PROSECUTORIAL MISCONDUCT BEFORE AND AFTER TRIAL

By: *Lori Quick*

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I. Introduction

Prosecutors have traditionally been held in high regard by jurors, which sometimes makes it easier for them to effectively circumvent the rules of evidence as well as notions of justice and fair play. (See *People v. Hill* (1998) 17 Cal.4th 800, 828; *People v. Bolton* (1979) 23 Cal.3d 208, 213.) It is important for appellate counsel to be able to identify and challenge prosecutorial misconduct occurring not only during trial, but also before.

II. Discovery and Exculpatory Evidence

A. Legal Authority

Penal Code section 1054.1 states that the prosecutor has a duty to disclose to the defense all of the following materials, if it is in the prosecutor's possession of if he or she knows it to be in the possession of investigating agencies:

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

(b) Statements of all defendants.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

(d) The existence of a felony conviction of any material witness whose

credibility is likely to be critical to the outcome of the trial.

(e) Any exculpatory evidence.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

(See *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1133, fn. 13.)

The requirement that the prosecutor disclose the name and address of any witness he or she intends to call at trial if the information is "in the possession of" the prosecutor, does not relieve the prosecutor of a duty to ascertain and disclose the known whereabouts of a witness if that information is readily available. It is a long-standing rule that the prosecutor may not deliberately refrain from obtaining the address of a witness. The words "in the possession of" in the statute are simply to clarify and confirm that the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense. (*People v. Panah* (2005) 35 Cal 4th 395, 460; *In re Littlefield* (1993) 5 Cal 4th 122, 135.)

B. Items Subject to the Prosecutor's Duty of Discovery

1. Names and Addresses of Witnesses

Under Penal Code section 1054.1, subdivision (a), the prosecution must disclose the names and addresses of persons whom it intends to call as witnesses at trial if that information is known or is reasonably accessible to the prosecution. (*Littlefield, supra,* 5 Cal.4th at pp. 135-136.) He or she may not deliberately fail to acquire a reasonably accessible address that is required to be disclosed, and the court may order the prosecutor to obtain the witness's address. (*Ibid.*) In the event that the prosecutor wishes to withhold an address of a witness because of safety concerns to the witness, potential loss or destruction of evidence, or compromise of other ongoing investigations, he or she may request the court's permission to make an in camera showing of good cause as to why disclosure should be denied, restricted, or delayed. (*Id.,* at p. 36.)

The prosecution's duty to provide names and addresses is not restricted to those of witnesses he or she intends to call in the case in chief. Although section 1054.1 does not specify that the prosecutor must also provide the information for rebuttal witnesses, the California Supreme Court has held that " . . . the only reasonable interpretation of the requirement that the prosecution disclose '[t]he names and addresses of persons the prosecutor intends to call as witnesses at trial' [(sec. 1054.1, subd. (a))] is that this section includes both

witnesses in the prosecution's case-in-chief and rebuttal witnesses that the prosecution intends to call." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375; accord, *People v. Gonzalez* (2006) 38 Cal.4th 932, 956.)

2. Statements

a. Defendants

Penal Code section 1054.1, subdivision (b) requires disclosure of statements made by "all defendants." This includes any statement to which the defendant has been a party, including all wiretapped conversations. (*People v. Jackson* (2005) 129 Cal.app.4th 129, 169-170.) The prosecution must disclose *all* statements of all defendants. (*Thompson v. Superior Court* (1997) 53 Cal.App.4th 480, 484, fn. 2.) However, notes concerning defendant interviews or interrogations that qualify as prosecution work product are not discoverable. (See Pen. Code, sec. 1054.6; *Thompson, ibid*.)

b. Codefendants

It is important for the defense to have access to the statements of codefendants because these statements may reveal important facts relating to the case, and may alert the defense to the necessity of ensuring that the statements will not be used at trial to incriminate the defendant. (See *People v. Aranda* (1965) 63 Cal.2d 518, 627-538, fn. 6.)

3. Real Evidence

"Real evidence" refers to physical objects used in evidence, as opposed to testimony. (See e.g., *People v. Sanchez* (2001) 26 Cal.4th 834, 838 [real evidence comprised of guns and bullet casings]; *Izazaga v. Superior Court, supra,* 54 Cal.3d at p. 364, fn. 1 [discussing trial court's order, which defined real evidence as tangible or physical evidence].) In cases involving child pornography, the prosecution must actually provide copies of the images to the defense. It is not sufficient to require the defense to view the materials at the prosecutor's office, as this would impact the defendant's right to the effective assistance of counsel and his right to a speedy trial. (*Westerfield v. Superior Court* (2002) 99 Cal.app.4th 994, 998.)

4. Felony Convictions

Penal Code section 1054.1, subdivision (d) requries the prosecutor to reveal the existence of a felony conviction of "any material witness whose credibility is likely to be critical to the outcome of the trial." (See also *People v. Tillis* (1998) 18 Cal.4th 284, 294; *Teal v. Superior Court* (2004) 117 Cal.app.4th 488, 490-491.) There is currently no case law defining what is meant by "critical to the outcome." The prosecutor is required to disclose these convictions even if he or she does not currently possess them if they are within his or her control or are are reasoanbly accessible to him or her. (*People v. Little* (1997) 59 Cal.App.4th 426, 431-432.)

The statute makes no mention of juvenile adjudications. Defendants clearly have the right to confront and cross-examine a witness with a prior juvenile record when use of the record could create a real possibility that the state's case would be seriously damaged. (*Davis v. Alaska* (1974) 415 U.S. 308, 318 [94 S.Ct. 1105, 39 L.Ed.2d 347].) Thus, such an adjudication could be used to show that a witness is biased in favor of the prosecution.

5. Exclupatory Evidence

This topic is covered below in the discussion of *Brady v. Maryland* (1963) 373 U.S. 83 [10 L. Ed. 2d 215, 83 S. Ct. 1194.]

6. Relevant Written or Recorded Statements

Penal Code section 1054.1, subdivision (b) applies only to witnesses. The prosecution is required to disclose *defendants*' statements *without limitation*. (*People v. Jackson* (2005) 129 Cal.App.4th 129, 169.) The prosecution cannot limit disclosure of a defendant's statements by arguing that they are not relevant. (*Ibid*.)

A defendant is entitled to discover Department of Corrections documents concerning the investigation of a crime he committed while in custody because the Department is part investigative agency and part third party. Thus, documents generated by the Department through its role as an investigative agency must be turned over to the defense, though documents not gathered in connection with the investigation would have to be requested using

third-party discovery methods such as a subpoena duces tecum. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305.) III. *Brady v. Maryland* (1963) 373 U.S. 83 [10 L. Ed. 2d 215, 83 S. Ct. 1194]

Pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 [10 L. Ed. 2d 215, 83 S. Ct. 1194], the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request, a general request, or none at all. (*People v. Maciel* (2013) 57 Cal.4th 482, 551*; In re Brown* (1998) 17 Cal.4th 873, 879.) The duty is with the prosecution, since "[a] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process . . ." (*Banks v. Dretke* (2004) 540 U.S. 668, 696.) The duty of disclosure applies to evidence held by the police or other government personnel even if the prosecutor is unaware of the existence of the evidence. (*Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-870; *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1475-1481.) Under the Fourteenth Amendment's due process clause, prosecutors must disclose evidence to a criminal defendant when it is " 'both favorable to the defendant and material on either guilt or punishment.' [Citations.] Evidence is 'favorable' if it hurts the prosecution or helps the defense. [Citation.] 'Evidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result … would have been different." ' " (*People v. Earp* (1999) 20 Cal.4th 826,

866; *accord, People v. Morrison* (2004) 34 Cal.4th 698, 741; see also *Brady, supra*, 373 U.S. at p. 87.) Thus, in order to successfully claim that evidence was withheld in violation of *Brady,* it must be shown that (1) the evidence was favorable to the defendant; (2) it was suppressed by the state; and (3) it was material. (*Strickler v. Greene* (1999) 527 U.S. 263, 282-282.)

A. What Must the Prosecutor Disclose?

1. What is "favorable" evidence?

Evidence is considered favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. (*United States v. Bagley* (1985) 473 U.S. 667, 676 [87 L.Ed.2d 481, 105 S.Ct. 3375]; *In re Sassounian* (1995) 9 Cal.4th 535, 544; *In re Pratt* (1999) 69 Cal.App.4th 1294, 1312.) Evidence probative of a testifying witness's credibility, including the potential for bias, is evidence favorable to the accused. (*Bagley*, *ibid.)* It may be favorable for *Brady* purposes even if it seems inculpatory at first blush as long as the defendant can use it to make a point helpful to his defense. (*U.S. v. Howell* (9th Cir. 2000) 231 F.3d 615, 625; *People v. Coddington* (2000) 23 Cal.4th 529, 589-590.) It does not mean evidence of innocence; rather all that is required is a showing of benefit to the defense. (*Gantt v. Roe* (9th Cir. 2004) 389 F.3d 908, 912.)

2. Suppression

"[I]nformation subject to disclosure by the prosecution [on discovery] [is] that 'readily available' to the prosecution and not accessible to the defense." (*In re Littlefield, supra,* 5 Cal. 4th at p. 135.) Consequently, "when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim." (*United States v. Brown* (5th Cir. 1980) 628 F.2d 471, 473; see also *United States v. Stuart* (8th Cir. 1998) 150 F.3d 935, 937 ["Evidence is not suppressed if the defendant has access to the evidence prior to trial by the exercise of reasonable diligence."]; *United States v. Slocum* (11th Cir. 1983) 708 F.2d 587, 599.) Thus, anything that the defense could not have obtained without doing so through the prosecution can be characterized as "suppressed" if it is not turned over. However, "evidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery." (*People v. Morrison* (2004) 34 Cal.4th 698, 715 [stating that the prosecution does not have the duty to conduct the defendant's investigation for him].) If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence.

(*Coe v. Bell* (6th Cir. 1998) 161 F.3d 320, 344; *U.S. v. Pandozzi* (1st Cir. 1989) 878 F.2d 1526, 1529–1530.) Accordingly, evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it " 'by the exercise of reasonable diligence.' " (*Morrison, ibid.*)

3. Materiality

The prosecution is only required to disclose evidence that is "crucial" or "material,", and which will be presented in the case-in-chief. Thus to prove a *Brady* violation, it must be shown that the omitted evidence was material either to guilt or to punishment. (*Brady, supra,* 373 U.S. at p. 87; *In re Alexander B.* (1990) 220 Cal.app.3d 1572, 1579.) Evidence is material if there is a reasonable probability its disclosure would have altered the trial result, and this materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. (*Strickler v. Greene, supra,* 527 U.S. 23; *Bagley, supra,* at pp. 682-683; *Brown, supra,* 17 Cal.4th at p. 887; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1108.) Evidence is material if it would have impeached a witness who supplied the only evidence linking the defendant to the crime, or if the likely impact on the witness's credibiltiy would have undermined a critical element of the prosecution's case. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1050.) On the other hand, if the testimony of the witness is corroborated by other testimony and evidence, the impeachment evidence is not "material." (*Ibid.*) Also, when newly discovered

evidence is merely "possibly useful to the defense but not likely to have changed the verdict," it is not material. (*U.S. v. Payne* (2d Cir. 1995) 63 F.3d 1200, 1210.)

Evidence that *is* considered material is perjured testimony that the prosecution knowingly used or failed to disclose unless the failure to disclose it would be harmless beyond a reasonable doubt. (See, e.g., *United States v. Agurs* (1976) 427 U.S. 97, 103-114 [no error in failure to disclose murder victim's prior record when defendant claimed self-defense but evidence of victim's multiple stab wounds and defendants' lack of injury convinced trial judge of defendant's guilt beyond a reasonable doubt]; *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1183-1184 [failure to disclose information during post-conviction appeal period about the credibility of a prosecution expert was not shown harmless beyond a reasonable doubt]; *People v. Ballard* (1991) 1 Cal.App.4th 752, 758-759 [failure to disclose information about informant was harmless beyond a reasonable doubt because prosecution's case was strong and informant's testimony was cumulative and offered in rebuttal].)

Whether the prosecution must disclose the results of polygraph testing that cast doubt on the credibility of a prosecution witness is an open question. The California Supreme Court in *People v. Price* (1991) 1 Cal.4th 324, 419-420, held that the prosecution did have such a duty. Unfortunately, in *Wood v. Bartholomew* (1995) 516 U.S. 1, the United States Supreme Court reversed

an order granting a habeas petition holding that since such evidence would not have been admissible at trial, it was not "material." Furthermore, the defendant has no constitutional right to the admission of polygraph results. (*United States v. Scheffer* (1998) 523 U.S. 303.)

In any event, materiality is determined by looking at the cumulative effect of the evidence suppressed, viewed collectively and not item by item. (*Kyles v. Whitley* (1995) 514 U.S. 419, 436-437; *Uribe, supra,* 162 Cal.App.4th at p. 1473.)

B. Does the Prosecutor Have to Disclose Rebuttal Evidence?

The prosecutor need only disclose evidence he or she intends to introduce in the case-in-chief. There is no requirement to turn over rebuttal evidence. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1212; *People v. Friend* (2009) 47 Cal.4th 1, 44.) The prosecution may not intentionally withhold crucial evidence properly belonging in the case in chief in order to take unfair advantage of the defendant. (*People v. Carter* (1957) 48 Cal.2d 737, 753-754.) However, the *Carter* rule does not apply to evidence that does not by itself establish guilt or that is not directly probative of the charged crime. (*Friend, ibid.*)

C. Standard of Review and Remedy

Claims of *Brady* error are reviewed de novo on appeal. (*Salazar, supra,* 35 Cal.4th at p. 1042; *Uribe, supra,* 162 Cal.App.4th at p. 1473

[applying *Salazar*'s independent review standard when reviewing on appeal alleged *Brady* error by a trial court; see *United States v. Manning* (9th Cir. 1995) 56 F.3d 1188, 1197-1198 ["[a]lleged *Brady* violations are reviewed de novo."].)

If the *Brady* error was discovered by trial counsel prior to judgment, he or she hopefully brought a motion for a new trial. On appeal, a trial court's ruling on a motion for new trial based on alleged Brady violation is reviewed under an abuse of discretion standard. *(People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27.) The Court of Appeal will not disturb the lower court ruling unless defendant establishes "'a manifest and unmistakable abuse of discretion.'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

Suppressed *Brady* evidence is often not discovered until after judgment. In that case, the defendant should appeal from the judgment and conviction and appellate counsel should simultaneously file a petition for writ of habeas corpus presenting the *Brady* issue.

III. OTHER FORMS OF PROSECUTORIAL MISCONDUCT DURING TRIAL

A. Vindictive Prosecution

The concept of a vindictive prosecution applies not only to vindictiveness by a bench officer (*North Carolina v. Pearce* (1969) 395 U.S. 711 [23 L. Ed. 2d 656, 89 S. Ct. 2072]), but also to conduct of a prosecutor

(*Blackledge v. Perry* (1974) 417 U.S. 21 [40 L. Ed. 2d 628, 94 S. Ct. 2098]). "Pearce and Perry dealt with postconviction action by the state in response to the defendant's exercise of statutory rights. The central notion underlying the rule of those cases is that a person who has suffered a conviction should be free to exercise his right to appeal, or seek a trial de novo, without apprehension that the state will retaliate by 'upping the ante' with more serious charges or a potentially greater sentence." (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1543.)

> "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.' [Citation.] In a series of cases beginning with *North Carolina v. Pearce* and culminating in *Bordenkircher v. Hayes* [(1978) 434 U.S. 357 [54 L. Ed. 2d 604, 98 S. Ct. 663]], the Court has recognized this basic—and itself uncontroversial—principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."

(*United States v. Goodwin* (1982) 457 U.S. 368, 372 [73 L. Ed. 2d 74, 102 S. Ct. 2485].)

Goodwin distinguished the situation, however, in which a defendant exercises a pretrial right from one in which the prosecutor acts after the defendant has exercised a postconviction right. In the pretrial situation, no presumption of vindictiveness arises. A presumption of vindictiveness arises only if the prosecutor "ups the ante" after exercise of a postconviction right.

"While a defendant's exercise of some pretrial procedural right may present an opportunity for vindictiveness, 'a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule.' " (*People v. Bracey*, *supra*, at p. 1544.)

Appellate counsel should consider raising a claim of vindictive prosecution whenever it appears that the consequences to your client have increased because he or she chose to exercise some right. A couple of examples are: where the prosecution adds prior conviction allegations on retrial following a hung jury where he or she had knowledge of the existence of those convictions before the first trial (see *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 375 [remanding to determine whether the filing of the allegations was in fact retaliatory]; where the severity of charges are increased after the defendant successfully moved for a mistrial after jeopardy had attached (see *In re Bower* (1985) 38 Cal.3d 865, 880 [holding that the defendant was properly convicted at the second trial, but that the offense should be reduced to second degree murder]; where the client is convicted of a lesser included misdemeanor offense at trial, the conviction is reversed on appeal, and the prosecutor refiles as a felony again. (See *People v. Puentes* (2010) 190 Cal.App.4th 1480, 1484-1488.)

The remedy varies depending on precisely what kind of misconduct occurred. In *Alvernaz* the court noted that specific enforcement of a failed

plea bargain is generally disfavored because specific enforcement limits the judge's sentencing discretion in light of additional or changed information or circumstances between the acceptance of the plea and sentencing. *(Alvernaz, supra*, 2 Cal.4th at p. 942, citing *People v. Mancheno* (1982) 32 Cal.3d 855, 861; *People v. Calloway* (1981) 29 Cal.3d 666; *People v. Kaanehe* (1977) 19 Cal.3d 1, 13; *People v. Johnson* (1974) 10 Cal.3d 868, 873.) Likewise the court noted specific enforcement would interfere with the prosecutor's legitimate exercise of discretion with regard to the negotiation and withdrawal of offered plea bargains. The court acknowledged that after a trial the prosecutor may see the case from a different perspective and reasonably conclude the sentence contemplated in the original plea bargain is no longer in the public interest. The court stated: "Given the changed complexion of the case after trial and conviction, the prosecutor should not be locked into the proposed pretrial disposition, appropriate as it may have been at the time." (*Alvernaz, supra*, at p. 943.)

B. Ex Parte Communications with Judge or Jury

"A prosecutor should not engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before the judge." (ABA Standards, 3-2.8(c).) Where the court relied on ex parte communication with the prosecutor in determining the appropriate sentence, appellate counsel should argue for a reversal of the

sentence. (See *In re Calhoun* (1976) 17 Cal.3d 75.) In reversing a sentence where there had been improper ex parte communications regarding sentencing, the court in *In re Hancock* (1977) 67 Cal.App.3d 943, 949 stated: "The appearance of justice is not satisfied where the People behind closed doors have been the moving force in the transfer of this case from the assigned judge and where the People have made ex parte statements to the sentencing judge which are adverse to the defendant's interest. Due process requires that Hancock be resentenced."

C. Using Subterfuge to Place Before a Jury Matters Which it Cannot Properly Consider

"It is improper to ask questions which clearly suggest the existence of facts which would have been harmful to the defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with the belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied." (*People v. Perez* (1962) 58 Cal.2d 229, 241; accord, *People v. Warren* (1988) 45 Cal.3d 471, 480-481.) *Perez* found it improper to ask a witness if he had been threatened after the witness testified in support of the defendant's denial of guilt. The witness denied that had occurred and the prosecutor did not follow up with proof to the contrary. The Supreme Court found the question to be improper. In *United States v. Davenport* (9th Cir. 1985) 753 F.2d 1460, the court

reversed a conviction for failure of the trial court to require the prosecutor to establish an actual predicate for such questions. It can be argued that such questions violated the defendant's due process right to a fair trial. (See *Sechrest v. Ignacio* (9th Cir. 2008) 549 F.3d 789, 808.)

D. Failure to Admonish Prosecution Witnesses not to Volunteer Inadmissible Evidence

The prosecutor has the duty to see that the witness volunteers no statement that would be inadmissible and must be especially careful to guard against statements that would also be prejudicial. (*People v. Schiers* (1971) 19 Cal.App.3d 102, 113-114.) This duty includes warning the witness against volunteering inadmissible statements. (See *Warren, supra,* 45 Cal.3d at pp. 482-483; *People v. Cabrellis* (1967) 251 Cal.App.2d 681, 688 ["A prosecutor is under a duty to guard against inadmissible statements from his witnesses and is guilty of misconduct when he violates that duty"].)

E. Failure to Abide by Court Rulings and Admonitions

"A prosecutor should comply promptly with all orders and directives of the court . . ." (ABA Standards 3-5.2(c).) "It is the imperative duty of an attorney to respectfully yield to the rulings of the court, whether right or wrong [citations]." (*Hawk v. Superior Court* (1974) 42 Cal. App. 3d 108, 126; *accord, People v. Pigage* (2003) 112 Cal.App.4th 1359, 1374.) As an officer of the court, a prosecutor owes a duty of respect for the court. (Bus. & Prof.

Code, sec. 6068, subd. (b).) "Where a court has made its ruling, counsel must not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue." (*People v. Diaz* (1951) 105 Cal.App.2d 690, 696; *accord, People v. Davis* (1984) 160 Cal.App.3d 970, 984.) In *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, relief was granted in a California murder case in part because of intentional prosecutorial misconduct in eliciting testimony that the defendant had previously been convicted of robbery with a gun despite a pretrial ruling that only the fact of the existence of the prior robbery conviction would be admitted.

F. General Bad Behavior

Bad behavior and antics in the courtroom should not be tolerated. When faced with a prosecutor who indulged in such behavior as audibly laughing in the middle of defense counsel's examination of witnesses, getting out of her chair during defense counsel's examination of witnesses, standing in defense counsel's line of sight, staring at him and making faces at him, the California Supreme Court stated that "[the prosecutor]'s tactics were petty and childish, heightening the acrimonious atmosphere in the courtroom and threatening the ability of defendant to receive a fair trial. It takes no citation to authority for us to conclude such juvenile courtroom behavior by a public prosecutor demeans the office, distracts the jury, prejudices the defense, and demands censure." (*People v. Hill* (1998) 17 Cal.4th 800, 834; see also

People v. Friend, supra, 47 Cal.4th at pp. 30-32.) In *People v. Hudson* (1981) 126 Cal.App.3d 733, 735, the court stated that "the deputy district attorney resorted to inflammatory rhetoric, violated the trial court's rulings, brought out inadmissible matters in the guise of questions and statements, used extremely vulgar forms of argumentative questions and injected prejudicial innuendo by his editorial comments in front of the jury." The court in *Hein v. Sullivan* (9th Cir. 2010) 601 F.3d 897, 913-914 listed a number of instances of improper argument including vouching for the prosecution witness and demeaning defense counsel and defendants. In *People v. Villa* (1980) 109 Cal.App.3d 360, 362, the court found that the prosecutor "acted unprofessionally, indeed childishly, on several occasions at trial. Only due to the overwhelming evidence of guilt do we find that his misconduct does not justify reversal."

IV. MAKING THE ARGUMENT

When raising prosecutorial misconduct, it should be argued that it denied defendant a fair trial in violation of the Fourteenth Amendment to the United States Constitution and the corresponding provisions of the California Constitution. The standards governing review of misconduct claims are settled. "A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' (*Darden v.*

Wainwright (1986) 477 U.S. 168, 181 [91 L. Ed. 2d 144, 106 S. Ct. 2464]; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.) "In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." (*Ibid*.) When a claim of misconduct is based on the prosecutor's comments before the jury, " 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Smithey* (1999) 20 Cal.4th 936, 960, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *accord, Friend, supra,* 47 Cal.4th at pp. 28-29.)

Obviously, if defense counsel did not object, the argument must be made through a claim of ineffective assistance of counsel. If counsel objected to some, but not all misconduct, it is easy enough to make the argument on direct appeal, since you can argue that since counsel objected at all, it is clear that there was no tactical reason for the failure to object to each instance of misconduct. (See *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131; *People v. Asbury* (1985) 173 Cal.App.3d 362, 366.)