

PROSECUTORIAL ERROR IN ARGUMENT

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This paper addresses examples of prosecutorial errors in opening and closing arguments. It does not, however, provide resources to overcome the hurdles of forfeiture or prejudice in the context of prosecutorial misconduct.¹ I intend this paper to be used as a checklist that helps you spot issues of misconduct in argument and find relevant California and federal cases on point, while providing you with some useful language or analysis from those cases.

Communications experts advise beginning a persuasive argument by articulating a value at stake with which the reader is sure to agree, thus priming the reader to continue agreeing with you to the end of your argument.² In 1935, Justice Sutherland articulated the values threatened by a prosecutor's oratorical misconduct as follows:

The United States Attorney . . . is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he

¹ Charles M. Sevilla provides a great explanation of issues of forfeiture and prejudice in the context of prosecutorial error/misconduct in his article, “Developing Claims of Prosecution Error at Trial, Appeal & Habeas” (Feb. 2011), available at <http://www.charlessevilla.com/_pdf/DAmisconduct10.pdf> (as of April 3, 2015).

² See, e.g., Public Works, “Reframe Government: Values, Systems and Civic-Thinking,” available at <<http://www.publicworks.org/wp-content/uploads/2014/02/Public-Works-Reframe-Government-Values-Systems-Civic-Thinking.pdf>> (as of April 3, 2015).

is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. United States* (1935) 295 U.S. 78, 88.) This paper presents a non-exhaustive overview of the types of “foul blows” struck by prosecutors.

I. Inflammatory Remarks:

A. Namecalling and Abuse

A prosecutor may not resort to epithets like “liar” or “perjurer.” (*People v. Ellis* (1966) 65 Cal.2d 529, 540; *People v. Johnson* (1981) 121 Cal.App.3d 94, 102-105 [reversing a conviction where prosecutor calls defense testimony an “outright lie”]; *People v. Conover* (1966) 243 Cal.App.2d 38, 46 [notes the fundamental rule prohibiting prosecutorial statement of disbelief of defense witnesses especially when the accusation carries with it the “perjury” label]; *Hein v. Sullivan* (9th Cir. 2010) 601 F.3d 897, 913-914 [amongst other improper arguments, prosecutor called defendants “a pack of wolves” and one was “a little punk”; found non-prejudicial because of curative rulings].)

B. Appeals to Law and Order:

A prosecutor’s appeals to law and order--designed to incite feelings of fear, anger, and retribution in jurors--have been found improper. (*People v. Adams* (1939) 14 Cal.2d 154, 161-162 [in child molestation case, prosecutor referred to another notorious similar case and implored jury to “render a verdict such as you will be proud of”]; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727 [appeal to jury to “take Mr. Mendoza off the streets”]; *People v. Talle* (1952) 111

Cal.App.2d 650, 673-678 [appeal to “avenge the cruel death of an innocent girl at the hands of . . . a beast”]; *People v. Hail* (1914) 25 Cal.App. 342, 357-358 [telling jurors they would be afraid to meet their fellow men if they acquitted, improperly had the effect of putting the jurors on trial]; *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1148 [misconduct to argue that convicting defendant “is gonna make you comfortable knowing there’s not convicted felons on the street with loaded handguns”]; *Commonwealth of Northern Mariana Islands v. Mendiola* (9th Cir. 1992) 976 F.2d 475, 486-487 [“[T]hat gun is still out there. If you say not guilty, he walks right out the door, right behind you.”]; *United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146, 1153 [improper references to the “war on drugs.”].)

Note, however, that the California Supreme Court has declined to find prosecutorial error where a prosecutor devoted “some remarks to a reasoned argument that the death penalty, where imposed in deserving cases, is a valid form of community retribution or vengeance.” (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1178.)

C. Insinuating Threats and Violence Against Witnesses:

Insinuating that the defendant killed, threatened, or bribed potential witnesses can be found improper because such insinuation invites a jury to speculate as to a witness’s poor testimony, or their failure to testify, and suggests that the prosecutor’s insinuation is based on confidential information that was not introduced in the trial evidence.

Courts in various jurisdictions have found such statements to constitute prosecutorial misconduct. (*United States v. Modica* (2d Cir. 1981) 663 F.2d 1173, 1179-1180 [condemning a prosecutor’s characterization of government witnesses as “scared” to explain their evasive and inconsistent testimony]; *United States v. Rios* (10th Cir. 1979) 611 F.2d 1335, 1342-1343 [“[T]here was no evidence linking the defendant with any threat to the [prosecution’s witness]. Such argument has been held so prejudicial to a defendant that it requires a new trial.”]; *People v. Ashwal* (1976) 39 N.Y.2d 105, 110 [“the prosecutor’s remark definitely conveys the impression that [the potential witness] was killed by those he had informed upon, one of whom was this defendant”].)

D. Appeals to Racial or Ethnic Prejudice:

It is improper to use racial or ethnic epithets, or to otherwise appeal to racial or ethnic prejudice, in argument. (*Kelly v. Stone* (9th Cir. 1975) 514 F.2d 18, 19 [finding the prosecutor’s argument that “maybe the next time it won’t be a little black girl from the other side of the tracks; maybe it will be somebody that you know” constituted a “highly inflammatory and wholly impermissible appeal to racial prejudice.”].)

Similarly, injection of a defendant’s ethnicity into a trial as evidence of criminal behavior is self-evidently improper and prejudicial for reasons that need no elaboration. (*People v. Simon* (1927) 80 Cal.App. 675, 677-686 [reversing where the prosecutor argued “there has been so many fires where the Jew lived in the house in order to obtain the money” and providing that “it is the duty of this

court not to allow the fountains of justice to be poisoned by what, in the instant case, savors so strong of race prejudice.”]; *United States v. Cabrera* (9th Cir. 2000) 222 F.3d 590, 596 [reversal for improper reference to “Cuban drug dealers” that had the “cumulative effect of putting the city of Los Vegas’s Cuban community on trial” rather than sticking to the facts of the defendants’ drug offenses].)

E. Appeals to Religious Preference or Prejudice:

A prosecutor’s appeals to religious prejudice are considered inflammatory and impermissible. (*Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 975 [prosecutor relied upon “clearly and concededly objectionable arguments for the stated purpose of showing that *all* Sikh persons (and thus [defendant] by extension) are irresistibly predisposed to violence when a family member has been dishonored”]; but see *People v. Lopez* (2008) 42 Cal.4th 960, 967 [in the trial of a priest for committing a lewd act on a child, the prosecutor’s comment that Catholic priests were human and “commit horrendous crimes” was not improper after defense counsel suggested that because defendant was a priest, he must have been telling the truth].)

Asking a jury to consider biblical teachings when deliberating is patent misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 836.) Biblical references made by attorneys in argument to the jury are improper if they would tend to convince the jury that their verdict should be based upon legal or other principles apart from what is stated in the trial court’s instructions. (*People v. Letner and*

Tobin (2010) 50 Cal.4th 99, 201, citing *People v. Wash* (1993) 6 Cal.4th 215, 261 [“[t]he primary vice in referring to the Bible and other religious authority is that such argument may ‘diminish the jury’s sense of responsibility for its verdict and . . . imply that another, higher law should be applied in capital cases, displacing the law in the court’s instructions.’ [Citations.]”]; *Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 780 [remanding with instructions to grant habeas petition where a prosecutor’s argument that execution of the defendant was sanctioned by God denied the defendant a fair penalty phase trial]; but see *People v. Slaughter* (2002) 27 Cal.4th 1187, 1211 [prosecutor’s extensive reference to biblical authority to justify capital sentence was improper but harmless because the prosecutor also focused on applicable law].)

Nevertheless, although a prosecutor “may not cite the Bible or religion as a basis to impose the death penalty,” courts have “suggested it is not impermissible to argue, for the benefit of religious jurors who might fear otherwise, that application of the death penalty according to secular law does not *contravene* biblical doctrine [citations], or that the Bible shows society’s historical acceptance of capital punishment [citation].” (*Letner and Tobin, supra*, 50 Cal.4th at pp. 201-203, citing *People v. Zambrano, supra*, 41 Cal.4th at p. 1169.)

F. Appeals to Patriotism:

Blatant appeals to patriotism have been found “wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice.” (*Viereck v. United States* (1943) 318 U.S. 236,

247-248, fn. 3 [prosecutor argued: “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.”]; but see *United States v. Licht* (2d Cir. 1946) 158 F.2d 458, 460-461 [“incidental references to the war, just as to other facts of contemporary history, cannot be improper of themselves alone when not intended as inflammatory and having pertinency to the facts as developed in the record.”].)

G. Appeals to Wealth and Class Bias:

Prosecutorial misconduct has been found where the prosecutor suggested that the defendant could afford to buy justice in court through the use of expensive exhibits and multiple defense attorneys. (*People v. Talle, supra*, 111 Cal.App.2d at pp. 674, 678 [prosecutor “implied that if a verdict less than murder were brought in that would demonstrate that a guilty rich man could not be convicted; the court opined that “[a] guilty man, even a wealthy guilty man, is as much entitled to a fair trial as an innocent one”]; *Sizemore v. Fletcher* (6th Cir. 1990) 921 F.2d 667, 671-672.) Appeals to class prejudice are not tolerated in the courtroom. (*Sizemore v. Fletcher, supra*, 921 F.2d at pp. 671-672, citing *Goff v. Commonwealth* (Ky. 1931) 241 Ky. 428; *United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 239-240; *United States v. Stahl* (2d Cir. 1980) 616 F.2d 30, 32-33.)

H. Appeals to Jurors as Parents:

It is improper for a prosecutor to attempt to influence jurors by appealing to them as parents of young children who could fall prey to the vices of the defendant. (*Piesik v. State* (Alaska 1977) 572 P.2d 94, 95 fn. 4 [“[I]s this the kind of man you want out on the streets with your 9 year old, 10 year old, your child, your neighbor’s children?”]; *People v. Reyes* (2d Dep’t 1978) 64 A.D.2d 657 [prosecutor argued that, as parents of children, they sometimes “find out that their own children use this crap, this junk, this heroin”].)

I. Appeals to Jurors as Individuals:

“The practice of addressing individual jurors by name during the argument should be condemned rather than approved.” (*People v. Wein* (1958) 50 Cal.2d 383, 395-396.)

Similarly, counsel should not quote individual juror statements from voir dire in their argument to the entire jury. (*People v. Riggs* (2008) 44 Cal.4th 248, 324-326 [improper to use jury statements on questionnaire in final argument of death penalty phase]; *People v. Freeman* (1994) 8 Cal.4th 450, 517.)

J. Asking Jurors to See Themselves as Victims:

It is improper for a prosecutor to tell the jurors to consider themselves victims of the defendant. (*People v. Mendoza* (2007) 42 Cal.4th 686, 706 [prosecutor argued that the jurors were themselves victims of defendant because they had to “make a decision as to whether or not somebody lives or dies”].)

In *Stansbury v. California* (1993) 4 Cal.4th 1017, 1057, overruled on other grounds by 511 U.S. 318, the prosecutor told the jury, “Think what she must have

been thinking in her last moments of consciousness during the assault. [¶] Think of how she might have begged or pleaded or cried. All of those falling on deaf ears, deaf ears for one purpose and one purpose only, the pleasure of the perpetrator.” The Court found that “an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of a trial. . . .”

(*Ibid*; italics removed from original.)

Other cases in which the court found improper a prosecutor’s request to have the jury view the case from the victim’s perspective include: *People v. Leonard* (2007) 40 Cal.4th 1370, 1407 (“The prosecutor also asked the jurors to imagine the thoughts of the victims in their last seconds of life. We agree with defendant that this was improper”); *People v. Mendoza* (2007) 42 Cal.4th 686, 704; *People v. Kipp* (2001) 26 Cal.4th 1100, 1130 [“[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt”]; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1192-1200 [reversed where the prosecutor asked the jurors to put themselves in the victim’s position and imagine what the victim experienced and argued about the impact of the crime on the victim’s family, judge gave no admonition]; *United States v. Copple* (3d Cir. 1994) 24 F.3d 535, 545-46; *Sager v. Maass* (Ore. 1995) 907 F.Supp.1412, 1420; *Miller-El v. State* (Tex. Crim. App. 1990) 782 S.W.2d 892, 895.

K. General Appeals to Sympathy or Passions:

“It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial. [Citations.] We recognize

that the prosecutor ‘may vigorously argue his case and is not limited to “Chesterfieldian politeness” [citations], but the bounds of vigorous argument do not permit appeals to sympathy or passion such as that presented here.’ (*People v. Fields* (1983) 35 Cal.3d 329, 362-363, fn. omitted.)

III. Violating Rights:

A. Defendant’s Demeanor:

In criminal trials, prosecutorial references to a nontestifying defendant’s demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness; (2) The prosecutorial comment infringes on the defendant’s right not to testify; and (3) Consideration of the defendant’s behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character. (*People v. Heishman* (1988) 45 Cal.3d 147, 197.)

The *Heishman* court concluded, however, that the prosecutor’s references to the defendant’s facial demeanor were not improper because they were made during the penalty phase, “in which defendant had placed his own character in issue as a mitigating factor. Under those circumstances it was proper for the jury to draw inferences on that issue from their observations of defendant in the courtroom and therefore proper for the prosecutor to base a closing argument on such observations.” (*Ibid.*)

In *People v. Garcia* (1984) 160 Cal.App.3d 82, the court found improper the prosecutor’s comment during closing argument that, when the victims testified

about their horrendous experiences, the defendant, who did not testify, snickered and jeered and laughed. (*Id.* at pp. 87, 93.) The *Garcia* court held the prosecutor's statement improperly invited the jury to speculate that the defendant's conduct demonstrated he would, and had, committed a crime. (*Id.* at p. 93.)

Both *Heishman* and *Garcia* concerned conduct by a defendant who did not testify. The court may distinguish these cases when the defendant does testify.

Federal cases that found a prosecutor's comments regarding the defendant's demeanor improper include: *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 979-982 (prosecutor asked jury to note the defendant's laughter in court when his pre-trial statements were played); *United States v. Pearson* (11th Cir. 1984) 746 F.2d 787, 796 (prosecutor stated defendant's leg movement during trial demonstrated his nervousness and fear); *United States v. Carroll* (4th Cir. 1982) 678 F.2d 1208, 1210 (prosecutor's reference to the defendant's courtroom behavior constituted constitutional error).

B. Statements About Why a Witness Did Not Testify:

In *People v. Gaines* (1997) 54 Cal.App.4th 821, the appellate court concluded that it was misconduct when a prosecutor made statements about why a witness did not testify. The court held that “[a]lthough ‘a prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story’ [citation], the comments here were not so limited.” (*Id.* at p. 825.) There, the prosecutor argued that the missing witness was going to testify contrary to what the defendant had testified, the defense had

somehow managed to get the witness “ ‘out of here,’ ” and the People had attempted to get the witness on the stand after it was clear that the defense was not going to call the witness to the stand. (*Ibid.*) The court reasoned that “to say only that the prosecutor got ahead of his evidence is far too benign. The prosecutor was in plain effect presenting a condensed version of what he was telling the jury would have been [the witness’] testimony. When this tactic is achieved in the guise of closing argument, the defendant is denied Sixth Amendment rights to confrontation and cross-examination.” (*Ibid.*)

Prosecutors may, however, “[c]omment on the failure to call a logical witness.” (*People v. Bell* (1989) 49 Cal.3d 502, 539; *People v. Grant* (1968) 268 Cal.App.2d 470, 475.)

C. Arguing What Non-Witnesses Would Have Testified:

Telling or implying to a jury what the testimony of a non-witness would have showed denies a defendant his Sixth Amendment right to cross-examine. (*People v. Hall* (2000) 82 Cal.App.4th 813, 817 [“[T]he prosecutor went too far when he told the jury the absent witness’s testimony would have been repetitive. The effect of this argument was to tell the jury that the witness, if called, would have testified exactly as Officer Williams did, in a manner favorable to the prosecution.”]; *People v. Gaines, supra*, 54 Cal.App.4th at p. 822 [“we hold that a prosecutor commits misconduct when he purports to tell the jury why a defense witness did not testify and what the testimony of that witness would have been”].)

D. Commenting on Defendant’s Silence or Failure to Testify:

Griffin v. California (1965) 380 U.S. 609 established that the Fifth Amendment of the United States Constitution forbids “comment by the prosecution on the accused’s silence.” (*Id.* at p. 615.)

Griffin holds that “error is committed whenever the prosecutor or the court comments upon defendant’s failure to testify.” (*People v. Vargas* (1973) 9 Cal.3d 470, 475.) Under *Griffin*, “it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf.” (*People v. Hughes* (2002) 27 Cal.4th 287, 371; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1339.)³ The California Supreme Court has also suggested “that it is error for the prosecution to refer to the absence of evidence that only the defendant’s testimony could provide. [Citation.] But although ‘ “ *Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand,”’ the prohibition ‘ “does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses.”’ [Citation.]” (*People v. Hughes, supra*, 27 Cal.4th at p. 372.)

In both *Hughes* and *Bradford*, the court found no *Griffin* error. In both cases, however, the high court relied on circumstances that may be distinguished

³ The foregoing two decisions illustrate the point that *Griffin* applies both to direct and indirect prosecutorial comments on a defendant’s failure to testify on his or her own behalf. (*People v. Mincey* (1992) 2 Cal.4th 408, 446.)

from the facts of your case. In *People v. Hughes, supra*, 27 Cal.4th 287, there were defense expert witnesses who testified on certain matters the prosecutor raised in closing argument (*id.* at p. 374), so any testimony by the defendant would not have been the sole focus of the prosecutor’s remarks. Regarding other topics the prosecutor in *Hughes* addressed, “Under the defense theory of the case, defendant was in an unconscious state during the killing, and hence could not be expected to have provided answers to the prosecutor’s questions, even had he taken the witness stand.” (*Id.* at p. 373.) In *People v. Bradford, supra*, 15 Cal.4th 1229, “the lack of evidence . . . might have been presented in the form of physical evidence or testimony other than that of defendant.” (*Id.* at p. 1340, italics omitted.)

Courts have, however, permitted prosecutors to argue that a defendant has presented no evidence to counter the prosecution’s case. “A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence” (*ibid.*), and “comments by the prosecution during closing argument noting the absence of evidence contradicting what was produced by the prosecution . . . and the failure of the defense to introduce material evidence . . . cannot fairly be interpreted as referring to defendant’s failure to testify.” (*Id.* at p. 139.)

Other cases in which *Griffin* error was found include: *In re Rodriguez* (1981) 119 Cal.App.3d 457, 460-461 (the prosecutor argued, “[T]he law isn’t that you

have to make up a defense for him. You are stuck with the evidence you have here. . . There is no evidence on the other side. It's as simple as that."); *People v. Williams* (1971) 22 Cal.App.3d 34, 43 ("no one has chosen to tell us what the motive was"; *People v. Crawford* (1967) 253 Cal.App.2d 524, 535 ("The only thing we have heard from the defendant is this roundabout story from . . . relatives.")).

E. Commenting on Lack of Defense Evidence That the Prosecutor Had Successfully Excluded Outside the Jury's Presence:

When a prosecutor has successfully excluded evidence outside the presence of the jury, she may not later comment on the lack of that defense evidence. These types of comments were found to be misconduct in *People v. Varona* (1983) 143 Cal.App.3d 566; *People v. Castain* (1981) 122 Cal.App.3d 138; *People v. Hernandez* (1977) 70 Cal.App.3d 271, 279-280.

F. Misstating Reasonable Doubt Standard:

It is improper for the prosecutor to misstate the law generally and particularly to attempt to absolve the prosecution from its obligation to overcome reasonable doubt on all elements. (*People v. Centeno* (2014) 60 Cal.4th 659, 666-673 [prosecutor used a misleading visual aid depicting the State of California to explain the "beyond a reasonable doubt" standard, which effectively suggested that the jury could find defendant guilty based on a "reasonable" account of the evidence].) To establish such error, bad faith on the prosecutor's part is not required. (*Ibid.*)

In *People v. Hill*, *supra*, 17 Cal.4th 800, the court found misconduct when the prosecutor argued, “[t]here must be some evidence from which there is a reason for a doubt.” (*Id.* at p. 831, italics omitted.) The court stated the prosecutor “committed 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.” (*Ibid.*) The court also surmised that it was possible the prosecutor “was claiming there must be some affirmative evidence demonstrating a reasonable doubt.” (*Ibid.*)

A prosecutor also may not argue “that you as jurors do your duty and well consider this matter and find these defendants guilty” without tying such a duty to the necessity of evidentiary proof. (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1224-1225.)

Other improper prosecution arguments trivializing reasonable doubt can be found in: *People v. Medina* (1995) 11 Cal.4th 694, 745 (in voir dire and without objection, prosecutor used a chart with two lines, one representing 100% certainty and one underneath representing proof beyond a reasonable doubt; the court noted problems with this – “perils undoubtedly would attend a prosecutor's attempt to reduce the concept of guilt beyond a reasonable doubt to a mere line on a graph or chart” but held no “prejudicial misconduct” because later instructions would have cleared it up); *People v. Otero* (2012) 210 Cal.App.4th 865, 872 (DA used rough and partially incorrect map of California to explain reasonable doubt, with the statement: “Even with incomplete and incorrect information, no reasonable doubt

that this is California.”); *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268 (DA pulled two pieces out of an eight piece puzzle and argued that because the picture of the Statue of Liberty was discernible, that was proof beyond a reasonable doubt); *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1005 (error to argue that if the jury couldn’t convict based on fingerprint evidence, the police were wasting their time, and unless the defendant explained the print’s presence, “you’ll know he's guilty”); *People v. Johnson* (2004) 119 Cal.App.4th 976, 980-985 (the court “equated proof beyond a reasonable doubt to everyday decisionmaking in a juror’s life” and the prosecutor, taking his cues from the court’s reasonable doubt instructions, did the same in his closing argument; held reversible per se); *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35 (“the jails and prisons are full, ladies and gentlemen. [¶] It’s a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you’re driving. If you have reasonable doubt that you’re going to get in a car accident, you don’t change lanes.”).

G. Burdening Exercise of Other Rights:

A prosecutor may not comment about a defendant’s exercise of his Fourth Amendment rights. (*People v. Keener* (1983) 148 Cal.App.3d 73, 78-79; *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 725; *United States v. Prescott* (9th Cir. 1978) 581 F.2d 1343, 1352 (“Yet use by the prosecutor of the refusal of entry, like use of the silence by the prosecutor, can have but one objective to induce the

jury to infer guilt”); but see *People v. Redmond* (1981) 29 Cal.3d 904, 909 [defendant’s caution to his mother not to let police into her garage was not an assertion of *his* rights].)

Commenting on a defendant’s assertions of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, or his right to counsel during interrogation, is considered constitutional error under *Doyle v. Ohio* (1976) 426 U.S. 610. (*United States v. Caruto* (9th Cir. 2008) 532 F.3d 822.)

IV. Disparagement of Defense Counsel:

Generally, “[a] prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.” (*People v. Hill, supra*, 17 Cal.4th at p. 832.)

If, however, the prosecutor’s statements were a response to a statement made by defense counsel, courts “view the prosecutor’s comment in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter.” (*People v. Frye* (1998) 18 Cal.4th 894, 978; but see *People v. Pic’l* (1981) 114 Cal.App.3d 824, 871 [“Two wrongs do not make a right. Thus, defense counsel’s misconduct does not justify a tit-for-tat answering misconduct by the prosecutor. We consider this to be the teaching of *People v. Perry* (1972) 7 Cal.3d 756, 790”]; *Hein v. Sullivan, supra*, 601 F.3d at pp. 913-914 [amongst other improper arguments, prosecutor stated defense counsel worked “cheap lawyer tricks,” “did some very dirty things” and “was dishonest”; found non-prejudicial because of curative rulings].).

A. Disparaging Defense Bar:

Misconduct has been found when a prosecutor insinuated that “law enforcement has an obligation to ascertain ‘the true facts surrounding the commission of the crime’ [citation], which defense counsel do not.” (*People v. Hawthorne* (1992) 4 Cal.4th 43, 59-60; *People v. Bell, supra*, 49 Cal.3d at p. 538 [misconduct when prosecutor stated: “‘It’s a very common thing to expect the defense to focus on areas which tend to confuse. That is—and that’s all right, because that’s [defense counsel’s] job. If you’re confused and you’re sidetracked, then you won’t be able to bring in a verdict.’ He also said: ‘It’s his job to throw sand in your eyes, and he does a good job of it, but bear in mind at all times, and consider what [defense counsel has] said, that it’s his job to get his man off. He wants to confuse you.’”].)

In *People v. Cunningham* (2001) 25 Cal.4th 926, 1002, however, the prosecutor had argued that the defense attorneys’ job was “to create straw men. Their job is to put up smoke, red herrings. And they have done a heck of a good job. And my job is to straighten that out and show you where the truth lies.” (*Ibid.*) The court determined that the prosecutor’s remarks were “not so extreme that an admonition would not have cured the harm. [Citation.]” (*Ibid.*)

B. Implying Defense Fabricated Evidence or Otherwise Attacking Counsel’s Ethics and Integrity:

Courts have found prejudicial error where a prosecutor accused defendant’s attorney of fabricating evidence. (*People v. Bain* (1971) 5 Cal.3d 839, 845-848;

People v. Herring (1993) 20 Cal.App.4th 1066, 1075-1077 [reversible error to argue defense counsel fabricated defense and suborned perjury].) It is “improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case.” (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.) Statements where the prosecutor “characterized defense counsel as ‘liars’ or accused counsel of lying to the jury” are impermissible. (*People v. Young* (2005) 34 Cal.4th 1149, 1193.)

But note that a “prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence, . . . [and] to argue on the basis of inference from the evidence that a defense is fabricated” (*People v. Tafuya* (2007) 42 Cal.4th 147, 182.)

C. Insinuating Defense Counsel’s Belief in Client’s Guilt:

It is “improper for the prosecutor to argue to the jury that defense counsel does not believe in his client's [case].” (*People v. Thompson* (1988) 45 Cal.3d 86, 112; *United States v. Tutino* (2nd Cir. 1989) 883 F.2d 1125 [defense counsel knew his client was guilty; curative instruction given]; *United States v. Kirkland* (9th Cir. 1980) 637 F.2d 654 [defense counsel knew their clients were “guilty as sin;” curative instruction given]; *Homan v. United States* (8th Cir. 1960) 279 F.2d 767 [argument that defense counsel knew defendant was guilty deemed improper and curative instruction given].)

D. Sandbagging:

Sandbagging occurs when a prosecutor argues new theories, changes theories

during trial, or in rebuttal argument, makes new arguments not made previously, thus affording defense counsel no opportunity to contest or clarify what the prosecutor said.

In *People v. Carter* (1957) 48 Cal.2d 737, the prosecution introduced evidence on rebuttal that a red cap, allegedly worn by the defendant on the day of the murder, was found with the murder weapon and the victim's wallet, taking the defense by surprise and denying the defendant an opportunity to introduce contrary evidence. There is unfairness in allowing the prosecution to "unduly magnify[] certain evidence by dramatically introducing it late in the trial" and the need to "avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence." (*Id.* at p. 753.) "[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." (*Ibid.*)

A type of sandbagging can also occur when a prosecutor uses inconsistent or irreconcilable theories to convict two defendants for the same crime. (*In re Sakarias* (2005) 35 Cal.4th 140, 159-160 ["the People's use of irreconcilable theories of guilt or culpability [as between two defendants on the basis of culpable acts for which only one could be responsible], unjustified by a good faith

justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for—and, where prejudicial, actually achieves—a false conviction or increased punishment on a false factual basis for one of the accused.”].)

E. Arguing Defense Experts Were Paid and Thus Lied for Their

Money:

Misconduct was found where a prosecutor commented that defense experts may have “shaded their testimony” in the hope of future employment. (*State v. Smith* (N.J. 2001) 167 N.J. 158, 188.) It was also found improper when a prosecutor tried to impeach a defense expert by saying that he testified in three other Sexually Violent Predator cases for the defense; the jury had no basis to evaluate that information. (*People v. Buffington* (2007) 152 Cal.App.4th 446, 455-456.)

Nevertheless, a prosecutor is free to remind jurors that a paid witness may accordingly be biased and is allowed to argue, from the evidence, that a witness’s testimony is unbelievable, unsound, or even a patent lie. (*People v. Parson* (2008) 44 Cal.4th 332, 360.)

F. Arguing Defense Counsel Should Have Revealed Alibi Before Trial:

In *People v. Lindsey* (1988) 205 Cal.App.3d 112, the court found prejudicial error where the prosecutor argued the *defense attorney* should have revealed an alibi known to her before trial. The prosecutor stated the defendant had gone “through a Preliminary Examination when the alibi was there all the time and this

man was in jail and this woman [defense counsel] allowed him to sit in jail without coming to the District Attorney's Office, without coming to the police department" with the alibi evidence. (*Id.* at 116.)

V. Expressing Personal Opinions and Beliefs:

A prosecutor has no business using argument or cross-examination as a basis to testify before the jury. (*People v. Hill, supra*, 17 Cal.4th at pp. 827-828.)

A. Bolstering Credibility:

A prosecutor may not vouch for the credibility of prosecution witnesses. (*People v. Padilla* (1995) 11 Cal. 4th 891, 945 [suggesting as improper an argument that an officer would never have "risked his whole career of 17 years" by testifying falsely]; *People v. Anderson* (1990) 52 Cal.3d 453, 479 [prosecutor's statement of doubt that "old, experienced officers" would jeopardize their reputation by lying on the witness stand found improper]; *United States v. Brooks* (9th Cir. 2007) 508 F.3d 1205; *United States v. Weatherspoon, supra*, 410 F.3d 1142; *United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999) [improper "bolstering occurs when the prosecutor implies that the witness's testimony is corroborated by evidence known to the government but not known to the jury."]; *United States v. Martinez* (6th Cir. 1992) 981 F.2d 867.)

In *People v. Hawthorne* (1992) 4 Cal.4th 43, 59, the Court stated that the following comments in final argument were improper: "Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the

ascertainment of the true facts surrounding the commission of the crime,” and
““The State has the obligation to present the evidence. Defense counsel need
present nothing.””

B. Personal Vouching:

In *People v. Huggins* (2006) 38 Cal.4th 175, 206-207, the court provided: “it
is misconduct for prosecutors to vouch for the strength of their cases by invoking
their personal prestige, reputation, or depth of experience, or the prestige or
reputation of their office, in support of it. [Citations] Specifically, a prosecutor's
reference to his or her own experience, comparing a defendant's case negatively to
others the prosecutor knows about or has tried, is improper. [Citation] Nor may
prosecutors offer their personal opinions when they are based solely on their
experience or on other facts outside the record.”

Prosecutorial assurances based on the record, however, “regarding the
apparent honesty or reliability of prosecution witnesses, cannot be characterized as
improper ‘vouching,’ which usually involves an attempt to bolster a witness by
reference to facts *outside* the record. (*People v. Medina* (1995) 11 Cal.4th 694,
757, citing *People v. Anderson* (1990) 52 Cal.3d 453, 479; see *Hein v. Sullivan*,
supra, 601 F.3d at pp. 913-914 [the prosecutor vouched for prosecution witness by
stating the witness was “very powerful and credible” and “painfully honest”; the
prosecutor’s statements were found non-prejudicial because of curative rulings.])

**C. Implying that a Defendant Must be Guilty, or He Wouldn’t Have
Been Indicted:**

In *United States v. Cummings* (9th Cir. 1972) 468 F.2d 274, a prosecutor made an argument that the evolution of the charges stemmed from an agent going to a prosecutor who, if he felt there was a law violation would take the case to the grand jury, and the latter would find the charges worthy of being brought. The court found the prosecutor's argument improper and prejudicial. (*Id.* at p. 278.)

Other cases in which a court found improper a prosecutor's implication that the whole governmental establishment had already determined defendant to be guilty include: (*Hall v. United States* (5th Cir. 1969) 419 F.2d 582, 587; and *Cargle v. Mullin* (10 Cir. 2003) 317 F.3d 1196, 1218 [“It is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted.” [Citations]]”). In *Cheney v. Washington* (9th Cir. 2010) 614 F.3d 987, the state and federal court found similar arguments improper but harmless when reviewed under the standard for ineffective assistance of counsel. (*Id.* at p. 992 [“There are many cases that we find unfounded and we don't go ahead with those. And it is only on true cases that we are required to recommend prosecution.”].)

D. Extra-Record Verification:

“When a lawyer asserts that something not in the record is true, he is, in effect, testifying. He is telling the jury: ‘Look, I know a lot more about this case than you, so believe me when I tell you X is a fact.’ This is definitely improper.” (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1321.) It violates the “advocate-witness” rule. (*United States v. Prantil* (9th Cir. 1985) 756 F.2d 759, 764.) In

Prantil, the prosecutor interjected his own participation in dealing with witnesses into cross-examination so as to communicate to the jury the testimony was credible. As a result, the questions communicated “assertion[s] of personal knowledge of a testimonial rather than an argumentative character.” (*Id.* at p. 768.)

E. Impeaching a Witness Without Evidence:

It is improper for an attorney to interview someone alone without a tape recorder, thus putting herself in the “intolerable position of being unable to impeach the witness without facing potential recusal.” (*Maniscalco v. Superior Court* (1991) 234 Cal.App.3d 846, 850, fn. 9; *People v. Guerrero* (1975) 47 Cal.App.3d 441, 443-448.)

VI. False and Misleading Arguments

A. Availability of Unused Evidence:

A prosecutor may not suggest that additional inculpatory evidence exists that was not presented at trial because of legal rules, trial tactics, administrative convenience, or defense objections. (*Berger v. United States, supra*, 295 U.S. at p. 87 [“You know the rules of law. Well, it is the most complicated game in the world. I was examining *a woman that I knew knew Berger and could identify him*, she was standing right here looking at him, and I couldn’t say, ‘Isn’t that the man?’ Now, imagine that! But that is the rules of the game, and I have to play within those rules.”].)

B. Misstating the Record:

“For a prosecutor to misstate the evidence is prosecutorial misconduct. [Citations.]” (*People v. Davis* (2005) 36 Cal.4th 510, 550; *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968-973 [misconduct for prosecutor to ask jury to infer, and misleading court and defense counsel into believing, that government had evidence that defendant fabricated alibi in telephone calls with witnesses in weeks before trial, when in fact prosecutor had evidence contradicting his assertions].)

Nevertheless, “[p]rosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide.” [Citation.]” (*People v. Abel* (2012) 53 Cal.4th 891, 926.)

C. Reference to Other Crimes of Defendant:

Arguments of propensity to commit an act in non-sex and domestic violence cases are improper; they are designed to show propensity to commit the specific act alleged and inflame the jury. (*United States v. Brown* (9th Cir. 2003) 327 F.3d 867, 871-872.)

D. Going Beyond the Record:

“It is . . . misconduct for a prosecutor to make remarks in opening statements or closing arguments that refer to evidence determined to be inadmissible in a previous ruling of the trial court.” (*People v. Crew* (2003) 31 Cal.4th 822, 839; accord, *People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071.)

“[W]hile prosecutors are not required to describe sinners as saints, they are

required to establish the state of sin by admissible evidence unaided by aspersions that rest on inadmissible evidence, hunch, or spite.” (*United States v. Schindler* (9th Cir. 1980) 614 F.2d 227, 228.) See ABA Standards, 3-5.9: “The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.” (See also *United States v. Reyes* (9th Cir. 2009) 577 F.3d 1069, 1077-1078 [prosecutor asserted as fact a proposition that he knew was contradicted by evidence not presented to the jury]; *United States v. Blueford, supra*, 312 F.3d at p. 973 [“We conclude that the prosecutor at trial improperly asked the jury to infer that the pattern of calls in late December demonstrated that Blueford was using the calls to concoct an alibi with prospective witnesses.”].)

E. No Inventing Evidence:

In *Miller v. Pate* (1966) 386 U.S. 1, the prosecutor argued that a pair of shorts allegedly worn by the defendant were soaked in blood. The prosecutor knew the stains on the shorts were paint. The Supreme Court vacated the conviction.

F. Arguing Prosecution Witnesses Will be Prosecuted After Trial When

There is No Such Plan:

A court found misconduct when a prosecutor told the jury that two snitch witnesses would be prosecuted after the trial, when he knew by closing argument that he had decided not to prosecute them. (*People v. Kasim* (1997) 56

Cal.App.4th 1360, 1387.)

G. Misstating the Law:

The prosecutor may not misstate the law. (*People v. Mendoza* (2007) 42 Cal.4th 686, 703 [misstating the law on manslaughter “reasonable person” standard]; *People v. Bell, supra*, 49 Cal.3d at p. 538; *People v. Bandhauer* (1967) 66 Cal.2d 524, 529; *People v. Najera* (2006) 138 Cal.App.4th 212 [describing voluntary manslaughter as a legal fiction was misleading; misstating that sudden quarrel heat of passion was second degree murder and misstating that it only applied if the defendant’s conduct was reasonable; all error but harmless and forfeited]; *Deck v. Jenkins* (9th Cir. 2014) 768 F.3d 1015, 1022-1031; *Sechrest v. Ignacio* (9th Cir. 2008) 549 F.3d 789 [DA’s false inflammatory statements during voir dire and closing argument, that the defendant would be paroled even with an LWOP sentence, denied a fair trial]; *United States v. Bohle* (7th Cir. 1971) 445 F.2d 54, 70 [misstating law on presumption of sanity in a jury trial].)

VII. But Remember, Wide Latitude is Given to Prosecutors in Argument:

A “prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) ““““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. [Citations.] . . . ’ . . . ‘A prosecutor may “vigorously argue his case and is not limited to ‘Chesterfieldian politeness””

[citation], and he may “use appropriate epithets””””” (*People v. Hill, supra*, 17 Cal.4th at p. 819.) Thus, a prosecutor may give his or her opinion on the state of the evidence and focus on deficiencies in defense counsel’s tactics and factual account. (*People v. Redd* (2010) 48 Cal.4th 691, 735; *People v. Taylor* (2001) 26 Cal.4th 1155, 1166-1167 [finding no misconduct when prosecutor made comments referring to defense “tricks” or “moves” to demonstrate a witness’ confusion or credibility]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [comments that “any experienced defense attorney can twist a little, poke a little, try to draw some speculation”” was not a personal attack on defense attorney’s credibility and was not misconduct]; *People v. Wharton* (1991) 53 Cal.3d 522, 567; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 190 [no misconduct where prosecutor told jurors that defense counsel was “trying to get you confused about what some of the issues are”” and was “trying to sidetrack you””].)

CONCLUSION

As the foregoing examples should demonstrate, the types of misconduct that can be found in a prosecutor’s oratory are varied, often interrelated, and can do much to color a juror’s perceptions against the defendant. Here’s hoping that the “foul blows” struck in your case lead you and your client to victory on appeal.