviction Discovery Motions

Pretrial: *Brady*

- Brady issues: Death penalty **REVERSED**, case remanded because prosecutor failed to turn over…
  - Evidence favorable to an insanity defense
  - Evidence of an anonymous video confession of a third party
  - Evidence of informant's extensive criminal history on **other** cases
  - Evidence of another person claiming to be the actual shooter
  - Evidence of defendant's intoxication or drug use at time of crime…

Preventing IAC – Do The Defense Attorney's Job For Him

- **ACB's Rules to Live By in EVERY 187:**
- **Get to know the entire life of the defendant, better than he/she knows it himself**
- **In looking for factors in aggravation, you will *necessarily*, uncover most mitigation (unless privileged)**
- **Turn over all mitigation**
- **Turn over all rebuttal to mitigation**

Preventing IAC – Do The Defense Attorney's Job For Him

- **ACB's Rules to Live By:**
- **Get to know the entire life of the defendant, better than he knows it himself**
- **Defendant's Family in *EVERY* 187:**
  - **Interview as soon as possible**
  - **Tape-record**
  - **Don't be afraid to ask about mitigation in the interview - you want the truth - you need to be able to prepare for it in advance - you need to find potential rebuttal evidence *(Mrs. Coleman – non-DP case)***

Preventing IAC – Do The Defense Attorney's Job For Him/Her

- ACB's Rules to Live By:
- Get to know the entire life of the defendant, better than he knows it himself
- Defendant's School Records:
  - Grades
  - Discipline
  - Learning Disabilities
- Defendant's Employment and Military Records:
  - All the good and bad
  - If the defense doesn't put in mitigation, consider putting it in yourself ***
  - Offer to stipulate to the introduction of mitigation

Preventing Ineffective Assistance of Counsel – Defense Experts

- Professionals who visit any defendants must **sign in and out** (**professional logs**)
- Don't wait for the defense to give you discovery of their experts or it will be too late
- Obtain certified copies of visitation logs
- "Google" the experts
- Call other jurisdictions about the expert
- Check expert libraries for transcripts
- Obtain published articles by experts
- Get copies of old CV's or resumes of experts

Preventing Ineffective Assistance of Counsel – Defense Experts

- Write Defense Expert a letter:
  - asking for a copy of their report
  - asking for a list of cases in which they have testified and in which they are retained
  - asking for test results, including raw data
  - asking for a list of what information they were provided
  - offer further information to assist them as a basis for their opinion

- *CAVEAT*: You must know what the law allows

If Prosecutor TOO Effective = Ineffective Assistance of Counsel

- **DEFENSE MENTAL HEALTH EXPERTS**:
  - *Hovey v. Ayers* (2006) a 1982 death penalty reversed for failure of defense counsel to adequately prepare defense psychiatrist for cross - 458 F.3d 892
  - "The prosecutor ably undermined Dr. Satten's opinion by pressing on the absence of the very sort of evidence that Hovey's counsel should have provided Dr. Satten."

Preventing Ineffective Assistance of Counsel – Defense Experts

- **MENTAL HEALTH EXPERTS**:
  Hovey v. Ayers (2006) a 1982 death penalty reversed for failure of defense counsel to adequately prepare defense psychiatrist for cross-examination
- Send the Defense Expert a Package of Materials:
  - Ask them to review
  - Offer further information as a basis for their informed opinion

Preventing Ineffective Assistance of Counsel – Defense Experts

- **Motion to Augment the Record - after trial - *at sentencing***
  - Gather all proof of defense efforts to investigate or present mitigation
  - Copies of Professional Logs that show Mental Health Professionals visited for hours
  - Attach Logs to Motion to Augment the Record

Motion to Augment the Record

- " The attached documentation demonstrates that attorneys for defendant thoroughly and adequately investigated and prepared the capital trial on behalf of their client, including any possible mitigation or presentation of a mental defense in either guilt or penalty phase:
- **Exhibit #1: Inmate visitor log showing defendant was visited by Dr. Nell Riley, neuropsychologist on 2/24/05 and 3/10/05**
- **Exhibit #2: Inmate visitor log showing defendant was visited by Prison Expert and Mitigation Specialist Daniel Vasquez on July 14, 2006.**
- **Exhibit #3: Jail Call: Defendant telling mom not to come."**

Preventing Ineffective Assistance of Counsel

- Constantly augment the trial record with defense strategies for failing to put on potential mitigation or affirmative defenses
  - Failing to call mom, kids, family
  - Instructions from defendant
  - DA had rebuttal evidence that would have been more prejudicial

Preventing Ineffective Assistance of Counsel

- **<u>ACB's Rules to Live By</u>:**
- **You are all excellent lawyers and we are held to a very high ethical standard, so**
- If you ever find yourself saying: "If I was the defense attorney, I would have done…
- Consider doing it yourself …
- Always have defense affirm tactical reasons for a given action

Opportunities For Error

- Investigation
- Charging
- Pretrial
- Jury Selection
- Guilt Phase
- Guilt Argument
- Penalty Phase
- Penalty Argument
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- Ineffective Assistance of Counsel

Safety Net - Bias Question 1

- Magic Question to ask of **EVERY JUROR**:
  "Have you ever been in a courtroom for any reason?"

This question uncovers the juror who:

- attended her boyfriend's murder trial,
- attended his father's molestation trial,
- testified as a character witness for defense
- was prosecuted for welfare fraud years ago
- was wrongfully arrested/arraigned for murder

Safety Net - Bias Question 2

- Magic Question to ask of **EVERY JUROR**:
  "Please describe *any contact* you have had with police?"

- **This question uncovers the juror who:**
  - was misidentified for a crime and later released,
  - was stopped and questioned at an anti-war protest,
  - had a juvenile child brought home by the police
  - was harassed by the police
  - who fought a traffic ticket
  - went with her boyfriend to register as sex-offender

Inquiry About Race

- A *capital* defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of ***racial bias***.
  Mu'min v. Virginia (1991) 500 U.S. 415, 425;
  Turner v. Murray (1986) 476 U.S. 28, 36-37

Top Ten Mistakes in Handling Capital Cases:

- #1: Ineffective Assistance of [Defense] Counsel*
- #1a: Failure to Make a Record of Defense Counsel's Adequacy: Efforts/Tactics
- #2: ***Brady*** Violation by Prosecutor
- #2a: Failure to Make a Complete Record of Discovery
- #3: ***Batson*** Violation
- #3a: Failing to Excuse a Bad Juror
- #4. Excluding Mitigation
- #5: Prosecutorial Misconduct
- #6: Instructional Error
- #7: Preventing Juror Misconduct

Preventing Juror Misconduct

- During jury selection *(only)* it is your duty both in oral *voir dire* and in the questionnaire to admonish the jury about what they are **NOT** allowed to do….
  - Do not investigate anything on the internet
  - Do not visit the crime scene
  - Do not talk about tv crime shows or the bible
  - Do not read articles about the case
  - The defendant doesn't have to prove anything… he doesn't have to call witnesses, he doesn't have to testify, he doesn't have to produce any evidence… will you follow that law? (voir dire only)
    Do you promise not to hold it against him if he doesn't prove his innocence? I am the only one who has a burden of proof, I am the only one who has to produce witnesses and evidence, will you follow that law?

Improper Cause Challenge

- Just ***one*** improper removal of a juror using a challenge for cause, will result in the ***AUTOMATIC*** reversal of the death penalty (even if the error did NOT result in the seating of an unqualified juror).
- ***Wainwright v. Witt*** (1985) 469 U.S. 412,424
- ***Gray v. Mississippi*** (1987) 481 U.S. 648; ***Uttecht v. Brown*** (2007) 551 U.S. 1, 6
- "…a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause, but if the juror is **not** substantially impaired, removal for cause is ***IMPERMISSIBLE***."

Improper Cause Challenge

- Just ***one*** improper removal of a juror using a challenge for cause, will result in the ***AUTOMATIC*** reversal of the death penalty.
- ***Wainwright v. Witt*** (1985) 469 U.S. 412,424
  Lockhart v. McCree (1986) 476 U.S. 162, 176
- ***Gray v. Mississippi*** (1987) 481 U.S. 648;
  Uttecht v. Brown (2007) 551 U.S. 1, 6
- *People v. Woodruff* (2018) Cal. Supreme #S115378 J. Chin ***
- The defense cannot be categorically denied the opportunity to inform the jurors of case-specific factors that could invariably cause them to vote for death. (old rule: only if in the charging document!)
- "I don't believe in the DP"
- "I think we shouldn't have the DP"
- "I would automatically vote LWOP"
- **But** all 3 said they **would** ***set aside*** their feelings if instructed they must consider and weigh the evidence – use peremptory instead!

Improper *Cause* Challenge

- Just ***ONE*** improper removal of a juror using a challenge for cause, will result in the ***AUTOMATIC*** reversal of the death penalty. D. entitled to an impartial jury that has not been tilted in favor of DEATH by DA challenges for CAUSE
- DEATH VERDICT will NOT stand if jurors were excluded **simply because they voiced general objections, religious or conscientious objections to DEATH**
- ***Wainwright v. Witt*** (1985) 469 U.S. 412,424
  Lockhart v. McCree (1986) 476 U.S.162, 176 (*DP unjust, can still serve!)*
- ***Gray v. Mississippi*** (1987) 481 U.S. 648,
  Uttecht v. Brown (2007) 551 U.S. 1, 6
  P v. Zaragosa (7/11/16) CA Supreme Court #S097886
  DEATH PENALTY REVERSED FOR ***WITT*** ERROR
  In questionnaire, juror revealed religious objections to DP.
  "I don't have the right to make judgement for another being to die." But later said she would follow the law.

Proper Excuse of Jurors

- Peremptory challenges are a historic right, provided "to insure that criminal trials are conducted before **jurors** who not only proclaim their impartiality, but **whose ability to be evenhanded is not seriously questioned by the parties**."
- Peremptory challenges excusing jurors **MUST** be for **genuine**, reasonably specific, **race- or group-neutral** explanation related to the particular case being tried
  Hernandez v. New York (1991) 500 U.S. 352
- Reasons **need not** amount to a challenge for cause

Proper Excuse of Jurors

- **<u>Making a Complete Record</u>**:
- Court makes a finding of **genuine, (credible)** group-neutral reasons -
  a finding on the prosecutor's credibility
  Ct. evaluates the totality of the relevant facts
- Trial court's first hand observations are of great importance! (re both the DA and the juror.)
  Batson v. Kentucky 476 U.S. 79 (1986)
- *Powers v. Ohio* 499 U.S. 400 (1991)
  Hernandez v. New York 500 U.S. 352 (1991)
- *Kesser v. Cambra* 465 F.3d 351 (9th Cir. 2006)
- *Synder v. Louisiana* 128 S. Ct. 1203 (2008)
  GENUINE versus PRETEXT
  - **GENUINE =** Judge must say on the record
    "I believe the race-neutral reasons given by the prosecutor." (i.e. the prosecutor's reasons are sincere)
    ***Kesser*: "to be believable, a prosecutor's reasons must be related to the particular case to be tried"**
  - **Reasons have some basis in accepted trial strategy**

Opportunities For Error

- Investigation
- Charging
- Pretrial
- Jury Selection
- Guilt Phase
- Guilt Argument
- Penalty Phase
- Penalty Argument
- Jury Instructions
- Post-Conviction
- Ineffective Assistance of Counsel

Guilt Phase Error

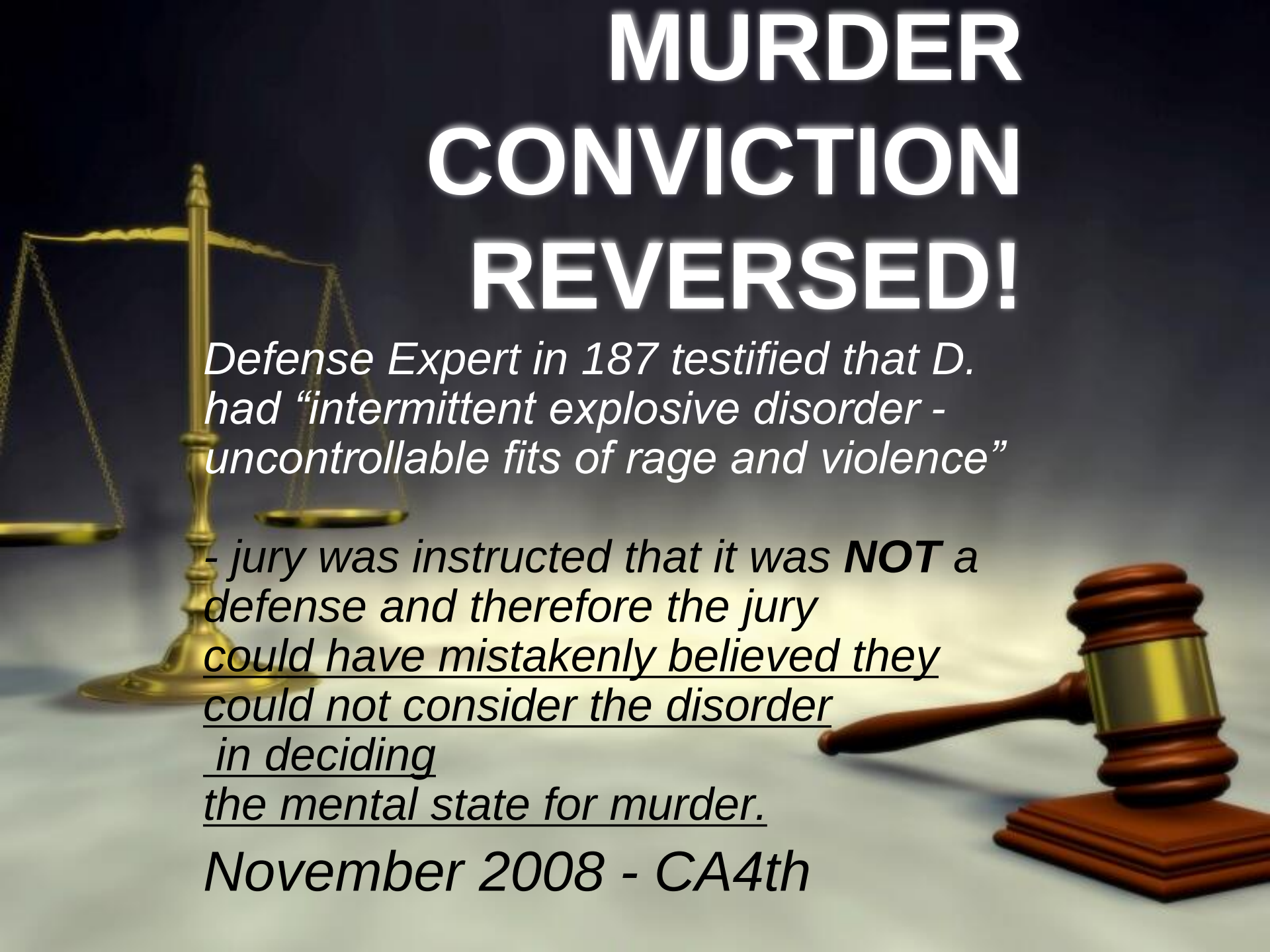
- Failing to allow defense to impeach prosecution witness that witness is on probation, has pending case or history
- Failing to allow cross of prosecution witness relevant to reliability of witness *Delaware v. Van Arsdall* 475 U.S. 673 (1986)
- Failing to allow defense to put on evidence of intoxication or drug use to defeat defendant's mental state
- Failing to allow evidence of mental illness or defect to defeat intent (+ PTSD *Herrera*)

MURDER CONVICTION REVERSED!

Defense Expert in 187 testified that D. had "intermittent explosive disorder - uncontrollable fits of rage and violence"

*- jury was instructed that it was **NOT** a defense and therefore the jury could have mistakenly believed they could not consider the disorder in deciding the mental state for murder.*

November 2008 - CA4th



Error in Theories of Liability - *BEWARE:*

Kill Zone Theory:

People v. Canizales (2019)

7 Cal.5th 591 C.J.Cantil-Sakauke

CDAA Webinar-on-Demand Library

by Supervising DDA Britt Imes - 3/11/20

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Guilt Argument

- Do not tell them to ignore evidence that might question the defendant's specific intent or mental state
- Do not tell them they cannot use evidence of a defendant's mental disorder in considering whether he had the mental state for murder

CLAIMS OF ALLEGED PROSECUTORIAL MISCONDUCT

- Impermissible Vouching may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity OR suggests that information NOT presented to the jury supports the witness's testimony.
  People v. Fierro (1991) 1 Cal.4th 173, 211
- Similarly, evidence of a prosecutor's SUBJECTIVE MOTIVATIONS when prosecuting a case IS NOT RELEVANT.
  People v. Bonilla (2007) 41 Cal. 4th 313, 336
- RULE: You can ONLY argue a witness's credibility based on the evidence and any deal or bias or threats…NO DA OPINIONS!

CLAIMS OF ALLEGED PROSECUTORIAL MISCONDUCT

- Evidence of **a prosecutor's *SUBJECTIVE MOTIVATIONS*** when prosecuting a case IS **NOT** RELEVANT.
  People v. Bonilla (2007) 41 Cal. 4th 313, 336
- **THEREFORE DO *NOT* SAY:**
- I know…
- I believe…
- I think…
- The government knows…
- I'm held to a higher standard
- They only have to vigorously represent their client, they don't have to be ethical

CLAIMS OF ALLEGED PROSECUTORIAL MISCONDUCT

- **THE GOLDEN RULE**: you cannot invite the jury to put themselves in the victim's shoes (except in PENALTY PHASE!)
- DO **NOT** SAY "IMAGINE" in the guilt phase
- Even though we represent the PEOPLE, we **CANNOT** call the victim "OUR CLIENT"
- If the defense puts forth inconsistent defenses and hopes the jury will buy one of the defenses, we **CANNOT** say the defense counsel "**knows**" the defendant is guilty and therefore **put forth a SHAM defense**, **knowing** one of the defenses was false!
- Cannot say "**the defense KNOWS**…"

Improper Guilt Argument: re Presumption of Innocence

- **Improper** Guilt Argument by prosecutor claiming the presumption of Innocence had ended at a certain point of proof:

- *"This idea of this presumption of innocence is over.* Mr. Ford had a fair trial. We were here for three weeks where ... he gets to cross-examine witnesses; also an opportunity to present information through his lawyer. He had a fair trial. This system is not perfect, but he had a fair opportunity and a fair trial. *He's not presumed innocent anymore."*
- *Ford v. Peery* (June 8, 2021) 976 F. 3d 1032 (9th Circuit)

Improper Guilt Argument: *Darden* error

- **Improper** Guilt Argument by prosecutor claiming the presumption of Innocence had ended at a certain point of proof: *was "over"*
- The prosecutor **misstated** clear and long-standing federal law as articulated in a number of Supreme Court decisions.
- *Darden* error: improper prosecutorial statements violate due process if they "so infect the trial with unfairness as to make the resulting conviction a denial of due process."
- *Darden* does NOT require an improper motive by prosecutor, **only** an improper statement by DA.

- *Ford v. Peery* (June 8, 2021) 976 F. 3d 1032 (9th Circuit)
  Darden v. Wainwright, 477 U.S. 168, 181 (1986)

Improper Guilt Argument: *Darden* error

- **Improper** Guilt Argument by prosecutor claiming the presumption of Innocence had ended at a certain point of proof: *was "over"*
  - "A jury must evaluate the evidence based on the presumption that the defendant is innocent. If the jury concludes beyond a reasonable doubt that the defendant is guilty, then --- and ONLY then --- does the presumption disappear."
  - Criminal defendants lose the presumption of innocence ONLY once they have been convicted. *Herrera v. Collins 506 U.S. 390, 399 (1993)*

- *Ford v. Peery* (June 8, 2021) 976 F. 3d 1032 (9th Circuit)

  Darden v. Wainwright, 477 U.S. 168, 181 (1986)

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- **Penalty Phase**
- Penalty Argument
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PENALTY PHASE

- Caution: Excluding mitigation
- The defendant has a right to offer any evidence relevant to the jury's determination of a sentence less than death.
  (ok to exclude the manner of execution –that's IT!)

- *If DA offers FUTURE DANGEROUSNESS, must allow in "A Day in the Life of an LWOP prisoner and security")*
- The evidence must be relevant to the defendant, his criminal record or the crime.
- Must have to do with ***this*** crime and ***this*** defendant.

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Prosecutorial Misconduct

- Prosecutorial Misconduct implies **the use of deception or reprehensible methods** to persuade court or jury

  People v. Samayoa (1997) 15 C.4th 795, 841

- "Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct, **even if** such action does **not** render the trial fundamentally unfair."

  People v. Gurule (2002) 28 C.4th 557, 657

Prosecutorial Misconduct

- State Test: Did the prosecutor's misconduct **render the defendant's trial fundamentally unfair** ***OR*** did the misconduct **involve the use of deceptive or reprehensible methods** to attempt to persuade either the court or the jury?

- Federal Test on Appeal: Is the prosecutor's conduct **so egregious that it infects the trial with such unfairness** as to make the resulting conviction of violation of due process?
- *People v. Samayoa* (1997) 15 C.4th 795, 841

Bad Faith Not Required

- Prior to 1979, a prosecutor's misconduct had to be intentional, in other words, in bad faith. The good faith intentions of a prosecutor would defeat a request for appellate relief.
- Since 1979, the standard is an objective standard. In fashioning this new rule, we explained that emphasis on intentionality is misplaced. Injury to defendant is nonetheless an injury, because it was committed inadvertently, rather than intentionally.
- **<u>Inadvertent</u> prosecutorial misconduct, rather than intentional, may still constitute reversible error in *ANY* criminal trial**!

Court's Look to. . .

- Whether the prosecutor's argument was **tied to the evidence**
- Whether the **DA's suggested inference found some basis in evidence** or was instead based on mere suspicion, imagination, speculation, surmise, conjecture, or guesswork.
- Whether the prosecutor's arguments **related to the factors upon which the penalty decision should be based**
- Whether or not the argument would invite **a verdict based on passion or prejudice**

People v. Coddington (2000) 23 C.4th 529, 635
People v. Morris (1988) 46 C.3d 1, 21

Prosecutorial Misconduct

- "**The most disturbing aspect of this case was outrageous and pervasive misconduct on the part of the state's representative at trial: the public prosecutor**…although we might find any individual instance of prosecutorial misconduct or other error harmless standing alone, we cannot ignore the combined prejudicial effect these many missteps had on the overall fairness of the trial. Finding the cumulative prejudice flowing from **the combination of prosecutorial misconduct** and other errors **rendered defendant's trial fundamentally unfair**, **we reverse the judgment in all respects**."

People v. Hill (1998) 17 C.4th 800 at 815

Prosecutorial Misconduct: Scope of Permissible Argument

- **". . . a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. It is also clear that counsel during summation may state matters not in evidence, but which are common experience, history or literature. A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness," and he may use appropriate epithets."**

People v. Hill (1998) 17 C.4th 800 at 819

Prosecutors Are Held to A Higher Standard of Conduct

- "As the United States Supreme Court has explained, the prosecutor represents '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**."
- *People v. Hill* (1998) 17 C.4th 800 at 820
  Berger v. United States (1935) 295 U.S. 78, 88
- We ALWAYS do the RIGHT thing for the RIGHT reason!

Calling Defense Attorney Names

- "A prosecutor commits misconduct if he or **she attacks the integrity of defense counsel, or casts aspersions on defense counsel**. *People v. Wash* (1993) 6 C.4th 215, 265
- "An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum, *it is never excusable*."

Intimidation of Witnesses

- Threatening a witness with perjury charges if his testimony did not comply with an earlier tape-recorded statement. ***
- Threatening a defense witness with a perjury prosecution **constitutes prosecutorial misconduct** that violates a defendant's constitutional rights.
- *People v. Hill* (1998) 17 C.4th 800, 835

Biblical References

- **NO!**
- **<u>The prosecutor's reference to Old Testament support for capital punishment was improper</u>** – such an argument tends to diminish the jury's sense of responsibility for its verdict and to imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions. *People v. Wrest* (1992) 3 C.4th 1088, 1107
- We cannot emphasize too strongly that **<u>to ask the jury to consider biblical teachings when deliberating is patent misconduct. DA cannot argue that capital punishment is sanctioned by God</u>**.

  People v. Sandoval (1992) 4 C.4th 155, 193-194
  People v. Wash (1993) 6 C.4th 215, 258-261
- *People v. Slaughter* (2002) 27 C.4th 1187, 1208

Biblical References

- **Biblical references in either guilt *or* penalty are IMPROPER!**
- Religious input has **no legitimate role** to play in **guilt** phase**.**
- Invoking God in **penalty** argument may diminish a juror's sense of responsibility for the decision or encourage jurors to base their penalty decision on a different or higher law than the penal code.
- **"A prosecutor who mentions the Bible in closing argument runs a grave risk that a reviewing court will find that the line has been crossed and will reverse the defendant's conviction."**

- *People v. Harrison* (2005) 35 C.4th 208, 243-250

Personal Beliefs

- **A prosecutor may not interject personal beliefs in the merits of the case**
- **A prosecutor may not rely in argument on her outside experience or personal beliefs based on facts not in evidence**
- A prosecutor may argue beliefs based on evidence produced at trial – "**I submit**" v. "I believe"; "**The evidence is clear**" v. "We know"; "**The evidence has shown**"

United States v. Weatherspoon (9th Cir. 2005) 410 F.3d 1142; *United States v. Younger* (9th Cir. 2005) 398 F.3d 1179, 1189-1192;*People v. Bain* (1971) 5 C.3d 839, 848; *People v. Thomas* (1992) 2 C.4th 489, 529

Commenting on the Credibility of A Witness

- A prosecutor **may** try to persuade the jury, **on the strength of the evidence**, that a witness is **unworthy** of belief.
- A prosecutor should avoid descriptions such as "coached testimony" unless there is evidence of coaching.
- Referring to defense mitigation testimony as "**lies**" is **proper**
- A prosecutor may argue **reasonable inferences** from the testimony and demeanor of witnesses and point out inconsistencies **based on the facts of the record**
- *People v. Dickey* (2005) 35 C.4th 884
- *People v. Farnam* (2002) 28 C.4th 107, 200
- *People v. Thomas* (1992) 2 C.4th 489,, 537

Death Penalty as a Deterrent

- An argument that the death penalty should be imposed on a particular person because of the deterrent effect it would have on others is **generally inappropriate** because it "addresses the minds of the jury to the deterrence of designated "potential killers" rather than the penalty to be adjudged to the defendants. . .The sought imposition of the death penalty thus rests upon the unproven and illegitimate assumption that it acts as a deterrent to
the described "potential killers"...

People v. Bittaker (1989) 48 C.3d 1046, 1105
People v. Wrest (1992) 3 C.4th 1088, 1106

Lack of Remorse

- Improper to invoke lack of remorse as **an aggravating factor**.
  People v. Ashmus (1991) 54 C.3d 932, 992

- **It is proper to argue remorse is lacking as a circumstance in mitigation**.
- Referring to a letter defendant wrote in prison to his sister, "And I would have to admit that if this letter were full of compassion and recognition for the wrong he had done there'd be some meaning here, something you'd really have to consider. . . No remorse for his crimes. They are not mentioned at all. There is no compassion for the victim's family. They are not mentioned at all."
- Proper comments observing that the letter provides **no evidence in mitigation**.
- *People v. Wash* (1993) 6 C.4th 215, 265

Lack of Remorse

- ". . . No matter what words may be used to try and convince us this defendant feels remorse and cares for others. . . Those are words. And words are easily spoken, but actions speak louder than any words.

  And **the sadism, premeditation and ritualistic repetition shown in these crimes are the classic trademark of the psychopath who feels no remorse and has no concern for anyone outside of himself**."

  It is proper to argue remorse is lacking as a circumstance in mitigation.

- *People v. Farnam* (2002) 28 C.4th 107, 198-199

Request for MERCY

- **Proper** to argue that the jury should show the defendant the same degree of mercy he showed his victim **(PENALTY ONLY!!!!)**

People v. Benevides (2005) 35 C.4th 69, 108-109

People v. Ochoa (1998) 19 C.4th 353, 464

Referring to Facts Not in Evidence

- This practice is ‘clearly . . . misconduct.’
- *People v. Pinholster* (1992) 1 C.4th 865, 948
- Crime has stopped = *“Since the defendant was arrested and locked up, it hasn’t happened over there again.”*

…

- I ***could*** have had an expert come in and analyze that but I don’t have to prove that. (in response to defense argument) Misconduct because it implies the expert would have testified favorably for the prosecution.

Defendant Might Get Out of Prison Unless Sentenced to Death

- NO! *Ramos* Error
- Cannot mention the possibility of a pardon or the possibility that the defendant could be released from prison if only sentenced to LWOP.
- Cannot ask the jury to speculate on any future event that might result in the defendant's release from prison because it tends to diminish the jury's sense of responsibility for it's verdict.
- *People v. Ramos* (1984) 37 C.3d 136
- *People v. Hill* (1992) 3 C.4th 959, 1007

Mischaracterizing the Evidence

- Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, **mischaracterizing the evidence is misconduct**.
- A prosecutor's vigorous presentation of facts favorable to his or her side "**does not excuse either deliberate or mistaken misstatements of fact**."
- *People v. Hill* (1998) 17 C.4th 800, 823, 837 "Everything defendant ever did one way or another, he got away with. He has killed. He has stabbed. He has robbed. He has gone to prison for it. He has not been rehabilitated…" (his only prior record was 245 with fists and a 487.)

Referring to Facts Not in Evidence

- **<u>Conditions of Life in Prison</u>** – implying that such a life was not a sufficient punishment for defendant
- Stating that jury would hear defense arguments that prosecutors always hear – implying that they are **stock** arguments and should be disregarded
- Talking about the possibility of rehabilitation – I suppose some people in state prison can be, but I have never seen it and I have been around a lot
- **These comments contributed to the overall unfairness of the trial** - *Hill* at 838

Misstating the Law

- It is improper for the prosecutor to misstate the law generally and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.
- It is misconduct to attempt to shift the burden to defense to show a reasonable doubt – "**There must be some evidence from which there is a reason for a doubt**" - ("*RD only until opening statement!*" NO!!!) misconduct insofar as her statements could reasonably be interpreted as suggesting to the jury she did **not** have the burden of proving every element of the crimes charged beyond a reasonable doubt.
- **To suggest there must be some affirmative evidence demonstrating a reasonable doubt - is misconduct by misstating the law** – the jury may simply **not** be persuaded by the prosecution's evidence
  Hill at 831 (*Beltran* case on Manslaughter)

Caldwell Error

- It is **IMPROPER** to undermine the jury's sense of responsibility for making the proper penalty determination, **by suggesting that the responsibility lies with the court**.

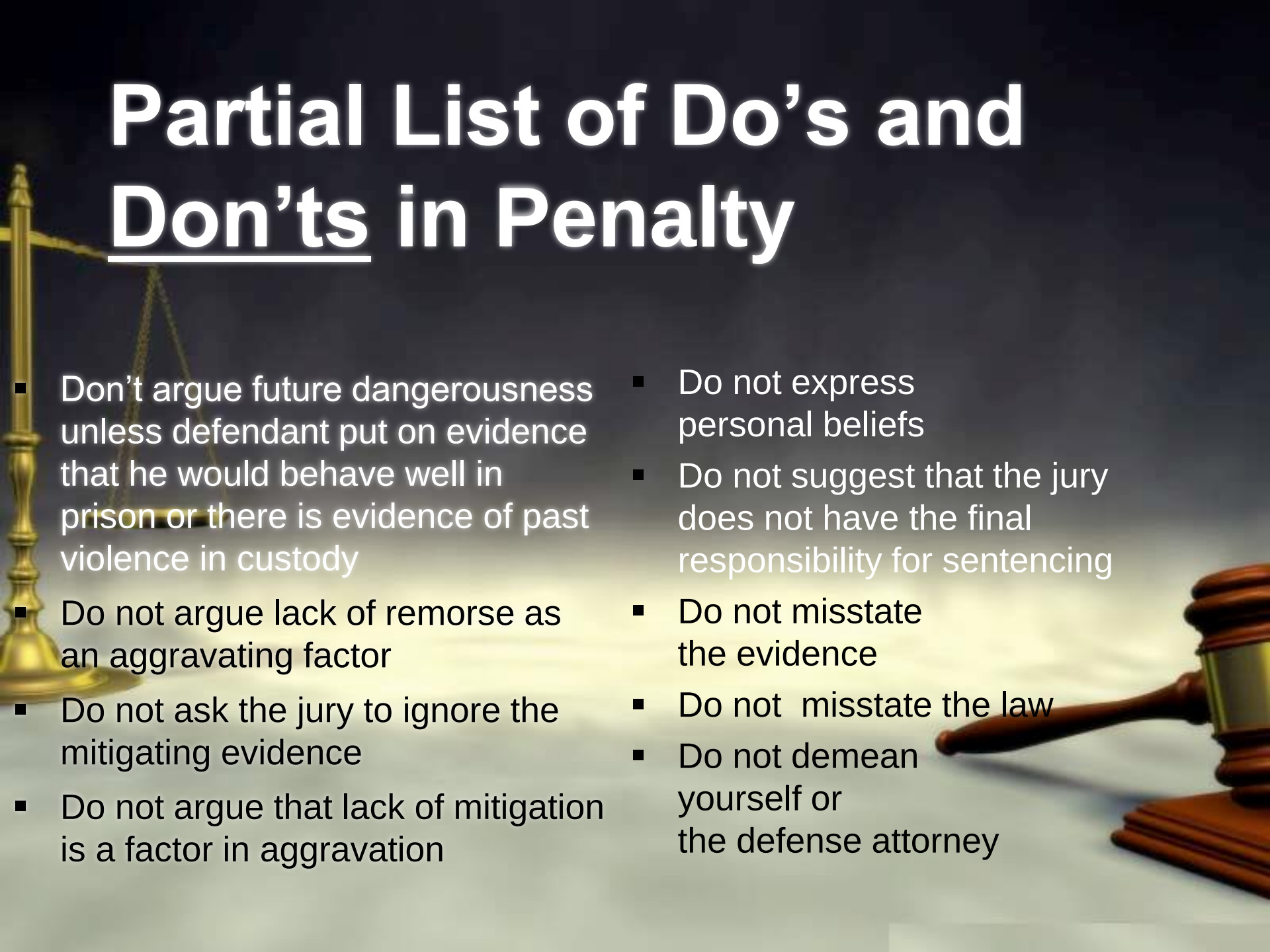
- *Caldwell v. Mississippi (*1985) 472 U.S. 320, 330 . It is important for the prosecutor to emphasize the notion of **personal responsibility of each juror** in deciding the appropriate punishment.

Defendant's Failure to Testify at Penalty Phase

- It is **IMPROPER** for the prosecutor to suggest to the jury that the defendant should have testified at the penalty phase or to comment on the fact that the defendant did not testify at the penalty phase.
  People v. Hardy (1992) 2 C.4th 86, 209

Partial List of Do's and Don'ts in Penalty

- Don't argue future dangerousness unless defendant put on evidence that he would behave well in prison or there is evidence of past violence in custody
- Do not argue lack of remorse as an aggravating factor
- Do not ask the jury to ignore the mitigating evidence
- Do not argue that lack of mitigation is a factor in aggravation
- Do not express personal beliefs
- Do not suggest that the jury does not have the final responsibility for sentencing
- Do not misstate the evidence
- Do not misstate the law
- Do not demean yourself or the defense attorney



Partial List of Do's and Don'ts in *Penalty* Phase

- Do argue **reasonable inferences based on the evidence**
- Do argue absence of mitigation
- Do argue that the mitigation is worthy of only slight weight
- Do argue that defendant's behavior at crime scene demonstrates lack of remorse as an aspect of the crime
- Do point out that sympathy for the defendant's family, while understandable, is not mitigation
- Do vigorously argue your case
- Do bring your victim back to life (not in guilt phase!)
- Do bring your victim's suffering back to life (penalty only)
- Do bring to light the suffering of the victim's family (penalty only)

Opportunities For Error

- Investigation
- Charging
- Pretrial
- Jury Selection
- Guilt Phase
- Guilt Argument
- Penalty Phase
- Penalty Argument
- Jury Instructions
- Post-Conviction
- Ineffective Assistance of Counsel

ACTUAL But UNREASONABLE Belief in the NECESSITY to Defend

- In **both**, perfect self-defense and imperfect self-defense the defendant must subjectively **ACTUALLY** believe in the NECESSITY to defend against imminent peril. (CALCRIM 571)

- **The ACTUAL belief may be established WITHOUT defendant's testimony or defendant's statements being admitted**

- *People v. Viramontes* (2001) 93 C.A. 4th 1256 2nd degree murder conviction **reversed** for failure to instruct on **imperfect** self-defense

Instructional fixes (by ACB)

- *Kansas v. Carr* situation:

  ACB's suggestion: Why not just tell the jury *in penalty*…
  "I am the only one that has a burden of proof – you cannot consider any aggravation unless it is proven beyond a reasonable doubt *and the defense has no burden of proof, you can consider any mitigation, however slight*"

- **Exculpatory Accomplice Testimony** (CA):

  6/29/16 *P. v. Smith* – LWOP 211/187- both convictions **reversed** because accomplice gave exculpatory testimony and trial court instructed that "any accomplice testimony must be corroborated." ACB's suggestion:
  "if offered against the defendant…however, it need NOT corroborated if it is helpful to a defendant."

Voluntary and Involuntary Manslaughter

- *People v. Saille* (1992) 54 Cal. 3d 1103

- regardless of heat of passion or imperfect self-defense, there may be an absence of malice based on voluntary intoxication or mental defect
- A defendant is free to show that because of his **mental illness** or **voluntary intoxication**, he did not *in fact*, form the intent unlawfully to kill, i.e., did not have malice aforethought. @ p. 1117

Voluntary Intoxication/ Specific Intent/Mental State

- **If** the evidence shows that a defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding ***whether or not*** a defendant had the required specific intent and/or mental state.

- If you have a reasonable doubt whether a defendant had the specific intent/mental state, you MUST find that the defendant did not have the specific intent and/or mental state.

Mental Disease/ Specific Intent/Mental State

- You have received evidence regarding a mental disease of the defendant.
- You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent and/or mental state.

Opportunities For Error

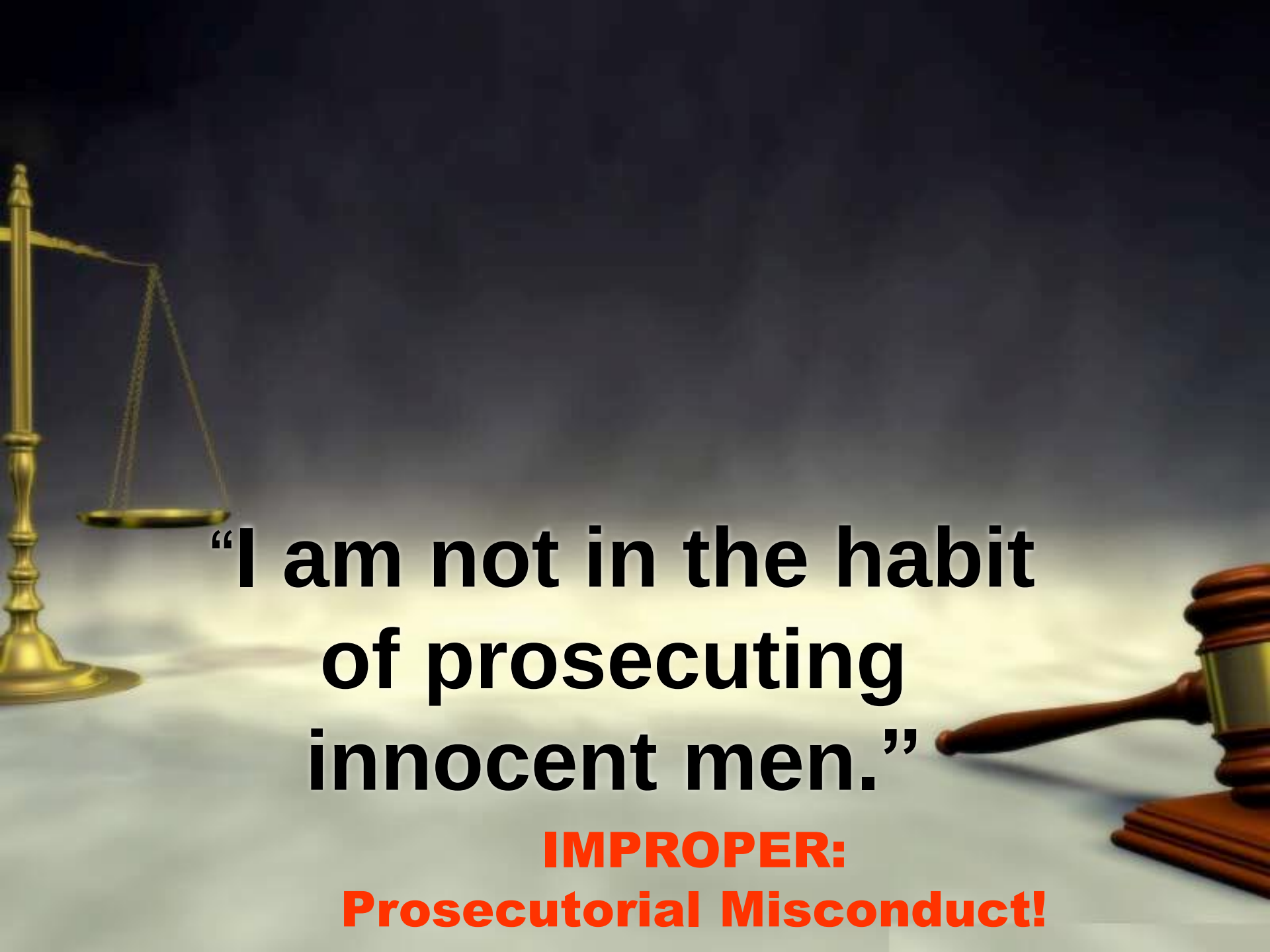
- Investigation
- Charging
- Pretrial
- Jury Selection
- Guilt Phase
- Guilt Argument
- Penalty Phase
- Penalty Argument
- Jury Instructions
- Post-Conviction
- Ineffective Assistance of Counsel

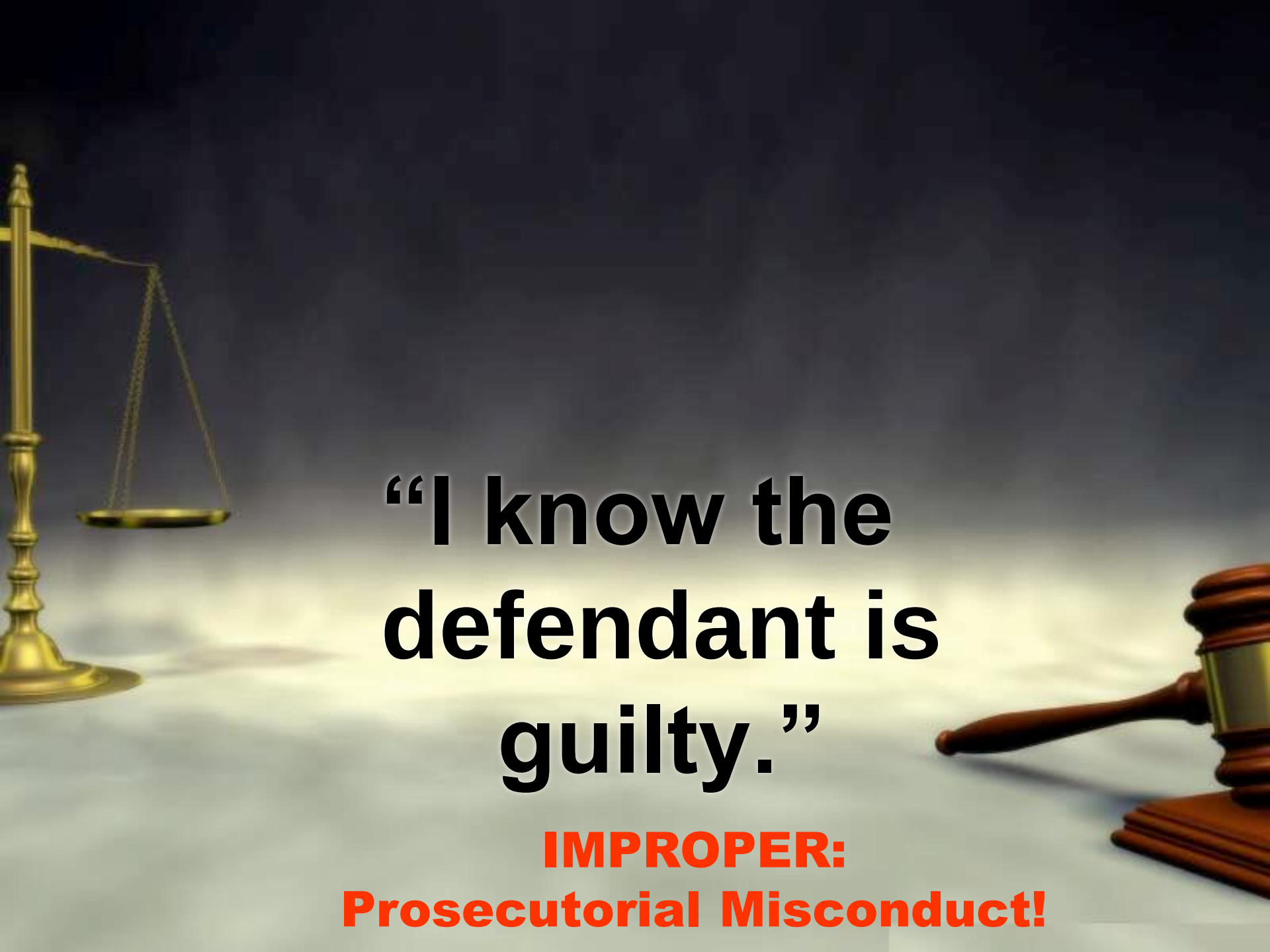
Post-conviction

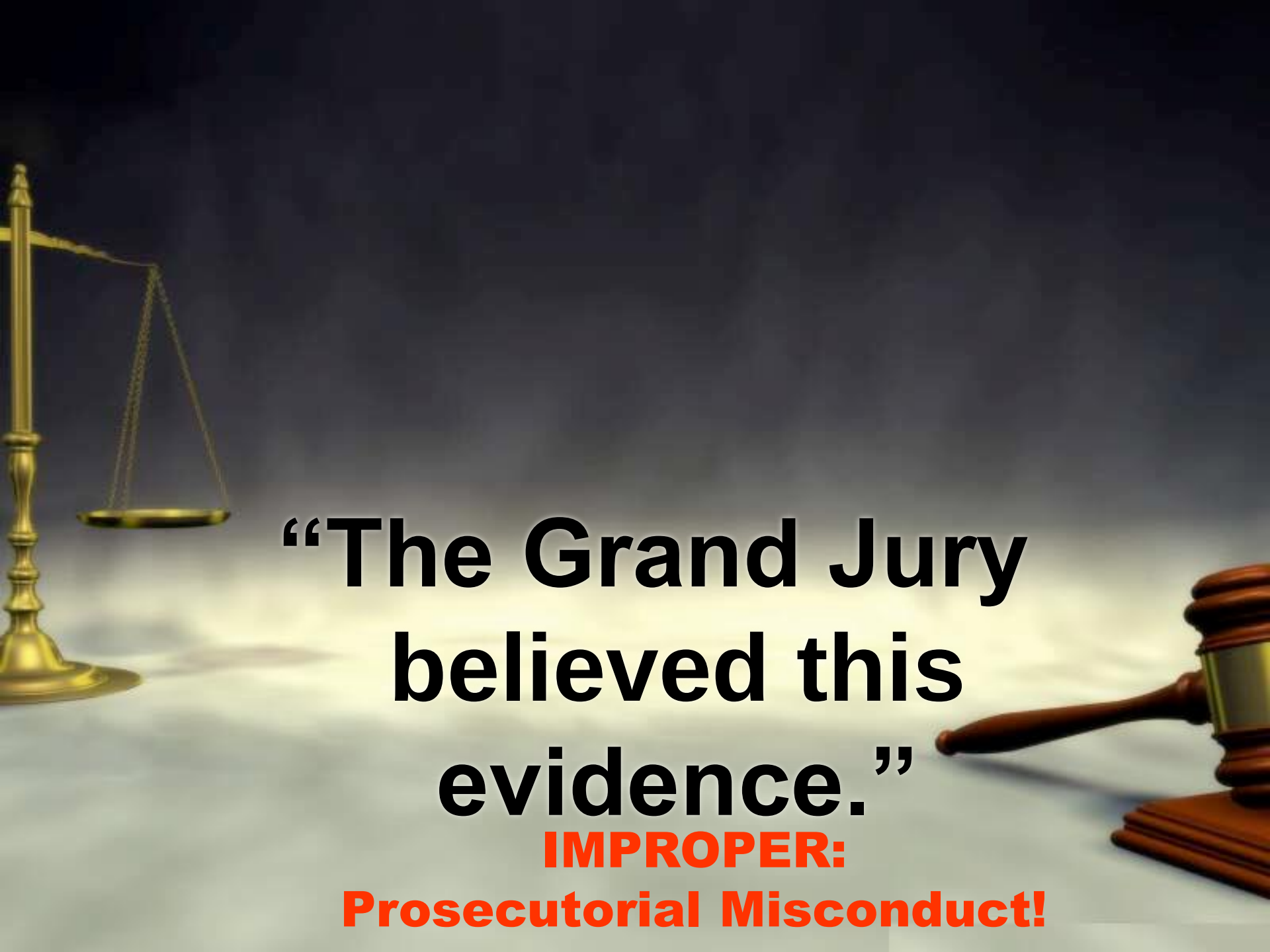
- Augment the Record with evidence of defense Tactics that shows they were diligent and pursued logical avenues (IAC section)
- Post-conviction discovery is much easier if you have a complete record of what you gave trial attorney (P.C.1054.9)

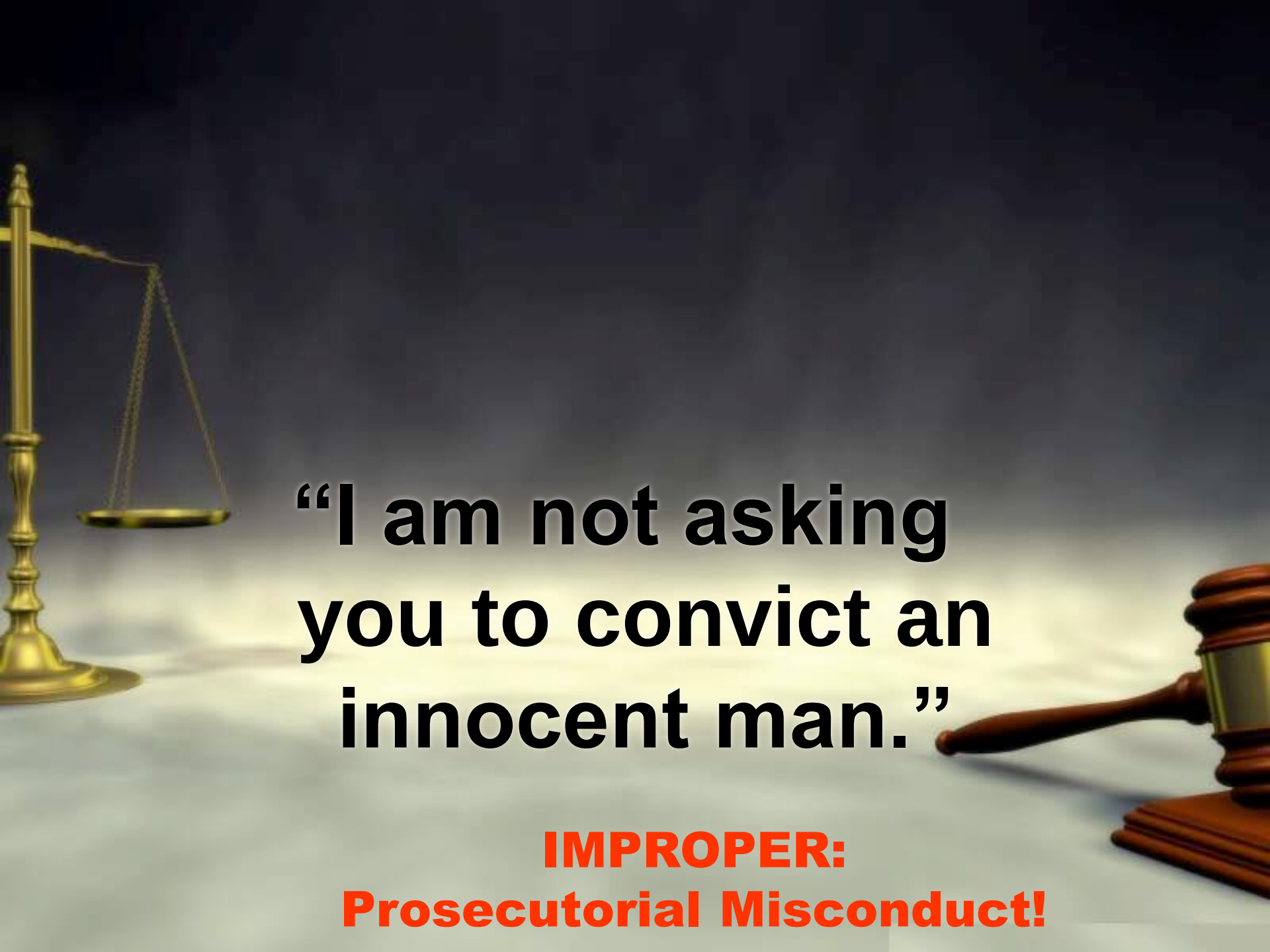
PROSECUTORIAL MISCONDUCT

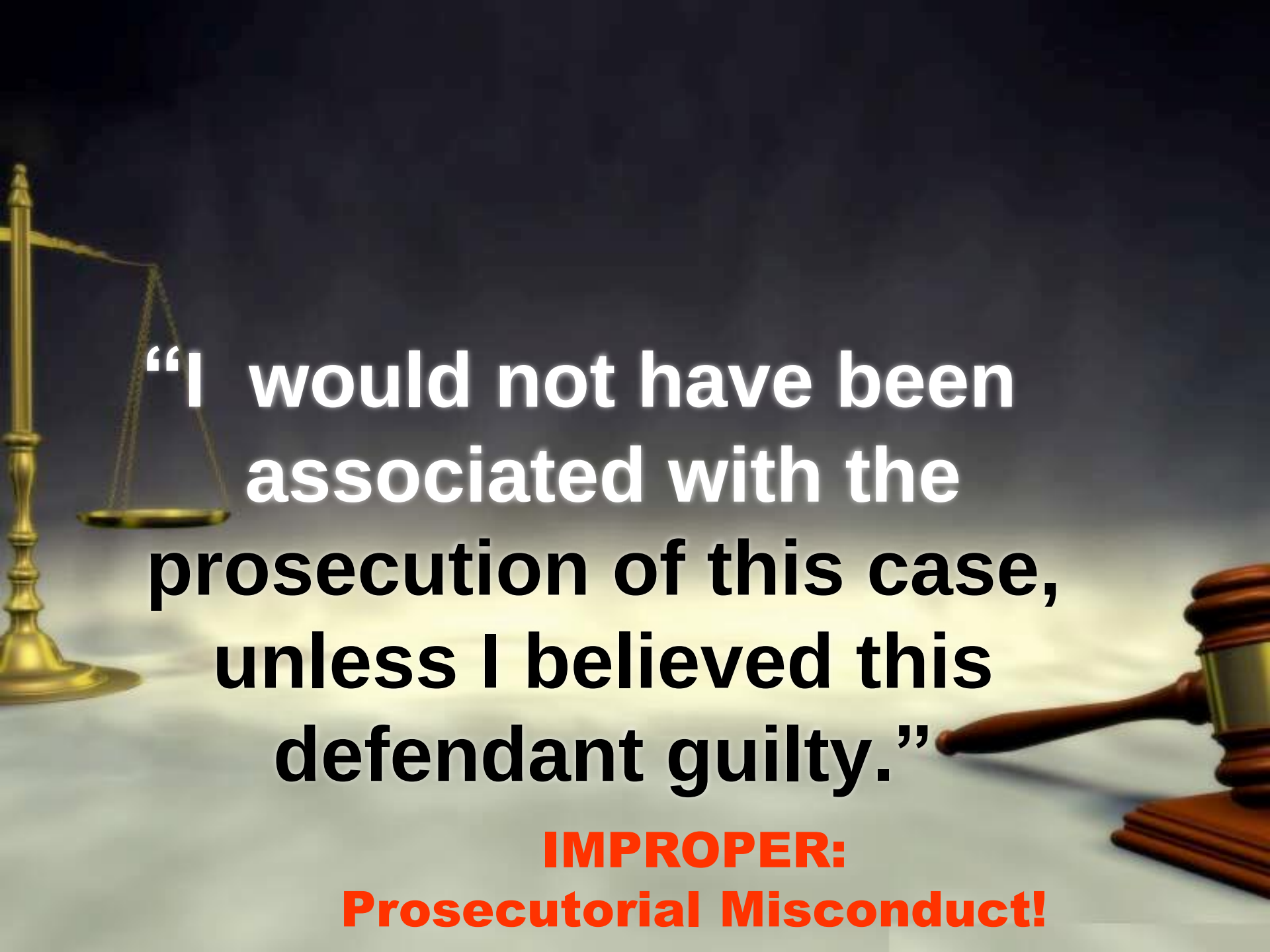
WHAT YOU CANNOT SAY, EVER!

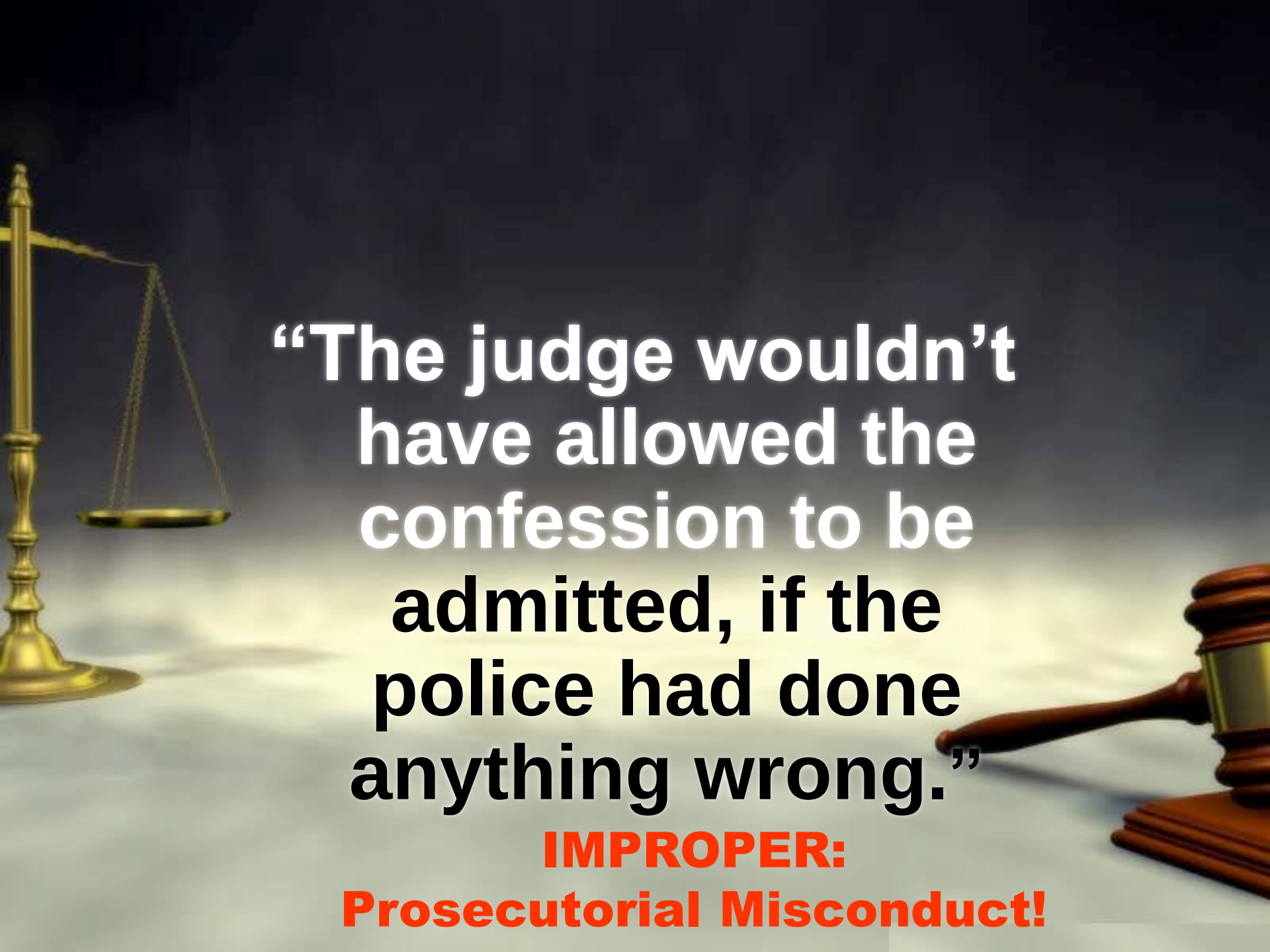

“I am not in the habit of prosecuting innocent men.”
IMPROPER:
Prosecutorial Misconduct!

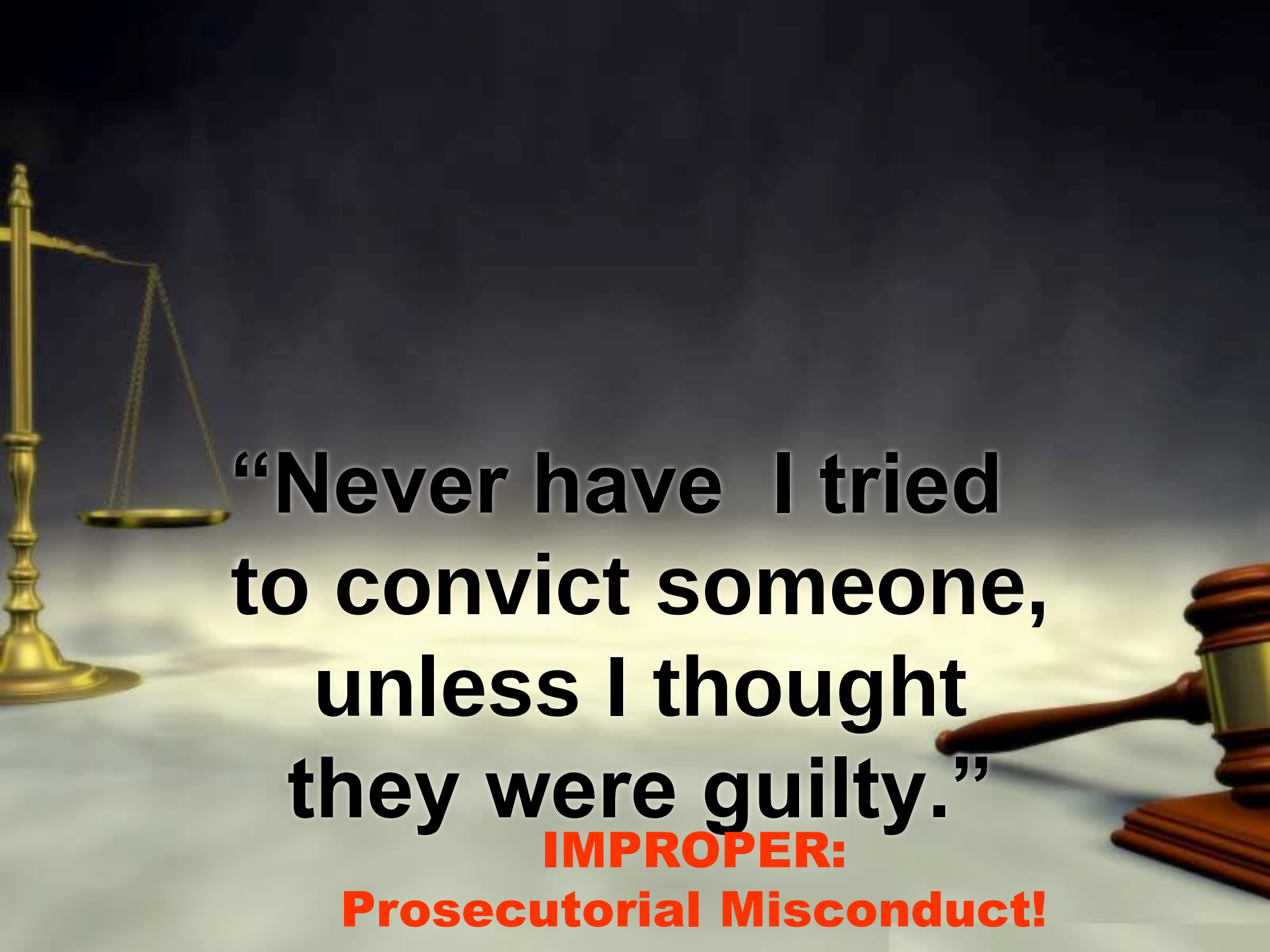

“I know the defendant is guilty.”
IMPROPER:
Prosecutorial Misconduct!

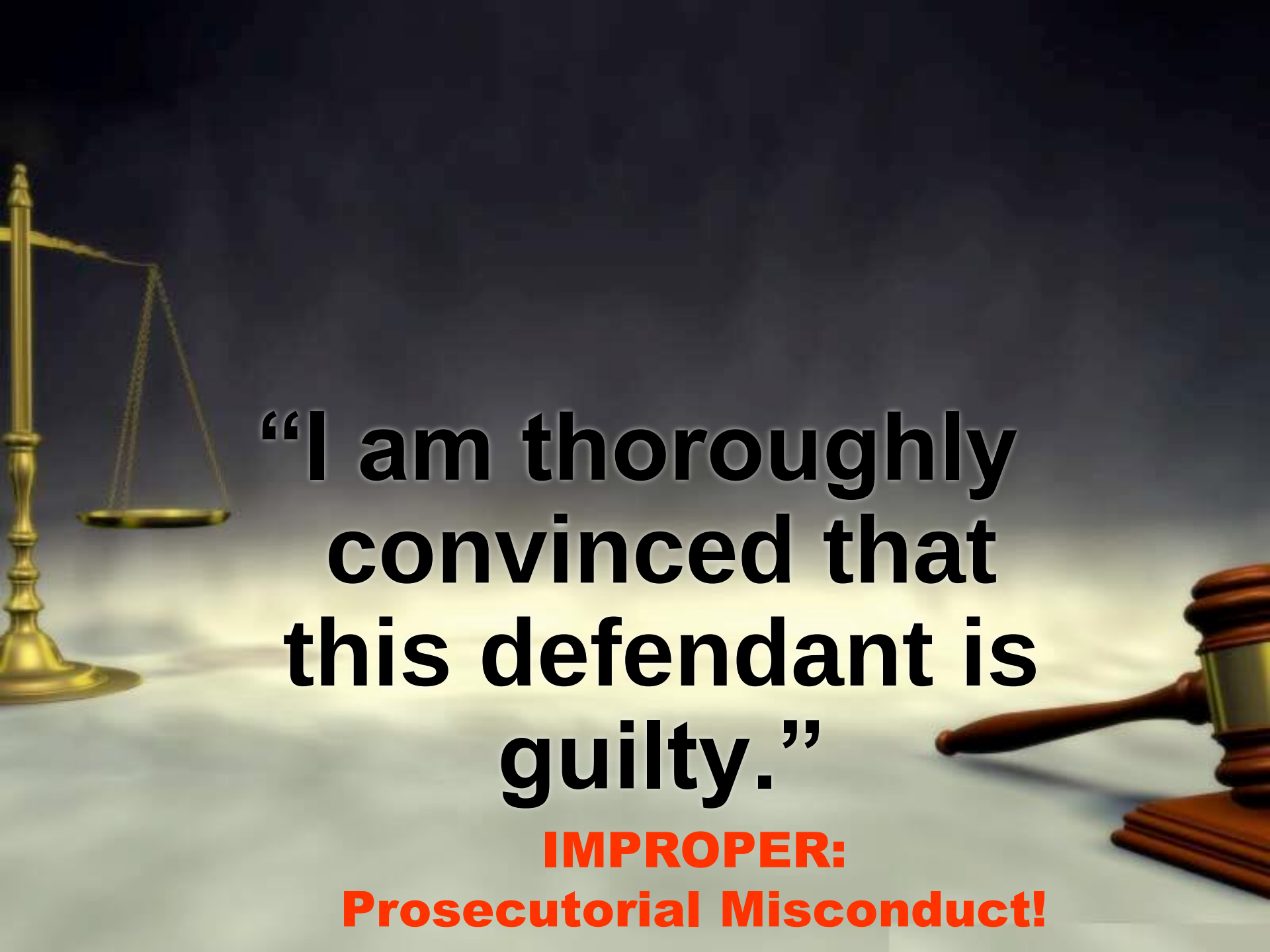

“The Grand Jury believed this evidence.”
IMPROPER:
Prosecutorial Misconduct!

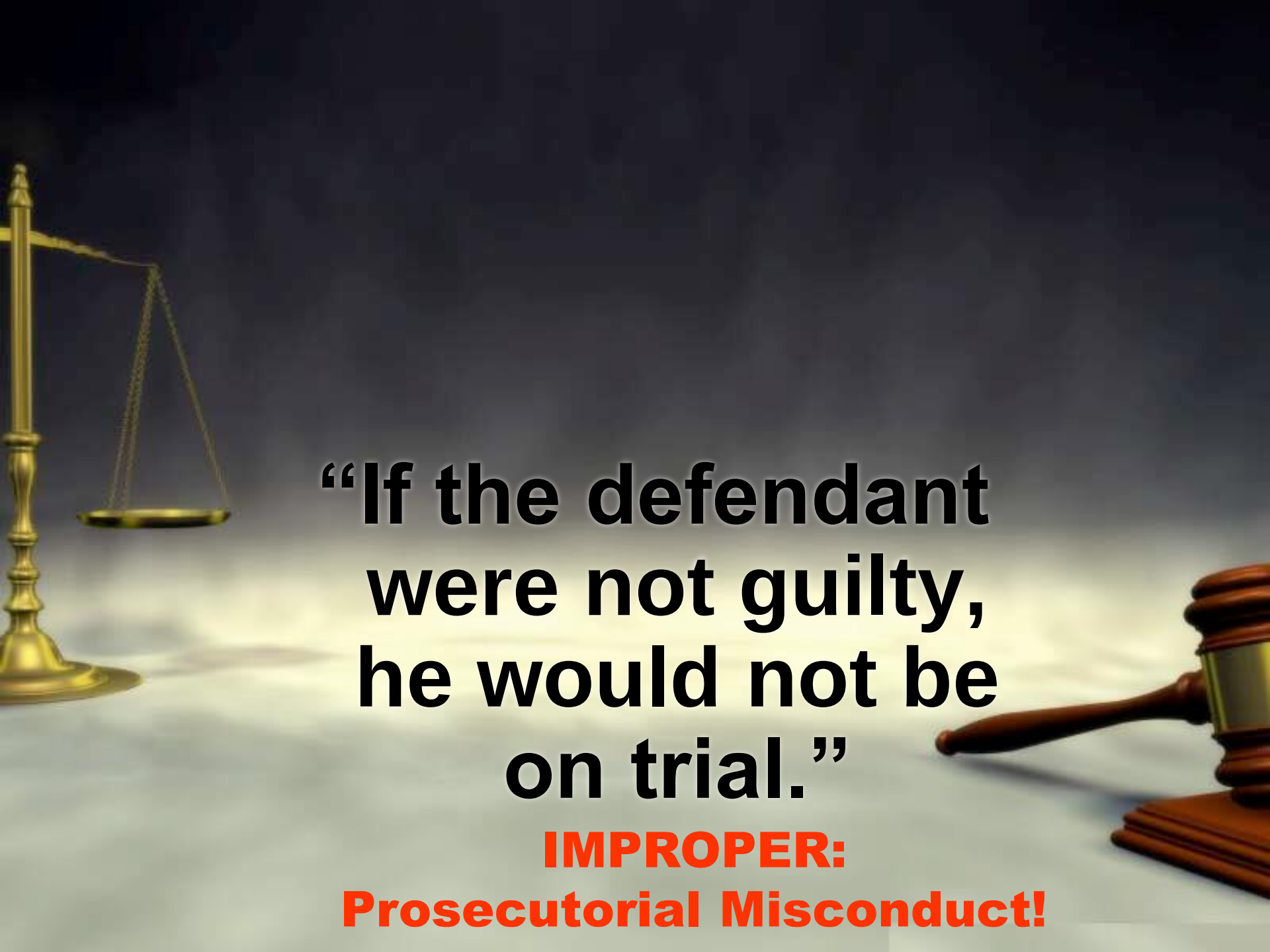

“I am not asking you to convict an innocent man.”
IMPROPER:
Prosecutorial Misconduct!

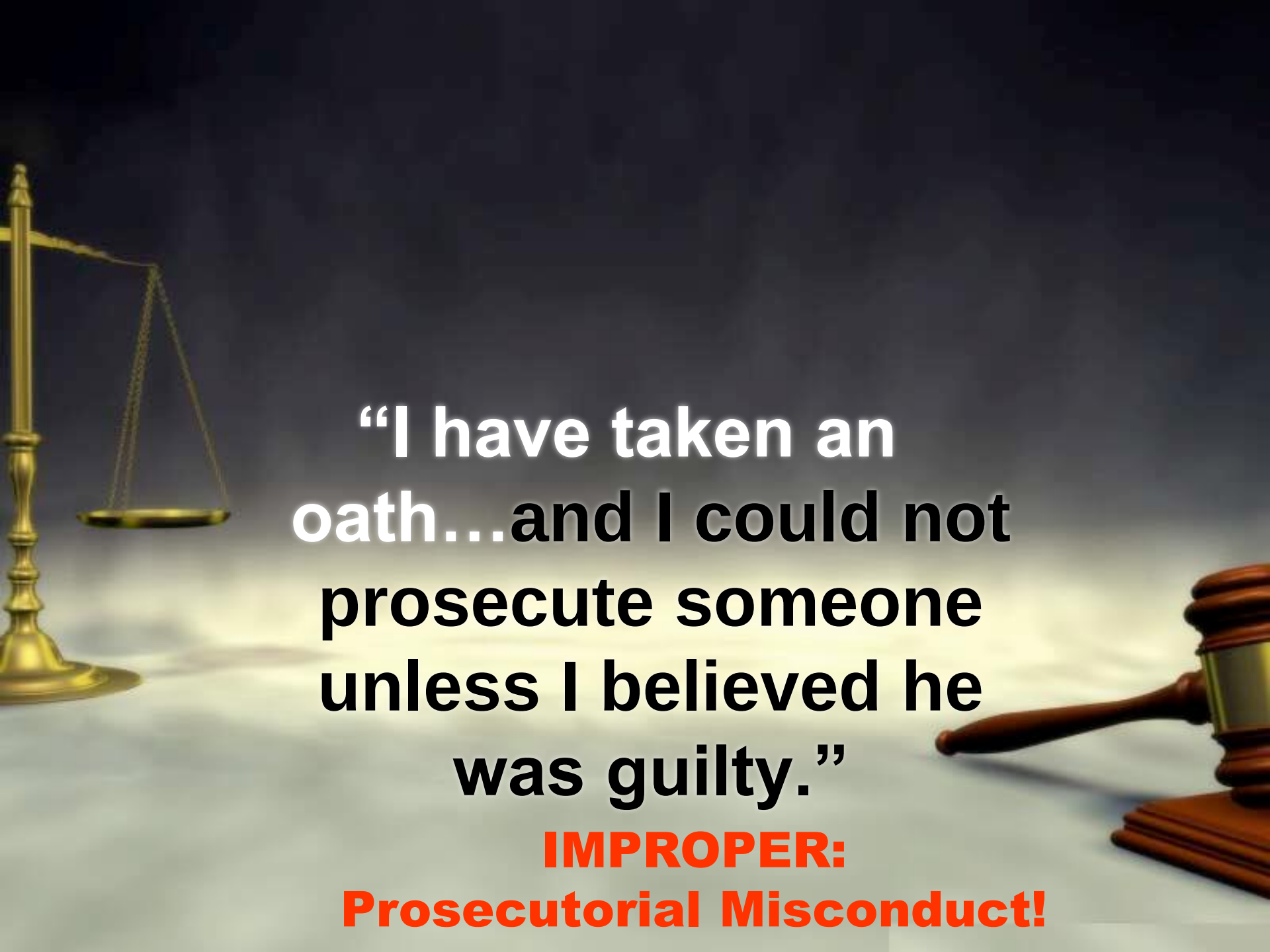

"I would not have been associated with the prosecution of this case, unless I believed this defendant guilty."
IMPROPER:
Prosecutorial Misconduct!

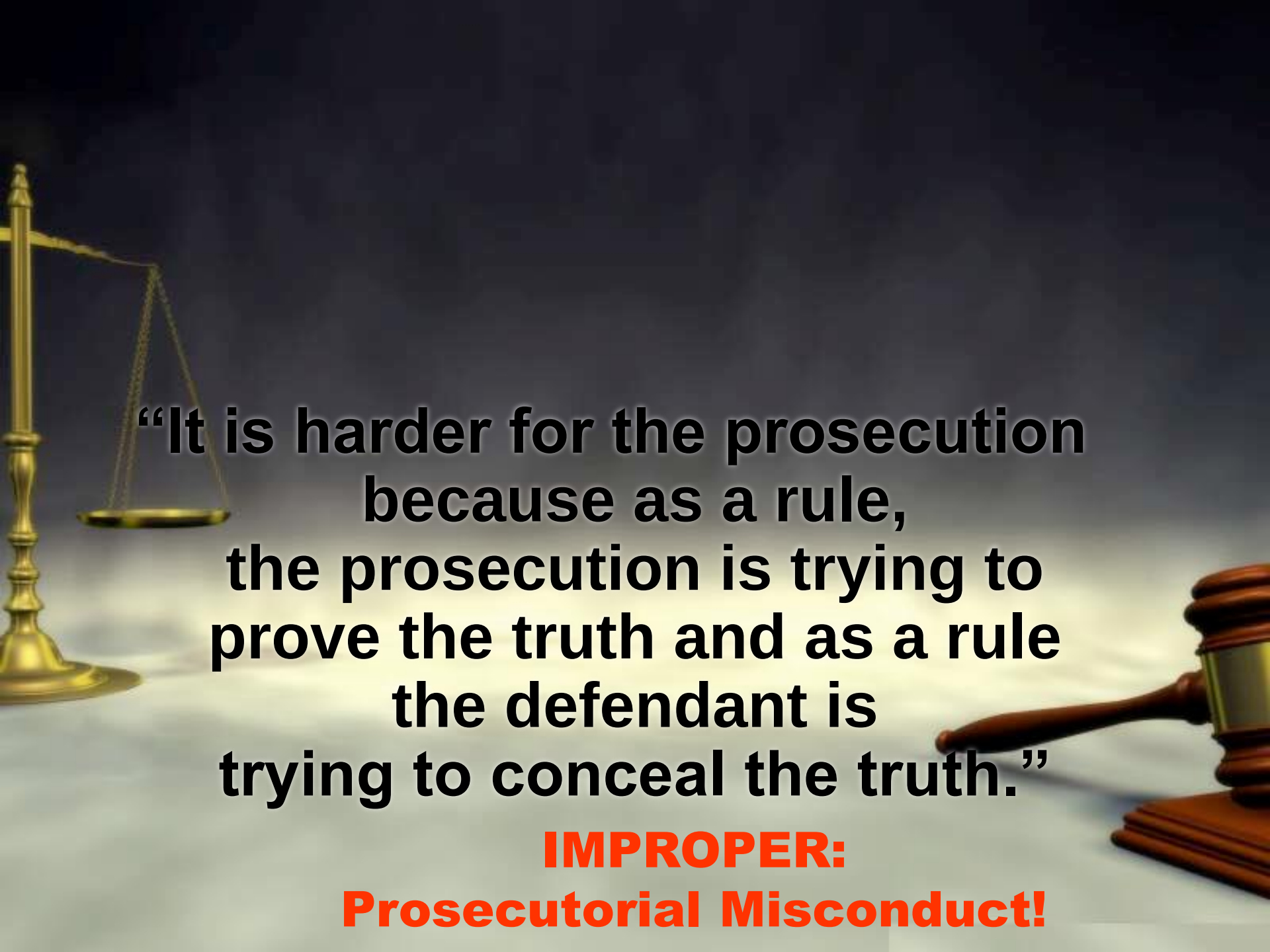

"The judge wouldn't have allowed the confession to be admitted, if the police had done anything wrong."
IMPROPER:
Prosecutorial Misconduct!

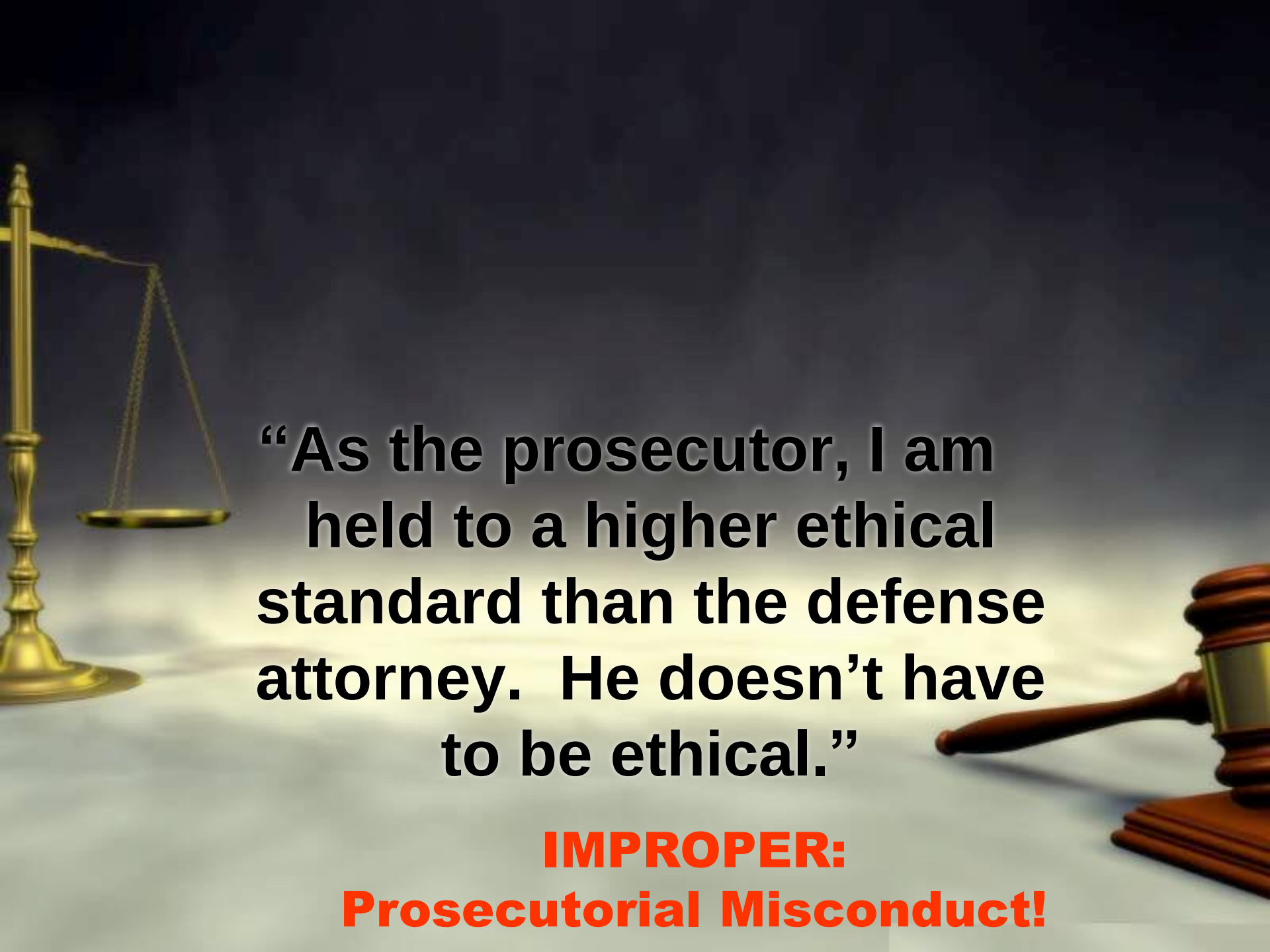

“Never have I tried to convict someone, unless I thought they were guilty.”
IMPROPER:
Prosecutorial Misconduct!

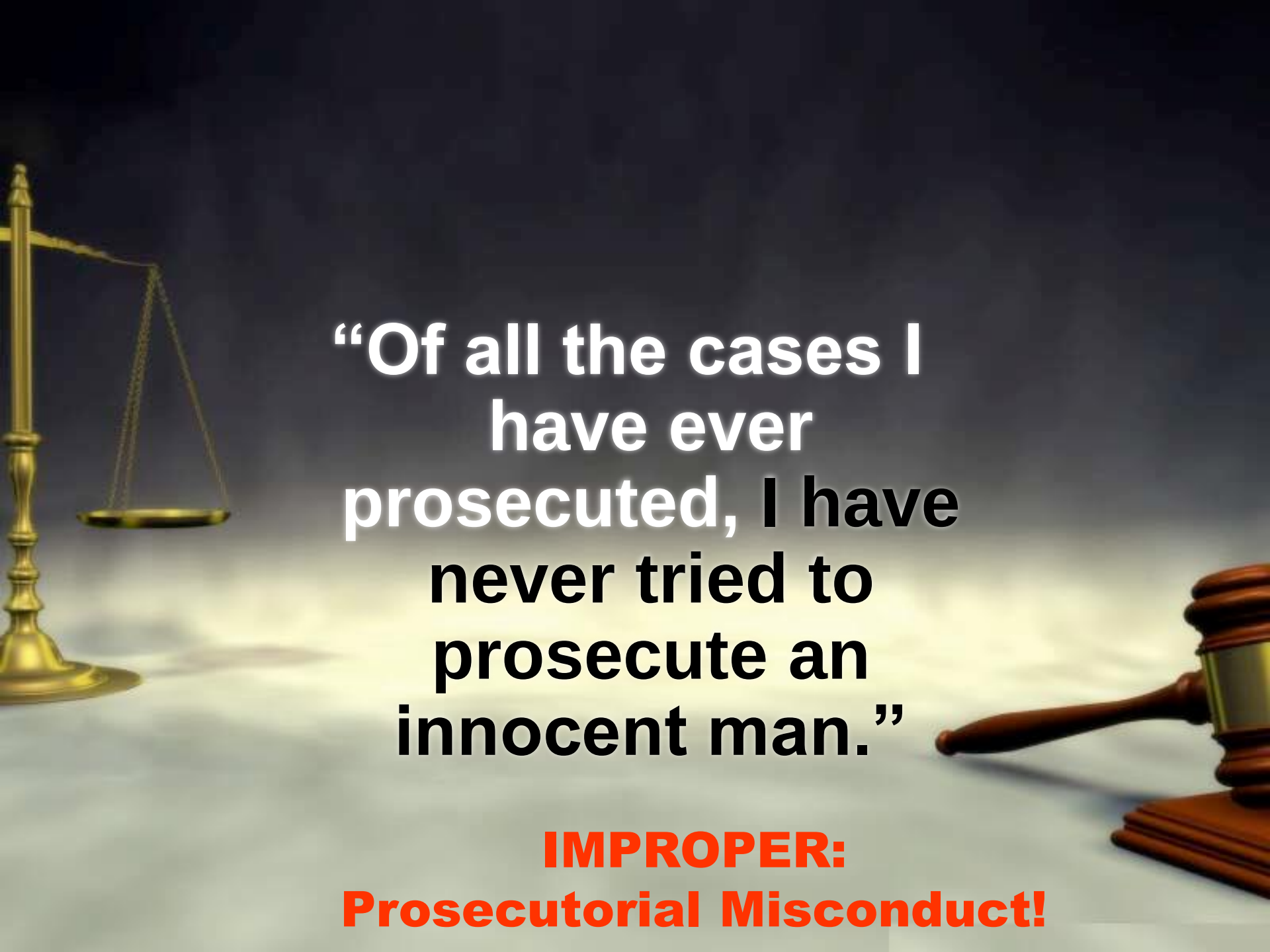

“I am thoroughly convinced that this defendant is guilty.”
IMPROPER:
Prosecutorial Misconduct!

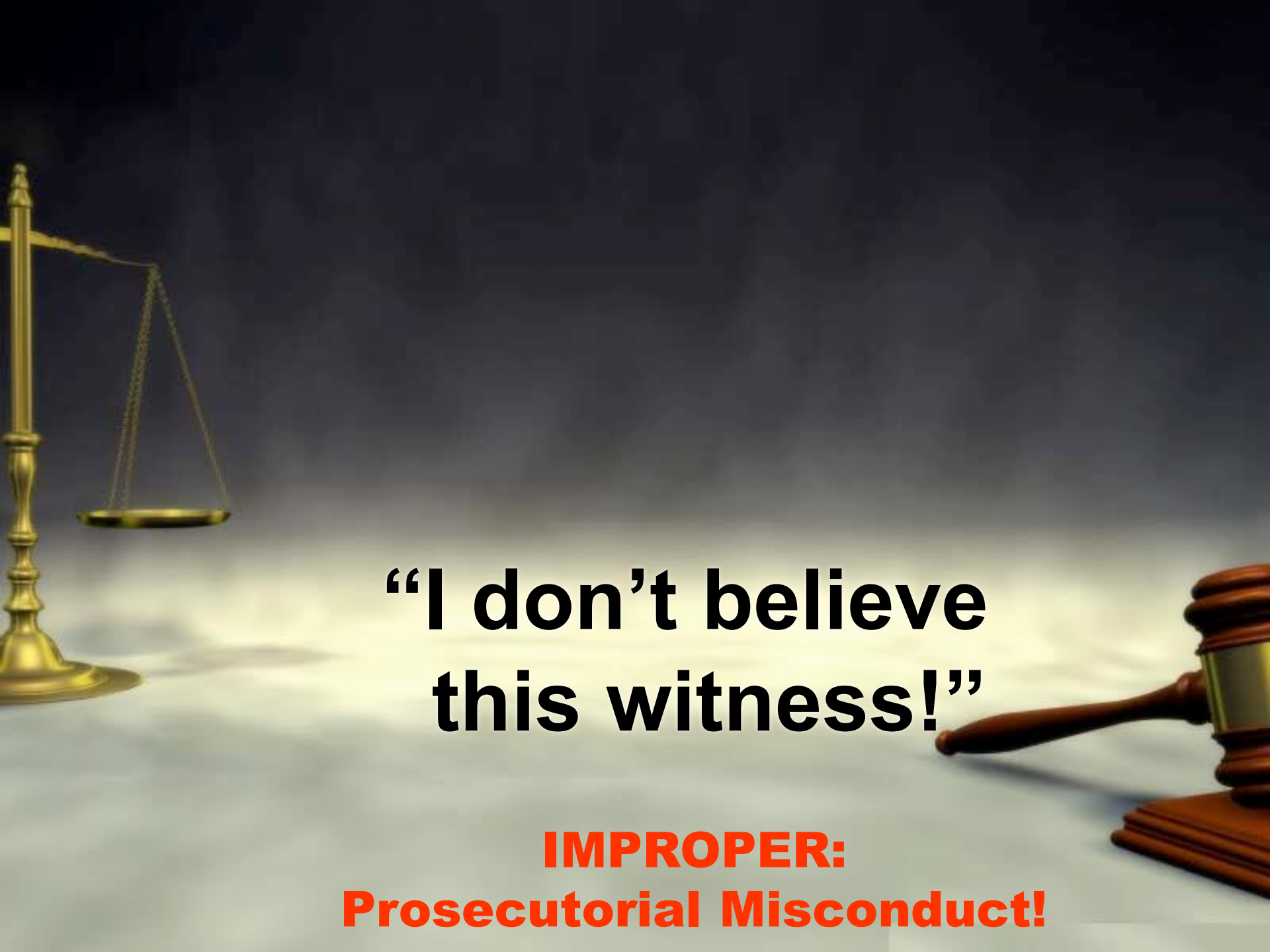

“If the defendant were not guilty, he would not be on trial.”
IMPROPER:
Prosecutorial Misconduct!


“I have taken an oath…and I could not prosecute someone unless I believed he was guilty.”
IMPROPER:
Prosecutorial Misconduct!

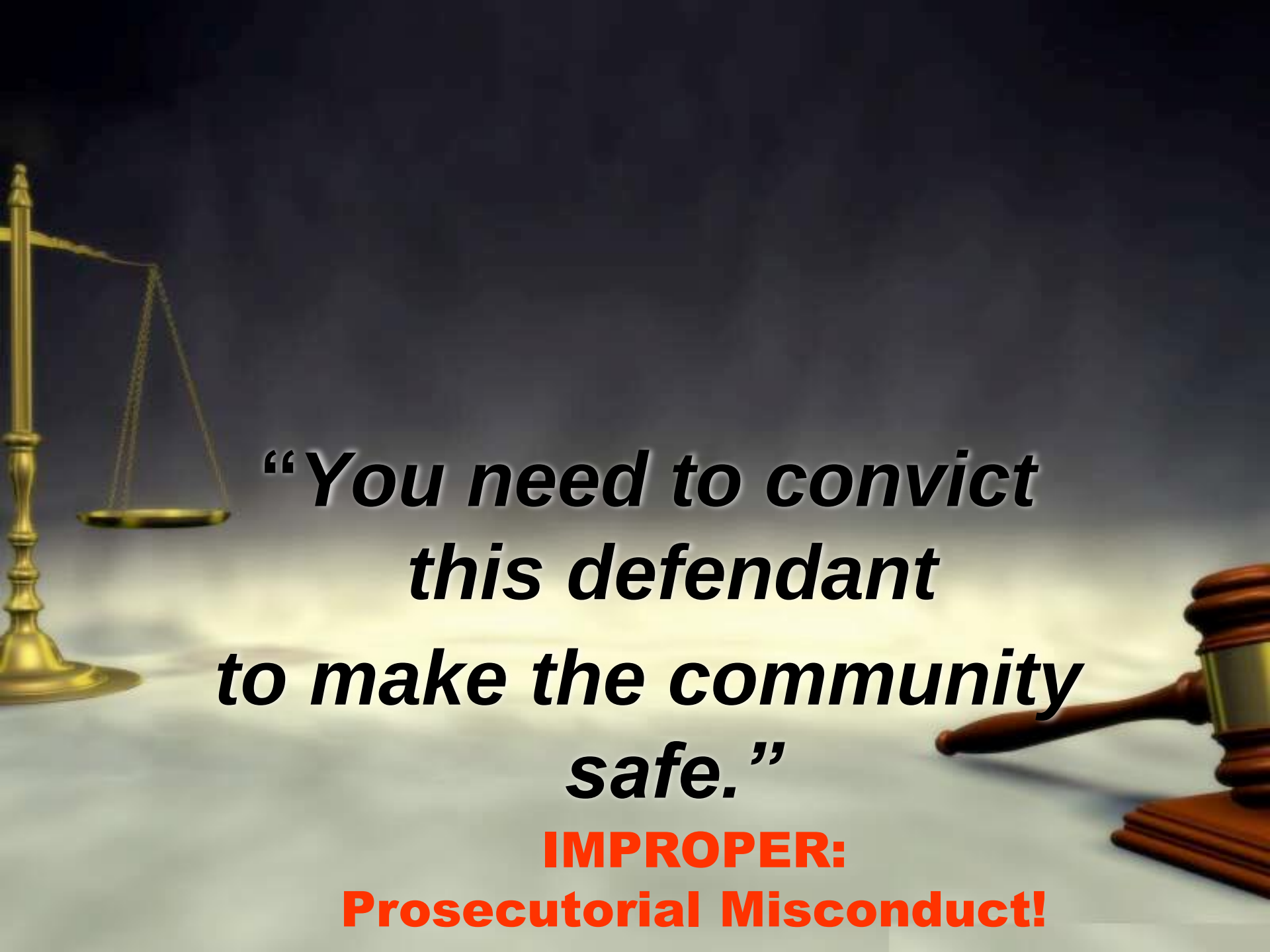

“It is harder for the prosecution
because as a rule,
the prosecution is trying to
prove the truth and as a rule
the defendant is
trying to conceal the truth.”
IMPROPER:
Prosecutorial Misconduct!

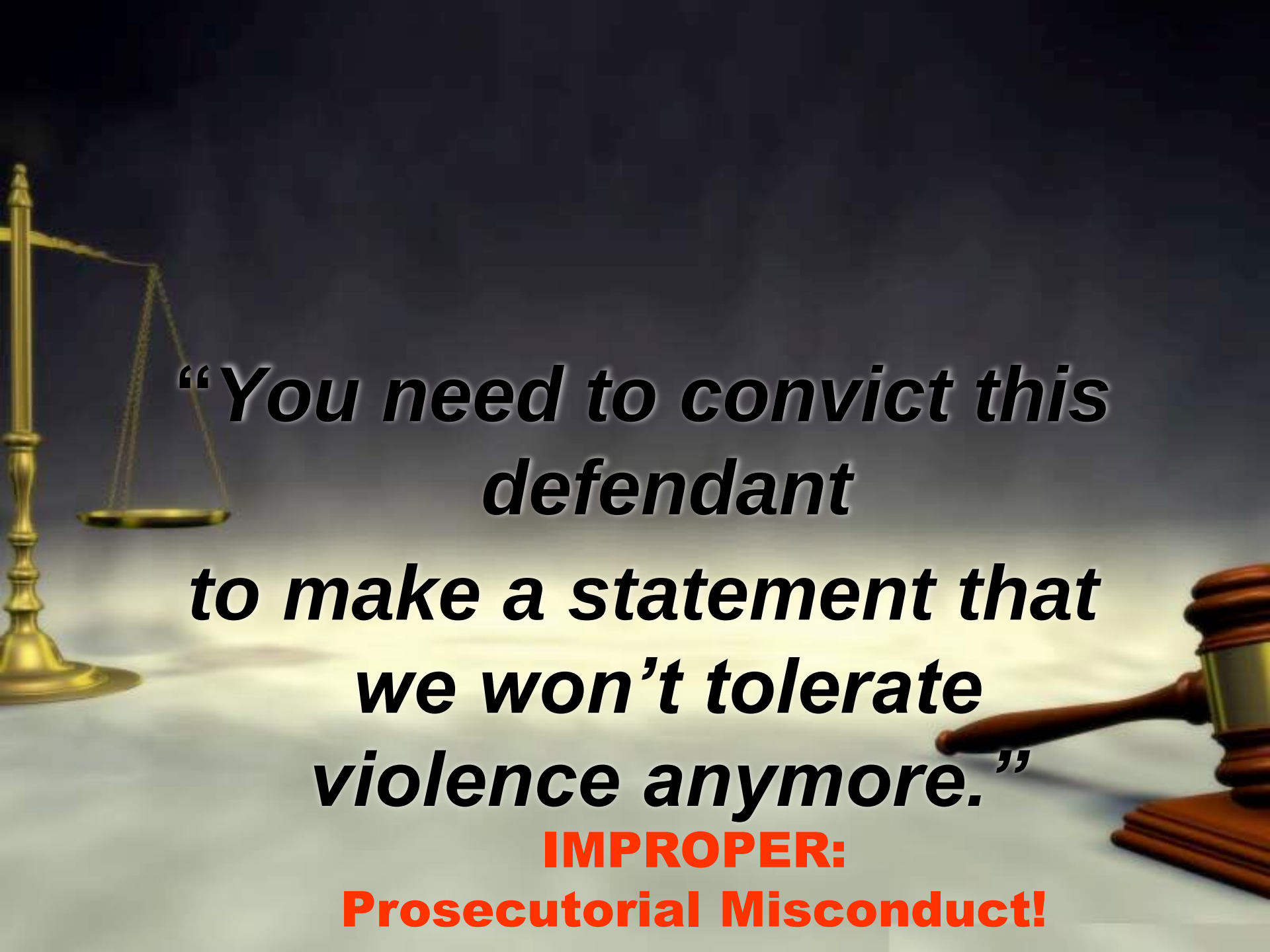

"As the prosecutor, I am held to a higher ethical standard than the defense attorney. He doesn't have to be ethical."
IMPROPER:
Prosecutorial Misconduct!

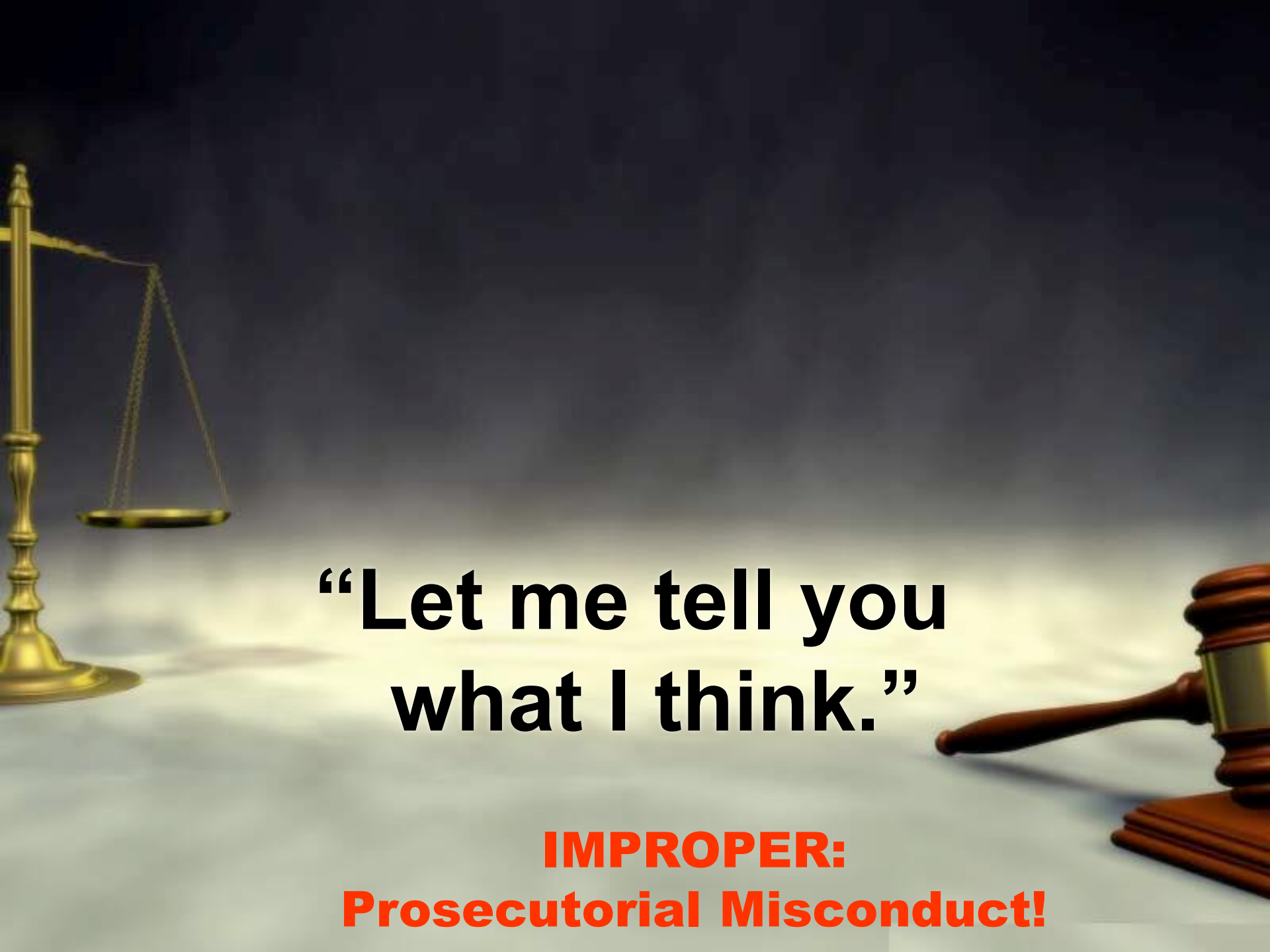

"Of all the cases I have ever prosecuted, I have never tried to prosecute an innocent man."
IMPROPER:
Prosecutorial Misconduct!

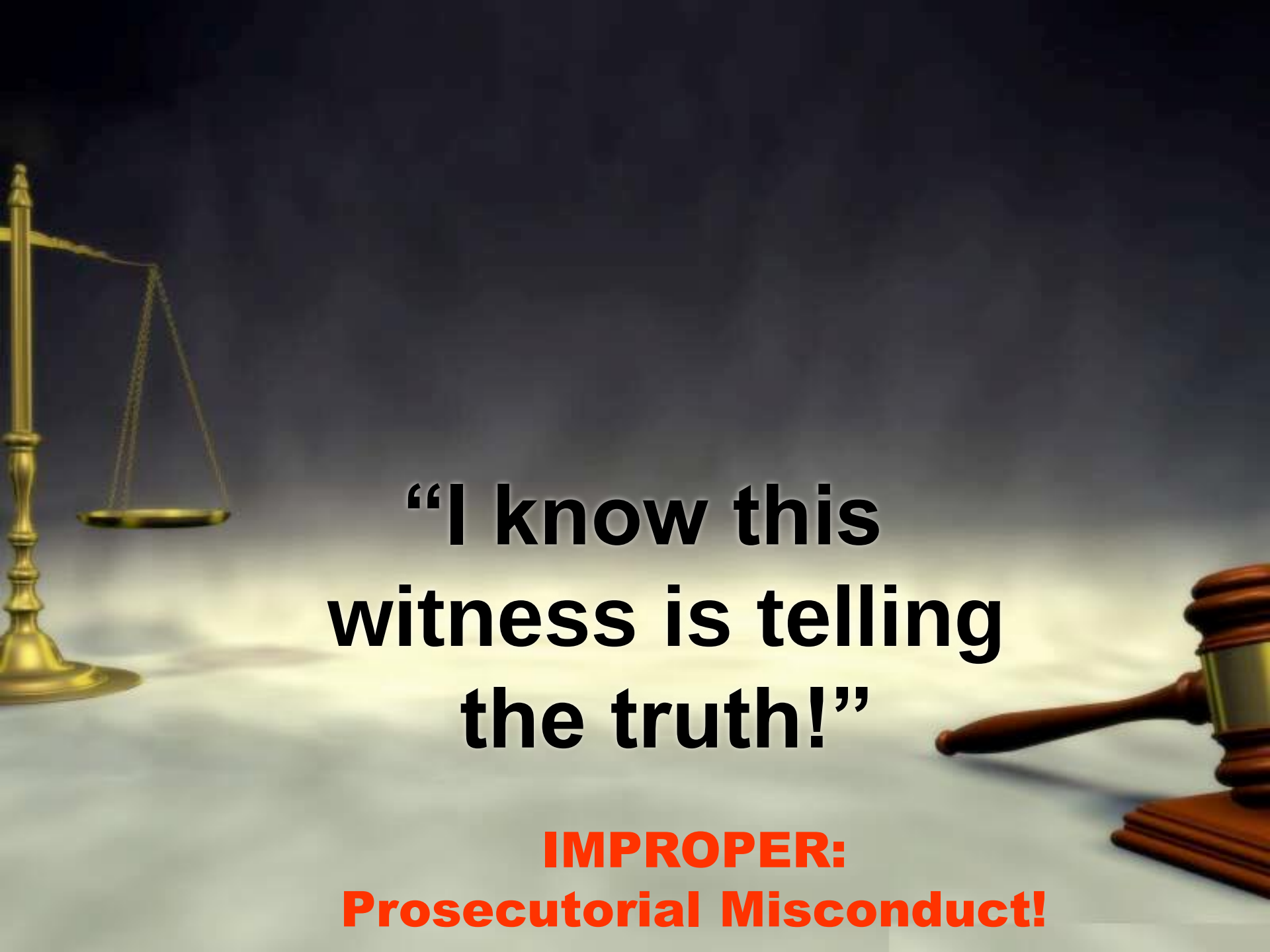

“I don’t believe this witness!”
IMPROPER:
Prosecutorial Misconduct!

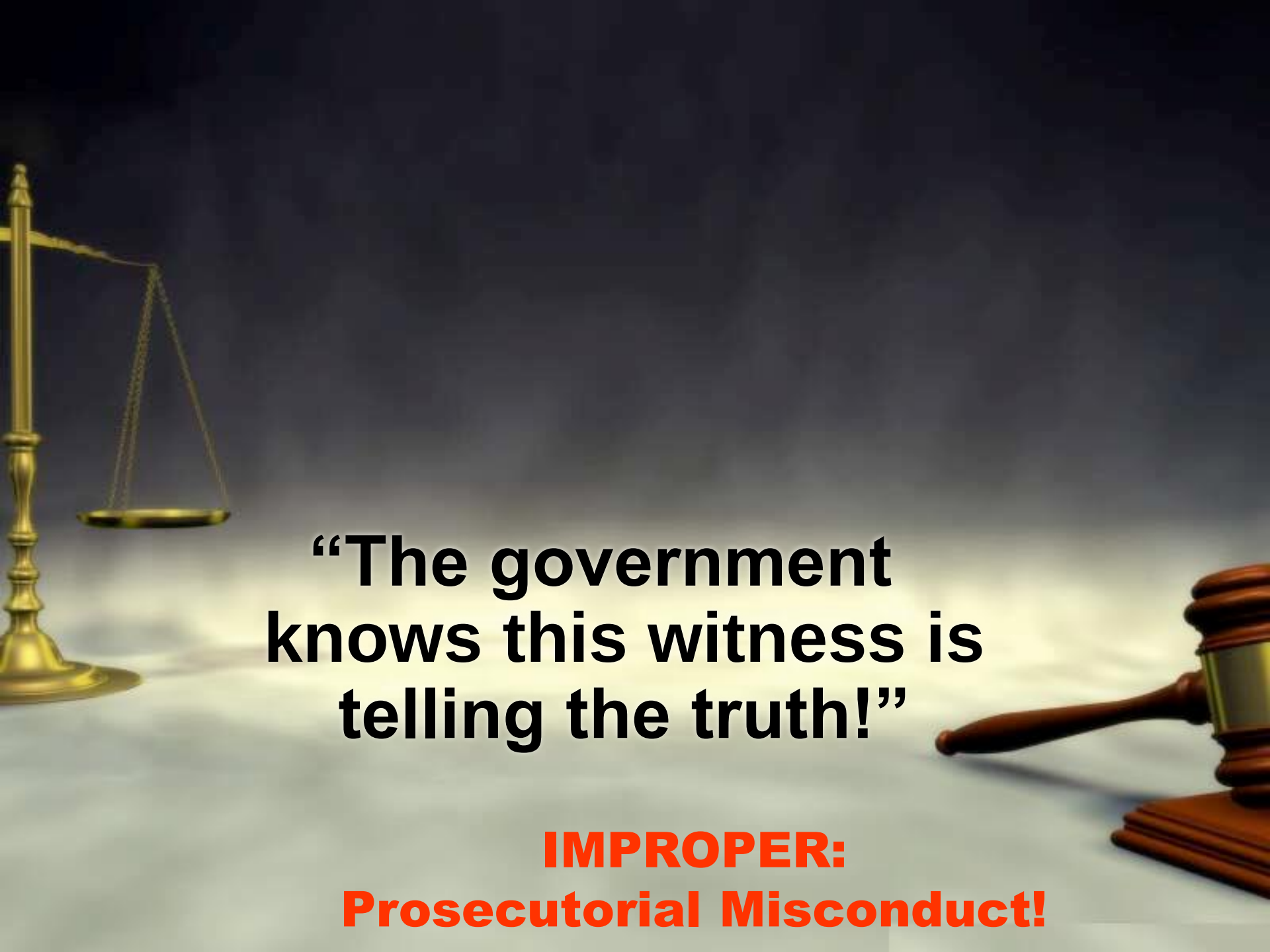

"You need to convict this defendant
to send a message
to other criminals!"
IMPROPER:
Prosecutorial Misconduct!

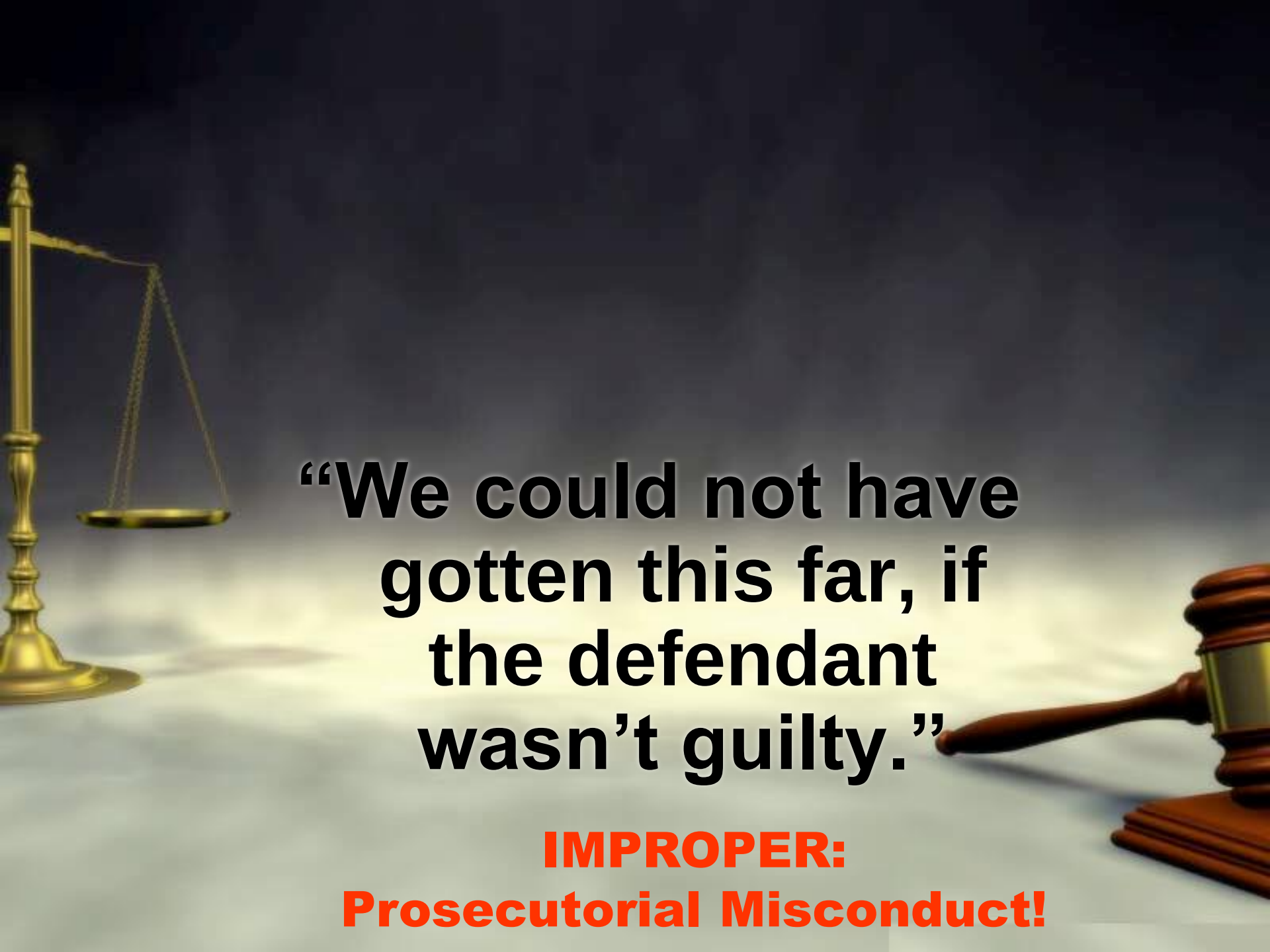

"You need to convict this defendant to make the community safe."
IMPROPER:
Prosecutorial Misconduct!

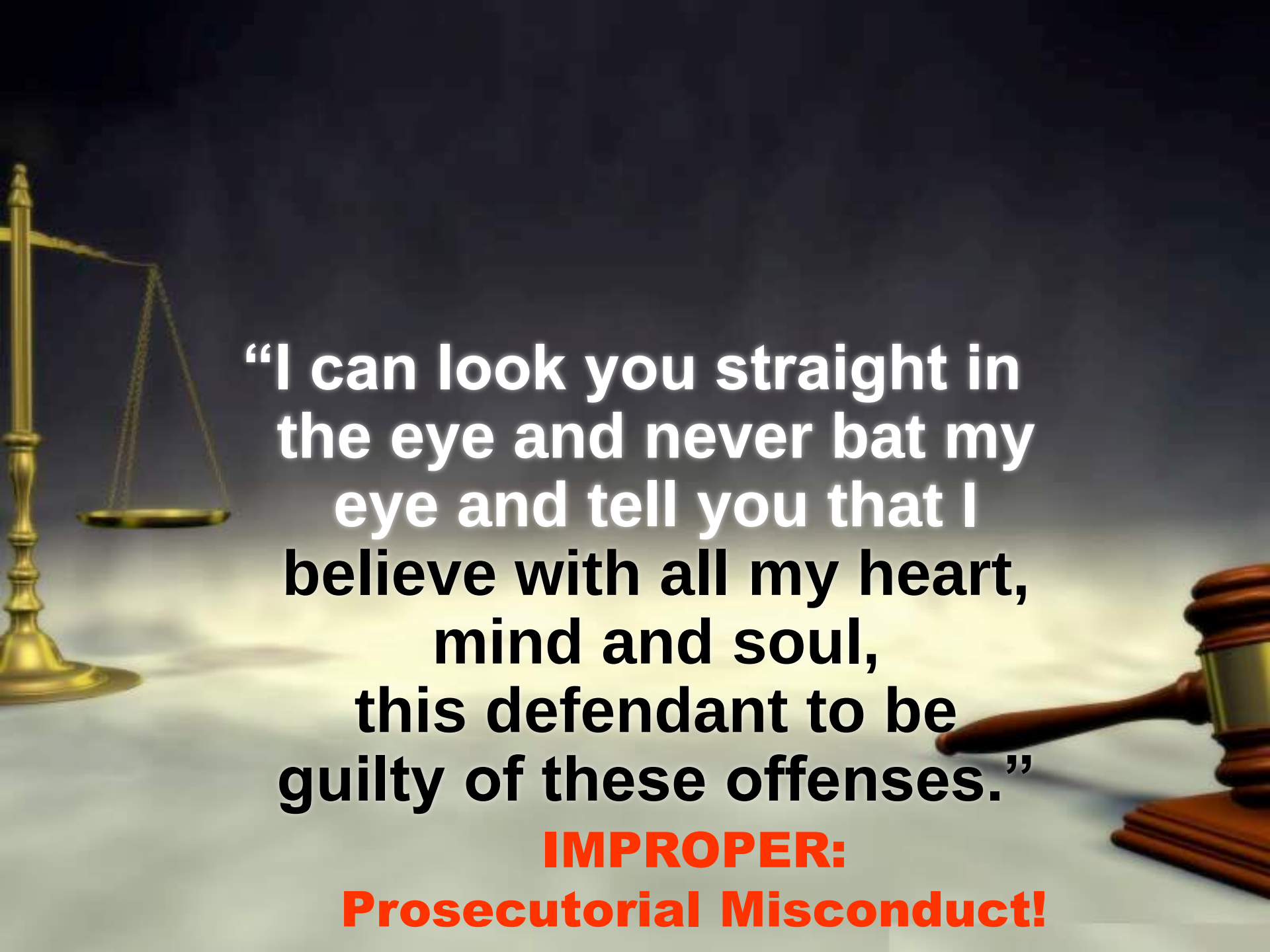

"You need to convict this defendant
to make a statement that we won't tolerate violence anymore."
IMPROPER:
Prosecutorial Misconduct!

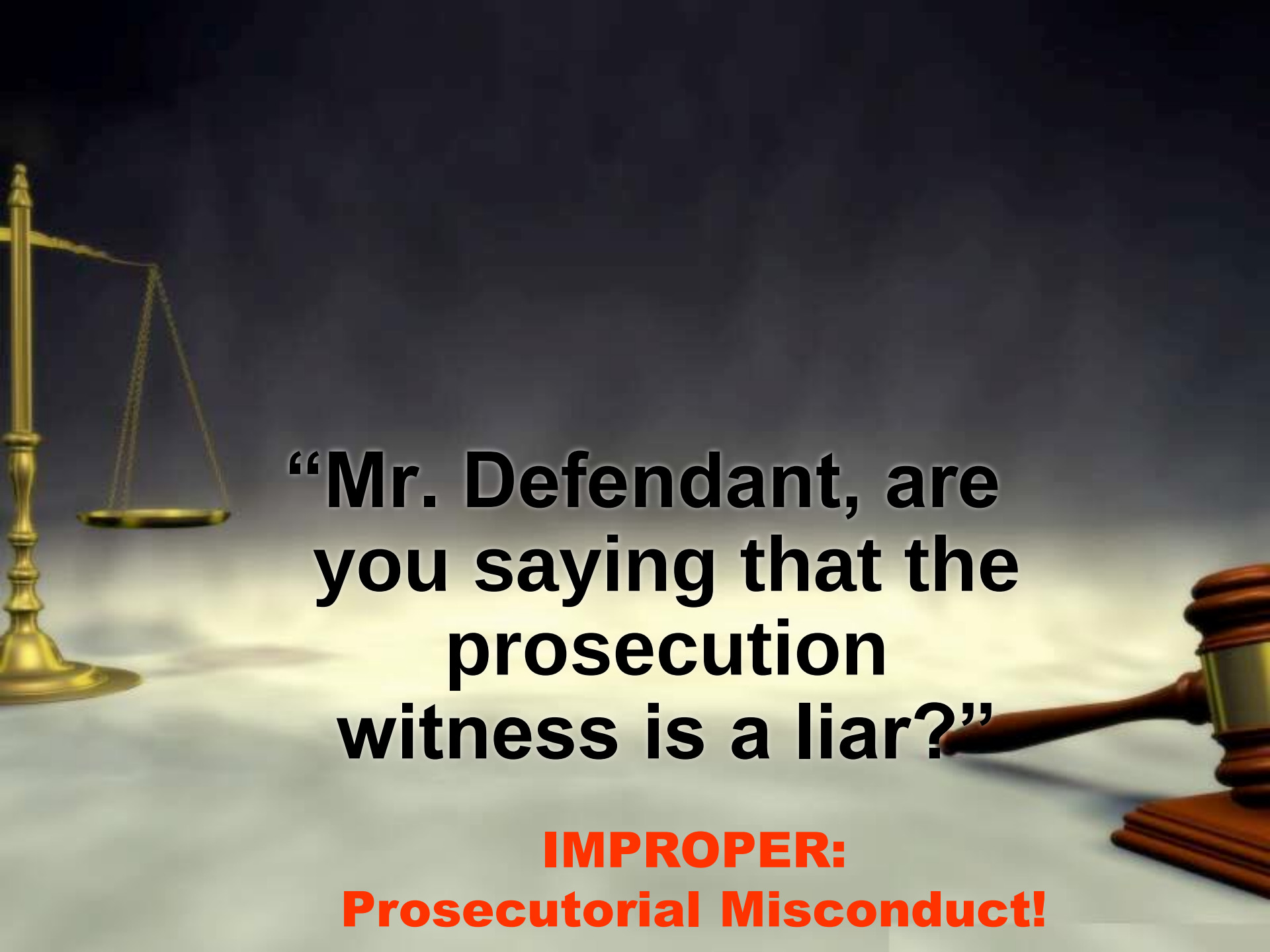

“Let me tell you what I think.”
IMPROPER:
Prosecutorial Misconduct!

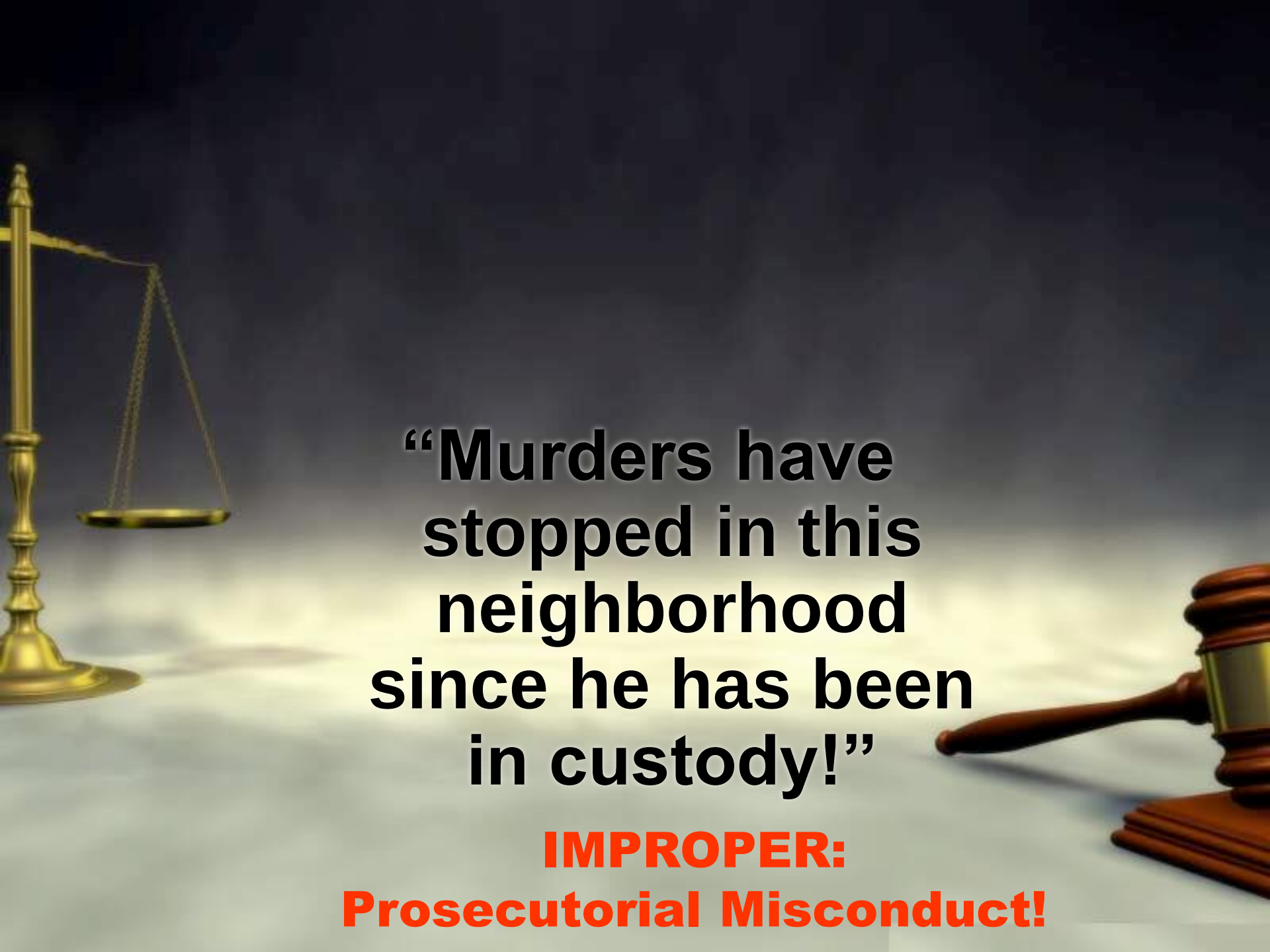

“I know this witness is telling the truth!”
IMPROPER:
Prosecutorial Misconduct!


“The government knows this witness is telling the truth!”
IMPROPER:
Prosecutorial Misconduct!


“We could not have gotten this far, if the defendant wasn’t guilty.”
IMPROPER:
Prosecutorial Misconduct!


“I can look you straight in the eye and never bat my eye and tell you that I believe with all my heart, mind and soul, this defendant to be guilty of these offenses.”
IMPROPER:
Prosecutorial Misconduct!


“Mr. Defendant, are you saying that the prosecution witness is a liar?”
IMPROPER:
Prosecutorial Misconduct!


“Murders have stopped in this neighborhood since he has been in custody!”
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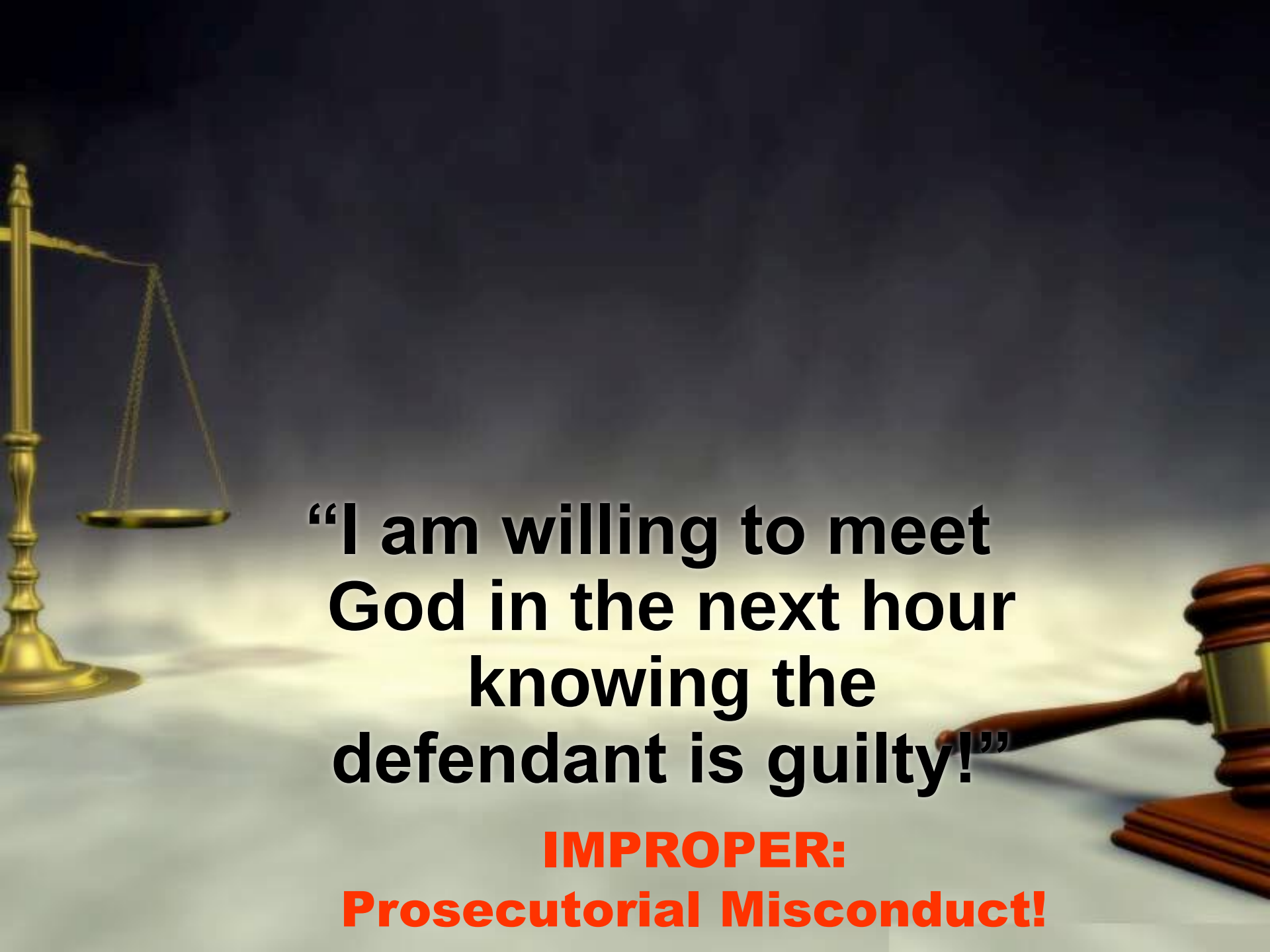
“I am willing to meet God in the next hour knowing the defendant is guilty!”
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Prosecutorial Misconduct!

Imagine the Victim's Suffering

- **It is proper <u>at the penalty phase</u> <u>(only)</u> to invite the jurors to put themselves in the place of the victims and imagine their suffering.**
- Proper to ask the jury to imagine **what was going through the mind of the murder victim** at the time of the crimes ***in penalty***.
- Calling attention to the **age, innocence and vulnerability** of the murder victims is **proper**.

People v. Gurule (2002) 28 C.4th 557, 658
People v. Slaughter (2002) 27 C.4th 1187, 1212
People v. Carpenter (1997) 15 C.4th 312, 412

- *People v. Medina* (1995) 11 C.4th 694, 778
- *People v. Wash* (1993) 6 C.4th 215, 263-264

Imagine the Victim's Suffering

- "To the extent that the argument was **inviting jurors to put themselves in the shoes of the victim**, we have found such an appeal **appropriate** *at the penalty phase* because there 'the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether the defendant should be put to death. . . In this process, one of the most significant considerations is the nature of the underlying crime. Hence **assessment of the offense from the victim's viewpoint would appear germane to the task of sentencing**."

- *People v. Lewis* (1990) 50 C.3d 262
  People v. Wrest (1992) 3 C.4th 1088, 1107 - 1108
- *People v. Wash* (1993) 6 C.4th 215, 263-264

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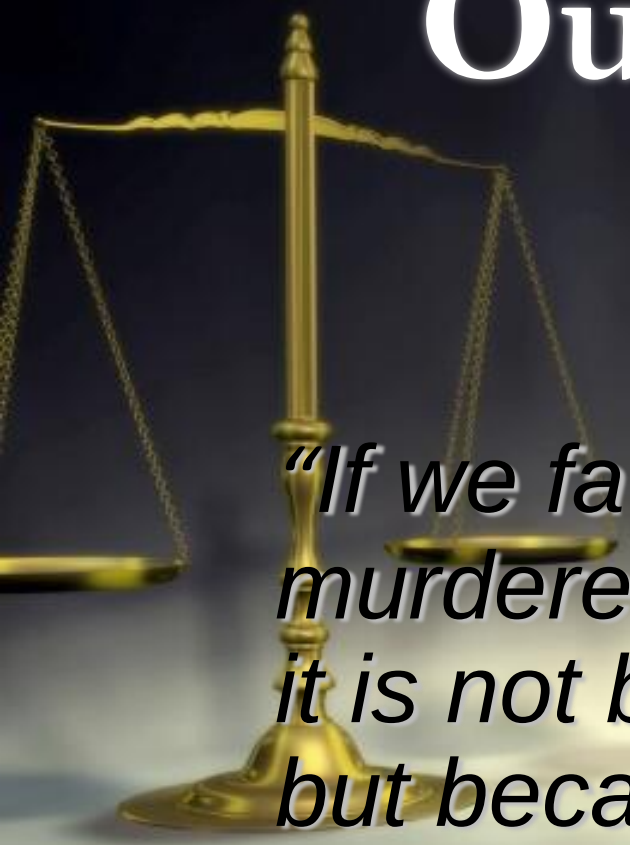
Our Moral Duty

"If we favor executing murderers,
it is not because we want to,
but because, however much we do not want to,
we consider ourselves obliged to."



Never Tire, Always Remember ... YOU are the Voice for Those Who Have Been Silenced by Violence

Thank you
for your hard work and
dedication to justice.

Angela C. Backers