Appellate Defenders, Inc. **October 2018**

PROSECUTORIAL MISCONDUCT (aka PROSECUTORIAL ERROR[1]) OUTLINE

I. PROCEDURAL COMPONENTS

A. Policies on the Prosecutor's Role and Preliminary Issues

1. "[T]he prosecutor['s]...interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. U.S.* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 633, 79 L.Ed. 1314].)

a. "The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present... the evidence..." (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378.)

2. Standard for prosecutorial misconduct is an objective one. Prosecutor's state of mind in committing misconduct is irrelevant; all that matters is the effect of the improper conduct on the defendant. (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Bolton* (1979) 23 Cal.3d 208, 213-214.)

B. Preserving the Issue (See *People v. Hill* (1998) 17 Cal.4th 800, 820-823.)

1. General rule: issue is waived if trial counsel does not object or does not request an admonition to the jury. (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

a. Objection must be specific. (*People v. Bolden* (2002) 29 Cal.4th 515, 564 [because defense counsel objected to prosecution's line of questioning on hearsay–and not misconduct–grounds, the issue of prosecutorial misconduct was not preserved on appeal].)

2. General rule does not apply if the misconduct is so egregious that an objection would have been futile, or an admonition would not have cured the problem. (See, e.g., *People v. Panah* (2005) 35 Cal.4th 395, 462-464; *People v. Boyette* (2002) 29 Cal.4th 381, 432.)

a. This exception is particularly common in close cases (*People v. Valdez* (2003) 109 Cal.App.4th 1414) and in cumulative error cases. (See "Cumulative Error" in "Standard of Prejudice" section.)

[1] See *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (noting that "prosecutorial misconduct" would be more aptly called "prosecutorial Error"). *Hill, supra*, in general, is the most extensive California case on the subject.

3. If trial counsel immediately objects to misconduct, and the objection is overruled, the issue is still preserved on appeal. (*People v. Green* (1980) 27 Cal.3d 1, 25, fn. 19; *People v. Johnson* (2015) 61 Cal.4th 734, 781 fn. 15 ["the requirement that a defendant also seek a curative instruction to alleviate the effect of improper argument applies only if the court sustains the defense objection as to its impropriety"]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692; *People v. Lindsey* (1988) 205 Cal.App.3d 112, 116, fn. 1.)

4. Even if an admonition is given, appellate review is still available when the admonition is not timely or is legally inadequate. (*U.S. v Perlaza* (9th Cir. 2006) 439 F.3d 1149, 1171-1172.)

a. Although prejudicial effect of mild misconduct during argument may be dissipated by instruction that statements of attorneys are not evidence, admonition is not "magical incantation" that erases prosecutor's erroneous representations from jurors' minds, especially when trial court implicitly endorses representations by overruling defense counsel's objections. (*People v. Woods* (2006) 146 Cal.App.4th 106, 118.)

5. In the Alternative: Where appropriate, appellate counsel can argue that trial counsel's failure to object was IAC.

a. See *People v. Anzalone* (2006) 141 Cal.App.4th 380, 395-396 [defense counsel's failure to object to Prosecution's misstatement of the law during closing argument could have served no reasonable tactical purpose and was prejudicial towards defendant].

C. Standard of Review

1. Like with all questions of law, questions about prosecutorial misconduct are reviewed *de novo*. (See, e.g., *People v. Cromer* (2001) 24 Cal.4th 889, 900-901.) This standard appears implied–even if never explicitly stated–in most of the prosecutorial misconduct cases.

2. If defendant files a motion for a new trial based upon prosecutorial misconduct, and the motion is denied, then standard of review is abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

D. Standard of Prejudice

1. Preliminary Considerations

a. If an objection is made and the jury is admonished, and the issue is raised on appeal, the standard is whether there was a

"miscarriage of justice." (*People v. Criscione* (1981) 125 Cal.App.3d 275, 284.)

i. If an admonishment is given, it is assumed the jury followed the admonition, and defendant therefor suffered no prejudice. (*People v. Jones* (1997) 15 Cal.4th 117, 168.)

b. "[T]o prevail on...misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.)

2. *Chapman*[2] Standard

a. "A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Roldan* (2005) 35 Cal.4th 646, 719; see also *People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Bolton* (1979) 23 Cal.3d 208, 214- 215.)

b. Many federal rights can be invoked, including:

i. Right to Cross-Examine Witnesses. (For example, prosecutor states facts not in evidence.)

ii. Right to Due Process. (See, e.g., *Chapman v. California* (1967) 386 U.S. 18.)

iii. Right to Counsel. (For example, prosecutor questions defendant before attorney appointed.) See *People v. Viray* (2005) 134 Cal.App.4th 1186, 1207.

iv. Fifth Amendment. (For example, prosecutor comments on defendant's silence.) See "Doyle Error" and "Griffin Error" sections below.

c. A review of the prejudicial impact of the misconduct should focus not only on the specific incident but as it relates to the entire case. (*U.S. v. Christophe* (9th Cir. 1987) 833 F.2d 1296, 1300-1301 ["A claim of prosecutorial misconduct must be viewed in the entire context of the trial. Reversal is justified only when such misconduct

[2] *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].

denies the defendant a fair trial. ...if it is more probable than not that the misconduct affected the verdict."].)

3. *Watson* [3] Standard

a. "Conduct...that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade...the court or the jury." (*People v. Roldan* (2005) 35 Cal.4th 646, 719; *People v. Hill* (1998) 17 Cal.4th 800, 819 citing *People v. Espinoza* (1992) 3 Cal.4th 806, 820; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

i. For an example of an application of the *Watson* standard, see *People v. Williams* (2009) 170 Cal.App.4th 587, 637-638 [where, despite appellant's eight contentions of instances of prosecutorial

misconduct, the Court ruled each contention was not prosecutorial misconduct or was harmless if it was; the Court ruled that because none of the individual instances–nor the cumulative effect of them–violated defendant's right to due process or a fair trial, the *Watson*, and not *Chapman*, standard was appropriate].

4. Cumulative/Collective Error

a. See *People v. Hill* (1998) 17 Cal.4th 800; *People v. Buffum* (1958) 40 Cal.2d 709 (overruled on other grounds by *People v. Morante* (1999) 20 Cal.4th 403); *People v. Burns* (1952) 109 Cal.App.2d 524.

II. PRE-TRIAL MISCONDUCT

A. Charging Policies/Vindictive Prosecution

1. Decision to prosecute cannot be based upon race, religion, or other classification. (*U.S. v. Armstrong* (1996) 517 U.S. 456, 464 [116 S.Ct. 1480, 134 L.Ed.2d 687] [defendant did not prove that African-Americans were being targeted in crack cocaine prosecutions since he provided no evidence of non- African-American individuals who committed the same offense as respondent and were not prosecuted in the same manner as African-Americans].)

[3] *People v. Watson* (1956) 46 Cal.2d 818.

a. In order to prove a selective prosecution case, defendant must show by clear and convincing evidence that prosecutor has committed an equal protection violation. (*Id.* at p. 464.)

i. In *People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, appellant met this burden by getting declarations from two lawyers whose clients had committed the same offense but were not prosecuted for those violations. (*Id.* at pp. 1187-1188.)

2. Once jeopardy has attached, prosecutorial discretion is more limited. (*In re Bower* (1985) 38 Cal.3d 865, 873.) In *Bower, supra,* prosecutor sought a first degree murder conviction after a mistrial where the prosecutor had stipulated to no more than a charge of second degree murder; since the prosecutor could not meet the burden to show discovery of new facts to justify the increased charge, the Court ruled that there was a vindictive motive in prosecuting defendant in the second trial. (*Ibid.*; see also *People v. Puentes* (2010) [at second trial, jury hung on statutory rape and convicted appellant of a misdemeanor, after which DA dismissed rape charge; after the misdemeanor was reversed on appeal, DA re-filed rape charge and appellant was convicted in a third trial; reversed as vindictive prosecution].)

B. <u>When does the prosecutor need to be recused?</u>

1. "The [recusal] motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that a defendant would receive a fair trial." (Pen. Code, § 1424.)

a. Two-part test established *P. v. Choi* (2000) 80 Cal.App.4th 476.

i. Is there a conflict of interest?

ii. Is [it] so severe as to disqualify the district attorney from acting? (*Id*. at p. 481.)

2. Entire prosecutor's office should be recused when a prosecutor "was both a witness to, and arguably a victim of, the criminal conduct [assault with a firearm] for which defendant [was] being prosecuted." (*People v. Connor* (1983) 34 Cal.3d 131, 144.) This case was an exceptional one because of the gravity of the offense, the victim's re-telling of the story to many co-workers at the District Attorney's Office, and the high media attention surrounding it. (*Ibid*.; see also *People v. Dekraa*i (2016) 5 Cal.App.5th 1110 ["OCDA had an

actual conflict because its loyalty to the Sheriff prevented the OCDA from performing its constitutional and statutory obligations in this case"].)

a. "[C]onflict must be of such gravity as to render it unlikely that defendant will receive a fair trial unless recusal is ordered." (*Connor, supra*, at p. 147.)

iii. But see: "[T]o recuse an entire prosecutorial office, defendant's showing of conflict...must be particularly persuasive." (*People v. Alcocer* (1991) 230 Cal.App.3d 406, 414.)

iv. Courts favor recusing individual prosecutors as opposed to the whole office. (*People v. Hernandez* (1991) 235 Cal.App.3d 674, 679-680.) In addition, it is possible to grant recusal only for certain counts. (*Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, 203-205.)

C. <u>Discovery and Exculpatory Evidence</u>

1. Penal Code section 1054.1 lists what materials the prosecution must disclose. These include: (1) witness list, (2) statements of all defendants, (3) all relevant evidence seized or obtained as part of investigation, (4) felony convictions of any material witnesses that is likely to be critical in the outcome of the trial, (5) any exculpatory evidence, and (6) relevant written or recorded statements relating to any witnesses to be called at trial (including scientific testing for experts etc.)

a. Discoverable materials should be disclosed by prosecutor, and such materials not only include information in the possession of just the prosecutor's offense but information in the possession of all agencies to which the prosecution has access. (*In re Littlefield* (1993) 5 Cal.4th 122, 135.)

2. Disclosure of exculpatory evidence post-conviction is required by prosecution. (*Imbler v. Pachtman* (1976) 424 U.S. 409 [96 S.Ct. 984, 47 L.Ed.2d 128]; *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]; *People v. Ruthford* (1975) 14 Cal.3d 399.)

a. For a *Brady* violation (failure of prosecution to disclose material evidence), standard of prejudice is whether it is "reasonably probable that disclosure [of the exculpatory evidence] would have affected the result." (*People v. Coddington* (2000) 23 Cal.4th 529, 590.)

b. Exculpatory impeachment evidence not required to be disclosed unless there is a trial (*U.S. v. Ruiz* (2002) 536 U.S. 622, 633 [122 S.Ct. 2450, 153 L.Ed.2d 586]), in which case it must be given to defense 30 days prior to trial. (See Penal Code § 1054.7; but see *People v. Gutierrez* (2013) 214 Cal.App.4th 343, 352 [The prosecution's due process duty to disclose material evidence that is favorable to the defense applies at the preliminary examination, notwithstanding § 1054.7]; Magallan v. Superior Court (People) (2011) 192 Cal.App.4th 1444 [defense has a right to pre-preliminary discovery to prove a Fourth Amendment violation].)

c. Rule 5-110 of the California Rules of Professional Conduct was revised in 2016 to require prosecutors "[m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor that the prosecutor knows or reasonably should know mitigates the sentence…"

D. <u>Obstruction of Witnesses and their Testimony</u>

1. Prosecution cannot obstruct defense *subpoena duces tecum*. (*Gordon v. U.S.*

(1953) 344 U.S. 414 [73 S.Ct. 369, 97 L.Ed. 447].)

2. "Governmental interference violative of a defendant's compulsory-process right includes...the intimidation of defense witnesses by the prosecution." (*In re Martin* (1987) 44 Cal.3d 1, 30.)

a. Defense must show that prosecutor "engaged in activity that was wholly unnecessary to the proper performance of his duties and of such a character as 'to transform [a defense witness] from a willing witness to one who would refuse to testify...'" (*Id.* at p. 31.)

b. Must show causal link between misconduct and inability of defense to present witnesses. (*Ibid.)*

3. Prosecution cannot order witnesses not to talk to defense counsel. (Rule 5- 310, Rules Prof. Cond. of State Bar; *People v. Shaw* (1896) 111 Cal. 171, 175; *Schindler v. Superior Court* (1958) 161 Cal.App.2d 513; *Walker v. Superior Court* (1957) 155 Cal.App.2d 134.)

III. TRIAL MISCONDUCT

A. Voir Dire

1. Trying to commit jurors to vote in a particular way is misconduct. (*People v. Smith* (2003) 30 Cal.4th 581, 603.)

2. Although not usually analyzed as prosecutorial misconduct, a common error by the prosecutor during voir dire is using a peremptory challenge to dismiss a juror on account of being a member of a group, usually race. (*Batson v. Kentucky*(1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258, 276.)

a. Process: i) Party claiming error must make prima facie case of discrimination; ii) Prima facie case shifts burden to party challenging juror for cause to give explanation for challenge that is group-neutral; iii) If explanation is given, court must decide if party claiming error had proven purposeful discrimination (which will include determination if explanation is reasonable). (*Purkett v. Elem* (1995) 514 U.S. 765, 767 [115 S.Ct. 1769, 131 L.Ed.2d 834]; *People v. Silva* (2001) 25 Cal.4th 345, 385-386 [reversal where no support in record for prosecutor's purported race- neutral reasons].)

b. For standards of review, see *People v. Bonilla* (2007) 41 Cal.4th 313, 341-342.

3. Some types of misconduct that occur in closing argument or opening statement–suggesting facts that cannot be proven, for example–can also occur here. See list of possible misconduct in "Opening Statement" and "Closing Argument" below. (See *Sechrest v. Ignacio* (9th Cir. 2008) 549 F.3d 789 [DA makes false inflammatory statements during voir dire and closing argument that the defendant would be paroled even with an LWOP sentence; this denied a fair trial].)

B. Opening Statement

1. Prosecutorial misconduct occurs when the prosecution states a fact it cannot prove at trial or states a fact significantly different from the evidence presented. (*People v. Barajas* (1983) 145 Cal.App.3d 804 [statement informant would support defendant was responsible for murder, if he testified,

but that informant was uncooperative and may not choose to testify was prejudicial misconduct where informant did not testify]; *People v. Purvis* (1963) 60 Cal.2d 323, 329-332, 343-346 [references to knifing in another state never proven was misconduct, as were references to purported adoptive admissions of defendant where evidence did not support standards for adoptive admissions].)

a. However, according to the Supreme Court, misconduct only occurs were remarks are "'so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.'" (*People v. Wrest* (1992) 3 Cal.4th 1088, 1108, quoting *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1225, fn. 5.)

2. See also "Closing Argument" section below. Errors listed there also can occur during opening statement.

C. Case-in-Chief

1. False Evidence

a. The offering of false evidence does not need to be intentional to be considered prosecutorial misconduct. (*Giles v. Maryland* (1967) 386 U.S. 66.)

i. In *U.S. v. Young* (9th Cir. 1993) 17 F.3d 1201, the testimony of a police officer in a hearing on a motion for a new trial strongly suggested that the prosecutor knew that another police officer's testimony at trial was false. The Ninth Circuit ruled that the trial court erred in denying defendant's motion for a new trial. "[E]ven if the government unwittingly presents false evidence, a defendant is entitled to a new trial 'if there is a reasonable probability that [without the evidence] the result...would have been different." (*Id.* at p. 1204.)

b. See *Banks v. Dretke* (2004) 540 U.S. 668, 675 (death penalty verdict reversed when key witness testified untruthfullyabout what he had told to the police; prosecutor knew such testimony was false and then claimed in closing argument that witness had been "open and honest").

2. Inconsistent Factual Theories

a. It was a due process violation to argue in two separate trials that each defendant committed a criminal act that only one could have committed. (*In re Sakarias* (2005) 35 Cal.4th 140, 145.)

i. But see *People v. Wilson* (2005) 36 Cal.46th 309, where there was no prosecutorial misconduct when prosecutor argued in a pretrial motion that there were two suspects involved in the crime, and then later argued to the jury that there was only one suspect (the defendant).

3. Inadmissible Evidence

a. It is not misconduct to unintentionally offer inadmissible evidence (*People v. Valdez* (2004) 32 Cal.4th 73, 125), but "the deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct." (*People v. Fusaro* (1971) 18 Cal.App.3d 877, 886.)

b. If the risk of inadmissible testimony is foreseeable (*People v. Leonard* (2007) 40 Cal.4th 1370, 1405), the prosecutor must warn a witness from making such a statement. (*People v. Warren* (1988) 45 Cal.3d 471, 482.) The prosecutor has a duty that his or witnesses make no inadmissible statements. (See *People v. Bentley* (1955) 131 Cal.App.2d 687, 690.)

c. It is improper for a prosecution witness to render an opinion on the ultimate question of guilt or innocence (*People v. Brown* (1981) 116 Cal.App.3d 820, 828-829), nor as to whether a crime was committed. (*People v. Torres* (1995) 33 Cal.App.4th 37, 46-48.) It is not misconduct, however, if the defense "opens the door" to a line of testimony, and the prosecution is simply trying to neutralize its effects. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1247-1249.)

d. Evidence of poverty is inadmissible to show motive for property crime, unless defense "opens the door" by denying any motivation for money. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1076.)

4. Suggesting Existence of Facts without any Supporting Evidence

a. Prosecution cannot ask questions that would be harmful to defendant without a good faith belief that they be answered in the affirmative or could be proved. (*People v. Perez* (1962) 58 Cal.2d 229 [overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1].)

i. To result in misconduct for improper questioning, the question must put information before the jury that is outside the evidence and would not have been heard but for the improper question. (*People v. Earp* (1999) 20 Cal.4th 826, 860.)

5. Prosecutor should not serve as both a witness and as a prosecutor in a given case. (*People v. Hernandez* (1991) 235 Cal.App.3d 674, 679, fn 3.)

6. Communications with Juror Before End of Trial

a. See Rule 5-320, subd. (I), Rules Prof. Cond. of State Bar.

D. Cross-Examination

1. Threatening the Witness

a. Prosecutor cannot block testimony by threatening defense witness with perjury but can advise him or her of the consequences of perjury. (Compare, e.g., *People v. Warren* (1984) 161 Cal.App.3d 961, 973-977 with *People v. Bryant* (1984) 157 Cal.App.3d 582, 592.)

b. No argumentative questions (see *People v. Chatman* (2006) 38 Cal.4th 344, 384) or questions on collateral matters. (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 461.)

i. In *People v. Wagner* (1975) 13 Cal.3d 612, 619-621, the prosecutor asked a series of questions of defendant on cross-examination going into defendant's personal matters, with no offers of proof made as to where the prosecutor obtained this information. Despite the defendant's answers in the negative to these questions, such questions implied that prosecutor had information about extensive prior drug transactions involving the defendant. The California Supreme Court ruled that this was misconduct.

2. Violating Privileges

a. Attorney-Client Privilege. (See, e.g., *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252.)

b. Privilege against Self-Incrimination. (*People v. Malone* (2003) 112 Cal.App.4th 1241.)

3. *Doyle* Error

c. It is a due process violation and prosecutorial misconduct for an arrested person's silence to be used to impeach an explanation subsequently offered at trial. (*Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240, 49 L.Ed.2d 91]; *People v. Evans* (1994) 25 Cal.App.4th 358, 367.)

i. *Doyle, supra*, has been expanded to post-arrest silence when no *Miranda* warnings were ever given (*People v. Gaines* (1980) 103 Cal.App.3d 89, 94-96), and to post-arrest silence prior to *Miranda* warnings eventually being given. (*U.S. v. Whitehead* (9th Cir. 2000) 200 F.3d 634, 638-639.)

E. Rebuttal

1. "Trial by Ambush"

a. *People v. Carter* (1957) 48 Cal.2d 737, 753-754: Prosecutor waited until rebuttal to offer physical evidence that linked defendant to crime. Court stated that evidence admissible during rebuttal "is restricted to evidence made necessary by defendant's case in the sense that he has introduced new evidence or made assertions that were implicit in his denial of guilt." (*Ibid*.)

b. See Penal Code section 1093, subd. (d) (stating that only rebuttal evidence can be submitted on rebuttal, unless Court gives permission to allow original evidence).

F. Closing Argument

1. *Griffin* Error

a. Prosecutor cannot comment on the defendant's failure to take the stand, failure to deny guilt, or decision to remain silent. (*Griffin v. California* (1965) 380 U.S. 609, 612-614 [85 S.Ct. 1229, 14 L.Ed.2d 106].)

i. However, it generally is permissible for the prosecutor to comment on the defense's failure to call logical witnesses or present evidence, where the prosecutor does not refer to the defendant's own silence. (*People v. Medina* (1995) 11 Cal.4th 694, 755 [no misconduct where prosecutor commented that the defense never provided explanation as to why the defendant was armed with a gun during a robbery].)

ii. A prosecutor may comment about an absence of explanation generally, but may not comment on the absence of a "denial" of a crime. (*People v. Vargas* (1973) 9 Cal.3d 470, 476 [statement "there is no denial at all that they were there [robbing Mr. Olness]" was *Griffin* error].)

b. A *Griffin* error can occur indirectly, for example where prosecutor argues that evidence went uncontradicted when only defendant could have contradicted it. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.)

c. Close analysis of prosecutor's words can turn up *Griffin* error.

i. In *People v. Sanchez* (2014) 228 Cal.App.4th 1517, the court found *Griffin* error in the prosecutor's argument that the defendant was "hiding" from the jury and it was for the jury to pull him out of his hiding place. The court found the only plausible interpretation of the comment was that the defendant hid by not testifying.

ii. In *People v. Denard* (2015) 242 Cal.App.4th 1012, the Court found Griffin error where prosecutor argued the "defendant clearly does not want to take responsibility for his actions," and "[h]e has put it upon [Rosa] to testify" [against him]...He has not taken responsibility himself. That is the kind of man he is." The court found these statements "cannot reasonably be interpreted as anything other than a comment on appellant's silence." (*Id*. at 1021.)

2. Arguing Personal Belief

a. It is prosecutorial misconduct for a prosecutor to argue his or her personal belief of defendant's guilt if it implies to the jury that prosecutor knows information about a case that was not included as evidence at trial. (*People v. Bain* (1971) 5 Cal.3d 839, 848 [prosecutor stated he would not have signed the initial complaint unless he believed that defendant was guilty and tied such argument to fact he was black like the defendant].)

b. A prosecutor's statement of his or her belief is not misconduct, however, if the belief is based upon evidence presented at trial.

(*People v. Lopez* (2007) 42 Cal.4th 960, 971 [prosecutor's statement of belief in defendant's guilt immediately followed discussion of the credibility of the prosecution's witnesses, implying the belief was based on testimony presented at trial].)

3. Improper Vouching

a. An attorney "[s]hall not assert personal knowledge of the facts at issue, except when testifying as a witness." (Cal. Bar Rules Prof. Conduct, rule 5-200(E).)

b. A prosecutor cannot use the prestige of the government office to bulk up a witness's veracity. (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1582-1586; *U.S. v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1276; United States v. Ruiz (9th Cir. 2013) 710 F.3d 1077, 1085-1086.) In addition, a prosecutor cannot indicate that information not presented to the jury supports the witness's testimony. (*U.S. v. Hermanek* (9th Cir. 2002) 289 F.3d 1076, 1098.)

c. Examples include:

i. Arguing that the jury should believe a witness because the prosecutor had an ethical duty not to prosecute the case if the prosecutor had any doubt that the defendant had committed the crime. (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1584-1585.)

ii. Arguing that a witness would lose his or her job by lying on the stand. (*U.S. v. Combs* (9th Cir. 2004) 379 F.3d 564, 574-575.)

iii. Asking a cooperating witness why he has to tell the truth ("because if they find out I'm lying, they will rip up the agreement and I'll end up with 25 to life"). (*U.S. v. Brooks* (9th Cir. 2007) 508 F.3d 1205.)

4. Appeals to Passion, Sympathy, or Prejudice

a. It is misconduct for prosecutor to appeal to jurors' sympathies or passions. (*People v. Fields* (1985) 35 Cal.3d 329, 362.)

i. A common appeal to passions is through suggesting jurors empathize with victim. (See *People v. Fields* (1985) 35 Cal.3d 329, 362.)

ii. “A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.” (*United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1149- 1150.)

iii. Of course, a prosecution’s appeal to emotions based upon race likewise is misconduct. (E.g., *Kelly v. Stone* (9th Cir. 1975) 514 F.2d 18, 19 [statement that crime next time might not involve little black girl is misconduct].)

5. Disparaging Defense Counsel and Name-Calling

a. Disparaging defense counsel without evidentiary basis to do so results in misconduct. (*People v. Bain* (1971) 5 Cal.3d 839, 847 [prosecutor argued defense counsel fabricated a defense]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1073-1077 [prosecutor argued: “My people are victims. His [defense counsel’s] people are rapists, murderers, robbers, child molesters. He has to tell them what to say. He has to help them plan a defense. He does not want you to hear the truth.”].) Such attacks have the tendency to draw the jury’s attention to irrelevant matters. (*Ibid*.)

i. Targeting defense’s tactical approach more generally is less likely to be misconduct. (See *People v. Stitely* (2005) 35 Cal.4th 514, 560 [prosecutor told jurors not to “fall” for the defense’s argument and that defense counsel was putting up a “legal smokescreen”].)

b. Misconduct occurs where derogatory remarks about a defendant are not supported by evidence, but does not occur where evidence supports such comments. (Compare *People v. Duvernay* (1941) 43 Cal.App.2d 823, 827 [misconduct where prosecutor stated the defendant had many characteristics typical of a narcotics user but

there was no evidence that defendant had any of these characteristics] with *People v. Rodriquez* (1970) 10 Cal.App.3d 18, 36 [no misconduct where prosecutor referred to defendant as a "smart thief and a parasite on the community"].)

6. Presenting False Information and Arguing Facts Not in Evidence

a. "In presenting a matter to a tribunal, a member…[s]hall not seek to mislead the judge...or jury by an artifice or false statement of fact or law." (Cal. Bar Rules Prof. Conduct, rule 5-200(B).)

b. Arguing facts not in evidence or presenting false information in argument may violate a defendant's Sixth Amendment right to confront and cross-examine evidence. (*People v. Bolton* (1979) 23 Cal.3d 208, 212-214.)

c. Examples of Presenting False Information

i. Arguing the defense could not provide evidence regarding a particular issue where the prosecution knows such evidence existed. (*People v. Varona* (1983) 143 Cal.App.3d 566, 568 [prosecutor said defendant could not provide evidence victim was prostitute when victim was on probation for prostitution and trial court had erroneously excluded such evidence pretrial].)

ii. Allowing prosecution witness to make false statements and arguing the witness had been completely honest. (*Banks v. Dretke* (2004) 540 U.S. 668, 675 [124 S.Ct. 1256, 157 L.Ed.2d.1166].)

iii. Arguing a theory of a case that excluded evidence would have refuted. (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757 [argument that molestation victim must have learned to molest others from defendant misled jury where evidence had been excluded that victim had been molested by others].)

d. Examples of Arguing Facts not in Evidence

i. Stating or implying a defendant had a prior record when no evidence was offered to prove that. (E.g., *People v. Bolton* (1979) 23 Cal.3d 208, 212-214.)

ii. Stating that a key witness's failure to come forward with information for an extended period of time is based on fear

if there is no evidence to support such a statement. (*People v. Kirkes* (1952) 39 Cal.2d 719, 724.)

iii. Referring to a knife supposedly found on the victim's person but never introduced into evidence. (*People. Evans* (1952) 39 Cal.2d 242, 251.)

iv. Predicting future conduct of the accused when there is no evidence to do so. (*People v. Lambert* (1975) 52 Cal.App.3d 905, 910 [prosecution stated that the reason defendant lied about what happened was so that he could be found not guilty, be released, and shoot someone else.].)

7. Misstating a Law (most problematically the "reasonable doubt" standard)

a. "In presenting a matter to a tribunal, a member: . . .(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law; (C) Shall not intentionally misquote . . .the language of a book, statute, or decision; (D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional . . . ." (Cal. Bar Rules Prof. Conduct, rule 5-200.)

b. Although there is some old authority suggesting misstatements of law are only misconduct if made in bad faith, *People v. Hill* (1998) 17 Cal.4th 800, 822, 829, establishes that no such requirement exists.

c. A common and extremely prejudicial form of misconduct is arguing a watered down version of reasonable doubt. (*Cage v. Louisiana* (1990) 498 U.S. 39, 39-41 [flawed instruction]; *People v. Hill* (1998) 17 Cal.4th 800, 831-832 [improper argument].)

i. Examples of misdefining reasonable doubt: *Cage v. Louisiana* (1990) 498 U.S. 39, 40 [111 S.Ct. 328, 112 L.Ed.2d 339]["must be such doubt as would give rise to a grave uncertainty . . . it is an actual substantial doubt" and its negation involves a " moral certainty"]; *People v. Garcia* (1975) 54 Cal.App.3d 61, 68 [trial

court's misstatement of reasonable doubt [would equally be error by prosecution]: "In other words, reasonable doubt means just what the term implies, doubt based upon reason, doubt that presents itself in the minds of reasonable people who are weighing evidence in the scales, one side against the other, in a logical manner in an effort to determine wherein lies the truth."]; *People v. Centeno* (2014) 60 Cal.4th 659 [use of graphic distorted reasonable doubt standard; argument that prosecution's account of the evidence was "reasonable" improperly diluted the burden of proof]; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353 [misconduct to argue the beyond-reasonable-doubt standard required the jury to determine whether defendant's innocence was reasonable (harmless error)].

ii. It is misconduct to equate reasonable doubt with everyday decisions like changing lanes or getting married. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36.)

iii. It is misconduct for a prosecutor to argue that once the jury begins to deliberate, the presumption of innocence vanishes, and "the presumption of guilt is going to take over . . . ." (*U.S. v. Perlaza* (9th Cir. 2006) 439 F.2d 1149, 1169.)

d. Likewise, shifting the burden of proof by suggesting the defense has a burden to prove innocence or disprove guilt is highly problematic misconduct

i. It is misconduct for the prosecution to argue that the defense has a burden to present evidence or to advise "the jury that appellant b[ears] some burden of proof or persuasion." (*People v. Woods* (2006) 146 Cal.App.4th 106, 113 [prosecutor remarked that defense counsel was "obligated to put the evidence on from that witness stand"].)

ii. However, prosecutor is allowed to comment on defense's failure to present any evidence (*People v. Reyes* (1933) 133 Cal.App. 574, 577) and can comment on defense's failure to put on material evidence generally (*People v. Wash* (1993) 6 Cal.4th 215, 263).

8. Focusing on Punishment

It is misconduct to discuss potential punishment defendant would receive. (E.g., *People v. Holt* (1984) 37 Cal.3d 436.)