A SYNOPSIS OF THE LAW OF PROSECUTORIAL MISCONDUCT IN CALIFORNIA

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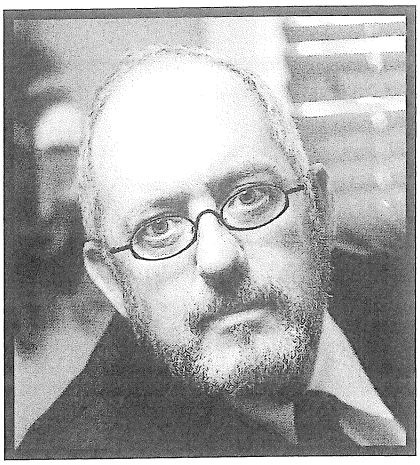
> It hardly needs citation of authority that an argument by the prosecution that appeals to the passion or prejudice of the jury, that asks for a verdict of guilty because of sympathy for the deceased, that repeatedly characterizes the defendant as a "despicable beast," that throws the dignity and prestige of the district attorney's office behind a personal assertion in the belief of the guilt of the accused, that avers that defendants have too many rights, that vilifies, without warrant, defense counsel and defense witnesses, that engages in fanciful inferences, not warranted by the evidence, and makes them as statements of fact not warranted by the record, that misstates the record, that uses evidence admitted for a limited purpose as substantive evidence of the facts there recited, that broadly implies the prosecution is possessed of much evidence tending to show guilt that has not been introduced, is erroneous and prejudicial. (*People v. Talle* (1952) 111 Cal.App.2d 650, 676-677.)

INTRODUCTION

Criminal defendants who exercise their constitutional right to trial are perennially prejudiced by the same type of preventable error: prosecutorial misconduct in closing arguments. This article provides a synopsis of the law of prosecutorial misconduct during argument in the state of California.

Prosecutorial misconduct is more prevalent at the argument stage of a trial than at all other stages combined. In October 2010, the Northern California Innocence Project issued a report on prosecutor misconduct in state and federal cases in California between



1997 and 2009.[2/] In the report, NCIP analyzed 707 cases in which courts explicitly found that prosecutors committed misconduct.[3/] NCIP categorized 782 separate findings of misconduct in these cases.[4/] Improper argument (whether during opening statements or at closing) accounted for 444 of the findings.[5/] Coming in second was improper examination, with only 164 instances; a distant third was failure to disclose exculpatory evidence, with 66 examples.[6/]

California courts have been quick to recognize a broad spectrum of misconduct, but reluctant to overturn convictions on the basis of a prosecutor's improper argument, particularly if the trial attorney did not preserve his objections. Therefore, the issue of prosecutorial misconduct needs to be raised early, before clients are hurt by bad argument or bad rulings from the bench. The more time that passes after misconduct has occurred, the less likely it is that the prejudice will be remedied. NCIP reviewed 4,000 cases where misconduct allegations arose during appellate proceedings.[7/] In 3,000, the courts rejected the allegation; in another 282, court did not even bother to reach the question.[8/] Of the 707 cases in which courts did find misconduct, only 159 (22 percent or 4 percent, depending how one makes the calculation) contained findings that the misconduct was harmful.[9/]

The following is a synopsis, organized by category, of the law of prosecutorial misconduct at argument in the State of California. The synopsis can be kept in a trial binder, attached to a motion, or used to bolster an appellate brief. It is simple to update, easy to review, and organized to be scanned for a quick case cite when objecting to an argument at trial.

Included in the synopsis is everything from improper requests to the jury that they stand in the victim's shoes, to impermissible expressions of personal opinions on the veracity of a witness, to the misuse of disparaging terms to refer to the defendant, defense counsel, and defense witnesses. Some Ninth Circuit case law and some case law regarding prosecutorial misconduct at stages other than closing argument are included, in order to draw a more robust and complete picture of the ways in which a prosecutor can prejudice a defendant.

Cases are summarized as succinctly as possible and presented without any advocacy – simply as a memorialization of judicial findings of misconduct. The point is the rule, not whether a trial verdict was reversed or whether the prosecutor was able to side step any negative repercussions from the misconduct The first steps towards combating improper argument are knowing the law, objecting to improper argument, and convincing the trial judge that she is not being asked to be a trailblazer. This synopsis should help facilitate all three.

A. SYNOPSIS OF CASES

I. Improper Statements to the Jury *Attempting to Persuade with Personal Belief or Opinion*

Providing own definition of terms and opinion of reoffending:

In re Brian J. (2007) 150 Cal.App.4th 97, 122. Prosecutorial misconduct to interject personal opinions into argument on multiple occasions. For example, the prosecutor stated, "Is it possible he's not going to go out and reoffend without any further treatment? That's possible. I don't think it's likely." The prosecutor also gave his own definition of addiction: "What is an addiction? My understanding of an addiction is that you want to engage in behavior, and you have a hard time not engaging in that behavior." These comments were misconduct because "the prosecutor implied the existence of facts not in evidence and interjected his personal views into the argument." (*Id.* at p. 123.)

Providing own opinion of defendant's family's reaction:

People v. Whitehead (1957) 148 Cal. App.2d 701, 706. Prosecutorial misconduct to argue in closing that: "If you should vote to send Mr. Whitehead back to his family today, I don't think they would welcome him." Argument was irrelevant and improper.

Vouching for prosecution's case:

People v. Alvarado (2006) 141 Cal. App.4th 1577, 1584. In closing argument, the prosecutor stated, "I have a duty and I have taken an oath as a deputy District Attorney not to prosecute a case if I have any doubt that that crime occurred. [¶] The defendant charged is the person who did it." This was improper, because it sought a conviction based on the prosecutor's opinion that the defendant was guilty and on the prestige of the office, as opposed to the evidence.

People v. Bain (1971) 5 Cal.3d 839, 847-850. In a prosecution for charges including forcible rape, oral copulation, and false imprisonment, the prosecutor (a black man) stated that he would not have "signed the complaint" if he was not convinced of defendant's guilt, and he asked the jury to accept his opinions regarding the defendant's guilt, because he, as a black man, "understood" black defendants. This was an improper appeal to the jury.

Appealing to the Passions or Sympathies of the Jury

Referring to what victim or victim's family has lost:

People v. Kipp (2001) 26 Cal.4th 1100, 1129. Improper appeal to the jury's sympathies for the prosecutor to state during the guilt phase: "So when you think about the elements of the offense of murder, as you will when you go back to deliberate, and as we, perhaps in somewhat of a legal abstract sense, the element satisfied a human being was killed. [¶] If you would, think for a moment about what it means. A living, breathing human being had all of that taken away." This was improper, because it was an appeal to the jury for sympathy for the victim, which is inappropriate during the guilt phase of a trial.

Requesting the jury to stand in victim's shoes:

People v. Vance (2010) 188 Cal.App.4th 1182. Murder conviction reversed, because prosecutor repeatedly told the jury to put itself in the shoes of the victim to "imagine the suffering of the victim."

People v. Mendoza (2007) 42 Cal.4th 686, 704. It was improper for the prosecutor to state, "Do you remember the thing he said to little Sandra just before he executed her with a gun at her head? Can you imagine the terror that this child is going through, and that all the people are going through? Certainly the children. Can you imagine that terror? It's not in the courtroom. We're not here doing some scientific experiment. Imagine yourselves at the scene. And what does he do?" The argument was improper, because it was an appeal to the jury to view the crime in the eyes of the victim.

People v. Simington (1993) 19 Cal. App.4th 1374, 1378. In closing argument, the prosecutor invited the jury to "picture somebody ...[with] a dagger ... right out where you can see it and he says, 'Give me $20.00.' ...You say 'No,' and he stabs you. You go to the hospital, and you have spent four days in the hospital, and you got a tube in your chest, flat on your back, and you come to court." This was an improper attempt of the prosecutor to appeal to the passion and prejudice of the jury in closing argument.

People v. Fields (1983) 35 Cal.3d 329, 361-363. Improper for the prosecutor to invite the jury to "view the case through the eyes of the victim," because it encouraged jurors to "depart from their duty to view the evidence objectively."

Insisting that the jurors are victims:

People v. Mendoza (2007) 42 Cal.4th 686, 706. It was misconduct for the prosecutor to say to the jury, "[y]ou are victims in the sense that you have to make a decision as to whether or not somebody lives or dies."

Telling the jury that only they have the power to enforce the law:

People v. Turner (1983) 145 Cal.App.3d 658 (overruled on other grounds). It was misconduct for the prosecutor to make an "emotional appeal" to jurors in closing argument when he stated, "A victim of a crime is probably the most alone person in the world. There is no law enforcement in the streets. Police officers don't really enforce the law; they just bring criminals into court. Prosecutors don't really enforce the law; all we do is present the cases. Jurys [*sic*] enforce the law, and that, ladies and gentlemen, is your duty."

Stating a non-guilty verdict would make the trial a waste of time:

People v. Pitts (1990) 223 Cal.App.3d 606, 695-696. After a sixth-month trial, the prosecutor in closing argument said, "If we fail to persuade all 12 of you beyond a reasonable doubt, we persuade 11 of you, it wipes out six months, folks. It's as though it never existed." The court held that this comment went "far beyond proper bounds," because the comment exerted a pressure with a "personal aspect," "the idea was planted in the jurors' minds that anyone not voting for conviction would be nullifying a great deal of hard work and rendering vain the personal sacrifice of all." The comment improperly appealed to the self-interest of jurors, asking them to view the case from a personal point of view.

Implying biblical consequences:

People v. Pitts (1990) 223 Cal.App.3d 606, 699-702. In closing argument, the prosecutor made several biblical references, including stating, "And Then Christ Told Everybody, Truly as I Say to You, Whoever Does Not Receive the Kingdom of God, Like a Child, Shall Not Enter It at All. He Talked About the Innocence of Children. He Talked About Kids. And They Have Come Forward Before You, Ladies and Gentlemen. And Not [*sic*] It's Time to Take Roll. Lisa [P.], Victim. Carol [P.], Victim. Tommy [M.], Victim. Windy [B.], Victim." The court held that the prosecutor's remarks went beyond biblical references and became "inappropriate" when he "noted Paul's

statement that people who behave like this 'will not inherit the kingdom of God.'" The statement was misconduct, because it was an argument to the jury that voting not guilty would be at odds with Christ and condoning behavior the Bible condemns. The appellate court found the tone of the argument played upon the passions and prejudices of the jury.

Sandoval v. Calderon (9th Cir. 2000) 241 F.3d 765, 775-776. Prosecutor's argument to jury that God approves of the death penalty was improper, because it is an argument not based on evidence in court or legal instructions. Instead, it urges the jury to make a decision based upon factors other than those that it is instructed are proper.

Requesting to Improperly Consider Other Parts of the Judicial Process

Referring to the fact that defendant was held to answer:

People v. Whitehead (1948) 148 Cal. App.2d 701, 706. Prosecutorial misconduct to argue to the jurors that they should consider the fact that defendant had been held to answer to the charge after a preliminary hearing.

Requesting the jury to consider elements of punishment is not appropriate:

People v. Holt (1984) 37 Cal.3d 436, 457-458. In a prosecution for first degree murder, the prosecutor argued that the jury should find the defendant guilty of committing a murder in the course of a robbery, rather than a burglary, so defendant would not be guaranteed a parole date. He said, "What happens if you conclude that this was a burglary. You know what happens? You give Steven Holt a parole date... if you conclude that Steven Holt is guilty of first degree murder based on a burglary theory, then you cannot conclude that the murder occurred during a robbery, and if you cannot conclude that it occurred during a robbery, you've just guarantee him a parole date." This was improper, because "'the jury is not allowed to weigh the possibility of parole or pardon in determining the guilt of the defendant....'" (quoting *People v. Barclay* (1953) 40 Cal.3d 146.)

People v. Mendoza (1974) 37 Cal. App.3d 717, 727. The prosecutor requested the jury "to take [defendant] off the streets." This constituted an improper reference to the potential punishment of the defendant, which is not a consideration of the jury.

Referring to grand jury phase

People v. Hale (1947) 82 Cal.App.2d 827, 832-833. It was misconduct for the prosecutor to state, "The Grand Jury after hearing the testimony returned an indictment against both defendants on the theory that both defendants were guilty." This was misconduct, because it was an argument directing the jury to use the fact that the grand jury found evidence of the defendants' guilt as evidence that the defendants were guilty. It also implied there was evidence in front of the grand jury pointing to guilt which was not before this jury; therefore, the argument was improper.

II. IMPROPER STATEMENTS FOR OR AGAINST OTHERS

Vouching for the Credibility of Prosecution Witness

People v. Woods (2006) 146 Cal.App.4th 106, 113. In the prosecution for possession of cocaine, the prosecutor argued that defendant was "obligated" to put on certain evidence supporting defense counsel's contention that the arresting officer's testimony was unbelievable, and that such evidence would certainly be available "in this day and age," if it existed. The court held this statement, along with the prosecutor's assertion that evidence of misconduct by the arresting officer didn't exist, to be improper, because "reasonable jurors could only understand the argument to mean that the prosecutor had actual knowledge that [the arresting officer] had never engaged in misconduct. The argument therefore constituted vouching."

United States v. Combs (9th Cir. 2004) 379 F.3d 564, 574. The prosecutor committed misconduct by arguing in closing that in order to acquit the defendant, the jury had to believe that the federal agent risked losing his job by lying on the stand. This was improper vouching, because it suggested that a government agent's testimony was supported by information not introduced as evidence.

United States v. Brooks (9th Cir. 2007) 508 F.3d 1205, 1210. Improper vouching for prosecution witnesses to testify that they would lose leniency from plea agreements if they lied. Court found: "These statements are mild forms of vouching, because they suggest that the witness, 'who might otherwise seem unreliable, has been compelled by the prosecutor's threats and the government's promises to reveal the bare truth.' *United States v. Wallace*, 848 F.2d 1464, 1474 (9th Cir.1988). Such references imply that 'the prosecutor can verify the witness's testimony and thereby enforce the truthfulness condition of its plea agreement.' *Id.*" The same case also holds that it was improper vouching for the prosecution to ask witnesses on redirect whether the plea agreement required them to testify truthfully and to ask the witness about the procedural process of obtaining a wiretap warrant.

United States v. Witherspoon (9th Cir. 2005) 410 F.3d 1142, 1146. Improper vouching for prosecution to argue in closing that the police officers were "credible police officers" and that they "had no reason to lie in this case or not tell the truth." The prosecutor argued that the officers told the truth, because if they lied then they would "risk losin' their jobs, risk losin' their pension, risk losin' their livelihood. And, on top of that, if they come in here and lie, I guess they're riskin' bein' prosecuted for perjury." The appellate court found this was improper vouching. The court explained: "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony (*United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir.1993))." Same holding in *United States v. Combs* (9th Cir. 2004) 379 F.3d 564, 574 [improper to argue to jury that in order to acquit the defendant, they have to believe that the federal agent was willing to lose his job].

Commenting on the Veracity of Other Witnesses

Expressing personal opinion on the veracity of a witness:

In re Gary G. (1981) 115 Cal.App.3d 629, 637. In a juvenile commitment proceeding, it was misconduct for the prosecutor to express his personal opinion to the court as to the veracity of a defense witness.

People v. Cotton (1959) 169 Cal.App.2d 1, 3. The prosecution urged the jury to believe his witness by arguing, "[T]hat

man is a man who is worthy of belief. At least some of us believe he is worthy of belief, or we wouldn't use him in this work and wouldn't put him on the witness stand." The court found it to be "misconduct for a prosecuting attorney to express his personal belief as to the reliability of a witness."

Asking improper "were they lying" questions:

People v. Zambrano (2004) 124 Cal. App.4th 228, 234-235, 240-241. In the prosecution of selling and transporting cocaine, the prosecutor asked defendant whether two police officers lied about his involvement in an alleged drug transaction. These questions included the following:

"[W]hat you're telling this jury is that the only thing Corporal Escarpe testified to truthfully was the fact that you were arrested that night?"

"So Corporal Escarpe is lying about everything he testified to, except for the fact that you were arrested that night?"

"And Officer Dorsey is lying about everything that took place that night, except for the fact that you were arrested October 10th, 2001, correct?"

"So everybody is lying, except for you?"

These "were they lying" questions were improper, because the prosecutor used them to berate the defendant before the jury and to inflame the passions of the jury. Moreover the testimony was inadmissible opinion testimony.

United States v. Combs (9th Cir. 2004) 379 F.3d 564, 572; *United States v. Sanchez* (1999) 176 F.3d 1214, 1219. It was improper cross-examination for the prosecution to ask the defendant about whether a federal agent was lying when he testified.

United States v. Geston (2002) 299 F.3d 1130, 1136. The prosecution asked a witness whether he would change his testimony if he knew that officers testified differently or if his testimony was correct and those other officers were mistaken. The Ninth Circuit held that this was improper, because it asked the witness to give an opinion regarding the veracity of other government witnesses.

Asking a witness his opinion for the veracity of other witnesses' extrajudicial statements:

United States v. Sanchez (9th Cir. 1999) 176 F.3d 1214, 1221. Eliciting an officer's opinion regarding the credibility of the defendant during an interrogation of the defendant was misconduct.

Disparaging Other Witnesses

Stating that a witness lied:

People v. McLain (1988) 46 Cal.3d 97, 112-113. In closing argument the prosecutor stated, "So obviously, what happened, [defense investigators] shopped around, found someone who was willing to come in and lie, but they didn't get his story straight enough...." This comment was improper, because it implied that the defense intentionally presented perjured testimony.

People v. Johnson (1981) 121 Cal. App.3d 94, 102. In closing argument, the prosecutor reminded the jury that he had personally investigated the defense witness testimony and personally believed it to be an "outright lie." Improper, because the prosecutor implied that he had personal knowledge of facts that were not available to the jury, but attorney failed to object.

Disparaging Defense Counsel

Using disparaging terms:

People v. Young (2004) 34 Cal.4th 1149, 1193. It was improper for the prosecutor to repeatedly refer to defense counsel as "liars" and accuse counsel of lying to the jury.

Stating that defense counsel did not want the jury to hear the truth:

People v. Herring (1993) 20 Cal.App.4th 1066, 1075. In a rape and assault case, the prosecutor stated, "My people are victims. His people are rapists, murders, 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." This was improper, because it implied all persons accused of crimes are guilty, denigrating the presumption of innocence. It also suggested that defense counsel suborned perjury, and it is improper to malign defense counsel's character.

People v. Vance (2010) 188 Cal.App.4th 1182, 1194. In a murder case, the prosecutor made the following comment after defense counsel continued to object to her opening statement which improperly implored the jurors to put themselves in the shoes of the victim: "Defense is objecting, because the defense believes I'm painting too graphic a picture." The court reversed the murder conviction. The court found the comment was improper, because it was an attack on the integrity of defense counsel. (*Id.* at p. 1200.)

Stating that defense counsel further victimized alleged victim:

People v. Turner (1983) 145 Cal. App.3d 658, 672-675 (overruled on other grounds). In a prosecution for rape, the prosecutor argued that the victim's experience was more painful, because of the actions of defense counsel. The appellate court found that it was improper for the prosecution to label defense counsel as an additional attacker to the violent crime, because it cast aspersions on the defendant's right to defend himself and to be represented by counsel.

Accusing the defense of fabrication:

People v. Bain (1971) 5 Cal.3d 839, 845-848. The California Supreme Court found that the prosecutor committed misconduct by, among other acts of misconduct, telling the jury that the defendant and his attorney fabricated the defense. In voir dire, the prosecutor told the jury that the defendant had three months to think about his story. In closing the prosecutor argued, "You might say to yourself, the defendant's got a good story. Did you think he was going to come in here without a good story? He's had how long to prepare . . . I don't want to imply that my colleague here, that he told him what to say, but he has the assistance of a lawyer."

Bruno v. Rushen (9th Cir. 1983) 721 F.2d 1193, 1195. Prosecutorial misconduct to imply that a complaining witness changed her story, because defense counsel dissuaded her: "Now, after that statement was given a lot of events started taking place. . . . All of the sudden, lawyers start getting involved in the case. And the next thing you know, the following day when the (witness) comes in to testify, all of a sudden everything got turned around, and that's no longer the case." The prosecutor asked the jury to think about the "kind of pressures. . . . exert[ed]" on the witness, because defense counsel referred her to a lawyer. The court found it was improper to try to destroy the credibility of the testimony by labeling defense counsel's actions as unethical, when the prosecution had no evidence to support its accusations.

Criticizing counsel's tactics:

People v. Podwys (1935) 6 Cal.App.2d 71, 73. The prosecutor committed misconduct when defense counsel asked

a witness a proper question, and the prosecutor said, "Counsel, what is the purpose of that–just your dilatory tactics?" Later, he called defense counsel a "clown" and charged him with a "breach of professional ethics," for which there was no foundation. Later, the prosecutor said, "I am surprised the public defender would use the tactics he does–that is, I am not surprised; I know him... This district attorney doesn't use the tactics you do." The court found the prosecutor had no right to inject his comments into the proceedings.

People v. Bell (1989) 49 Cal.3d 502, 538. During his rebuttal argument, the prosecutor remarked, "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." The appellate court found the comments were improper, because they "suggested that counsel was obligated or permitted to present a defense dishonestly."

Stating that defense counsel does not believe in his case or knows that the evidence shows his client is guilty:

People v. Purvis (1963) 60 Cal.2d 323 (overruled on other grounds). It is improper for the prosecutor to state that defense counsel believes his client deserves the death penalty.

United States v. Kirkland (9th Cir. 1980) 637 F.2d 654, 656. It was improper for the prosecutor to argue to the jury that defense counsel knew their clients were "guilty as sin."

People v. Herring (1993) 20 Cal.App.4h 1066, 1075. It was improper to argue to the jury that defense counsel did not believe his own client, because it is irrelevant, and it may have misled the jury about the law.

Statements About Defendant and Defendant's Rights

Disparaging defendant/using disparaging terms:

People v. Herring (1993) 20 Ca.App.4th 1066, 1074-1075: In a rape and assault case, the prosecutor stated that defendant was "like a parasite ... never works ... stays at people's homes ... [d]rives people's cars ... steals from his own parents to get anything ... won't work for it." These remarks were improper, because they were character assaults. The implication is that people who do not work, live with others, and drive other people's cars are bad people and more likely to do criminal acts, and this is an improper consideration for the jury.

People v. Fosselman (1983) 33 Cal.3d 572, 580. In a prosecution for assault with a deadly weapon and false imprisonment involving a female victim, the prosecutor called defendant an "animal ... out to get somebody that morning." The court held the comments to be misconduct that constituted an "inflammatory characterization of defendant."

People v. Duvernay (1941) 43 Cal. App.2d 823, 828. It was misconduct for the prosecutor in closing argument to state, "The characteristics of one who uses narcotics habitually are pretty well known and recognized by one who has any knowledge at all of the matter. The defendant has many of the characteristics of a user of narcotics." The court found the comments were calculated to prejudice the defendant and prevented him from having a fair and impartial trial, because the comments were unsupported by evidence in the record.

Stating that defendant or defense witnesses committed perjury:

People v. Ellis (1966) 65 Cal.2d 529, 541n.16. Repeated references to the defendant and his wife as perjurers and suggesting that the defendant should be found guilty because he is a perjurer is misconduct.

People v. Conover (1966) 243 Cal. App.2d 38, 44-445. The prosecutor improperly argued in closing that a defense witness's testimony was "engineered" and that his testimony was perjured, implying that the defense counsel suborned perjury. The statements were improper, because they expressed the prosecutor's personal belief in the unreliability of a defense witness, and because the accusation of perjury was an improper attempt to impeach the witnesses for conduct with which they were not charged.

People v. Resse (1963) 220 Cal.App.2d 143, 147. It was improper for the prosecutor to argue to the jury that some defense witnesses "committed perjury" because the comment "indirectly branded defendant's witnesses as possible felons." To do so is improper, because it impeaches those witnesses for offenses for which they have not been charged or convicted.

Remarking on defendant's courtroom behavior:

People v. Vance (2010) 188 Cal.App.4th 1182, 1201. It is misconduct to remark that "the defendant's appearance throughout this trial [has been] extremely deceiving . . . the defendant . . . sitting there looking like a pitiful excuse for a human being."

People v. Boyette (2002) 29 Cal.4th 381, 434. It was improper for the prosecutor to state to the jury, "[Defendant is a v]ery remorseless, cold-blooded individual. . . . Remember, appearances can be very deceiving and he's been working on you. He has been working on you, watching you come and go, smiling and waving when he's introduced to you. Appearances, ladies and gentlemen, can be very deceiving." This remark was improper to the extent that the prosecutor was suggesting that the jury should find that defendant was duplicitous, based on his courtroom behavior.

Referring to defendant's race or religion:

People v. Simon (1927) 80 Cal.App. 675, 677-678. It was misconduct for the prosecutor to repeatedly refer to defendant's race and religion in his argument to the jury. His improper remarks included: "There has, of course, grown up a suspicion in this country with reference to fires, whenever a Jew has anything to do with it;" "I did not make them Jews. I am not responsible for the fact that they are Jews;" and "The Jews with their experience and with the help of Fordson oil expected the thing to go up and to burn up, and that there would not be anything left of it, there would not be anything but ashes to tell the story. That is what they expected to find."

Arguing that the defendant is less credible because he is in custody:

People v. Lambert (1975) 52 Cal.App.3d 905. It was improper for the prosecutor to argue to the jury that the defendant's testimony was less credible because he came through the holding cell door as opposed to witnesses who came through a public entrance. This is an improper form of impeachment.

Improperly Commenting on Defendant's Defense

Commenting on defendant's failure to testify:

Griffin v. California (1965) 380 U.S. 609, 615. "[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

People v. Diaz (1989) 208 Cal.App.3d 338, 341-342. Defense was that defendant was not the thief, but was only a middleman. In closing argument, the prosecutor asked, "Who testified or what evidence do we have that says I'm a middleman? That I didn't steal this property and that someone else did?" Even though the court found the comment "brief" and "indirect," it nonetheless held that it was improper because the comment focused on defendant's failure to testify that someone else and not he stole the stereo.

People v. Ryner (1985) 164 Cal.App.3d 1075, 1084. In a prosecution arising out of a shooting in a bar, the prosecutor stated that "the one who can tell you what happened, who can bring you the name and addresses of witnesses who saw exactly what happened is right there [defendant]." The court found that this comment went beyond a permissible comment on the evidence in the case. Rather, it was a reference to the defendant's failure to take the stand and clarify the gaps in the evidence. The court noted that the prosecutor's intent was irrelevant and that because the comment drew attention to the defendant's failure to testify, it was misconduct.

People v. Rios (1983) 140 Cal.App.3d 616, 622. In a prosecution for robbery, the prosecutor said, "[I]f I were the accused, I don't believe I would get up on the stand and say anything either in a lot of circumstances." The court found this was a blatant violation of *Griffin v. California*, because the meaning of the comment was that the prosecutor would not testify in view of the strong evidence of guilt in the case.

People v. Garnica (1981) 121 Cal. App.3d 727, 736. In a prosecution for murder, the prosecutor argued, "Now, if he didn't have [a tattoo] on his back, why didn't you see his back? Why didn't he get up before you and say, 'I don't have that kind of tattoo?'" The attorney general conceded that the comments were improper.

In re Rodriguez (1981) 119 Cal. App.3d 457, 460-461. In a prosecution for kidnapping, rape, and robbery, the prosecution in closing argument stated, "It's absolutely undisputed that there was a kidnap, absolutely undisputed. Where is that disputed?" The prosecutor also repeatedly reminded the jury not to hold the defendant's failure to testify against him. The court found the comments together violated *Griffin v. California*, because the former comments may have been a reference to the defendant's silence, and the latter comments, in their context, had the probable effect of focusing the jury's attention on the defendant's failure to testify.

People v. Medina (1974) 41 Cal.App.3d 438, 457-458. The prosecutor argued to the jury that the testimony of three prosecution witnesses was "unrefuted. No one has come forward and said that it is false. No one has come before you to show you it wasn't that way. You have not heard that." These comments constituted misconduct, because the only possible witnesses who could have refuted the testimony were the defendants themselves, and therefore, the comments implied that the jury should take into consideration the fact that the defendants did not take the stand to refute the testimony. Specifically, the court focused on the prosecution's statement to the jury that there was no "denial" that the defendants were at the scene of the crime; the court found the use of the word "denial" connoted a personal response from the accused himself.

People v. Vargas (1973) 9 Cal.3d 470, 479. In a robbery case, the prosecutor in closing argument committed a non-prejudical *Griffin* error when he stated, "there is no denial at all that [defendants] were" at the scene of the robbery. The words "no denial" impliedly referenced the fact that the defendant did not take the stand and deny his guilt.

People v. Mendoza (1974) 37 Cal. App.3d 717, 726. Improper for prosecutor to argue to the jury that "[t]his is a serious offense; you should give it great, great thought. Since olden days, I guess it is from the time when the defendant was not capable of taking the stand, you know, he couldn't be a witness in those days, there is a cautionary instruction that says to you, 'The charge is easily made; hard to defend against.'" The Court of Appeal found that this comment violated the spirit of *Griffin*.

Comments or Evidence Violating Defendant's Right to Counsel

People v. Schindler (1980) 114 Cal. App.3d 178, 184, 187-189. In a prosecution for second degree murder in which defendant asserted a diminished capacity defense, the prosecutor commented, "She has enough presence of mind right after that when she is at the police station when Osti walks in there and questions her, she wants to see a lawyer....Why do you think she asked for Mr. Geragos? Because Mr. Geragos had prosecuted Lou Schindler in one of those past cases. She knows what she wants." The court held that the potential effect of these remarks constituted misconduct as an impermissible penalization of defendant's constitutional right to counsel.

Bruno v. Rushen (9th Cir.1983) 721 F.2d 1193, 1195. It was improper for the prosecutor to analogize the defendant's hiring of an attorney to represent him to "a Judas syndrome" which "betrayed" the criminal justice system. The Ninth Circuit stated, "At the outset, we feel it incumbent on us to note that in no situation in a criminal trial, such as this one, do we feel the mere act of hiring an attorney is probative in the least of the guilt or innocence of defendants. '[L]awyers in criminal cases are necessities not luxuries,' . . . and even the most innocent individuals do well to retain counsel." The court found that the attacks on the defendant's exercising of his right to counsel were improper and error.

Commenting on defendant's post-arrest silence:

Doyle v. Ohio (1976) 426 U.S. 610. It is unconstitutional for the prosecutor to use defendant's post-arrest silence to impeach an explanation offered at trial.

Killian v. Poole (9th Cir. 2002) 282 F.3d 1204. It is misconduct for the prosecutor to ask the defendant eight times on cross-examination whether the reason she invoked *Miranda* after being arrested was because she had something to hide. It did not matter that the defendant invoked her right to remain silent two hours into the interview, because she invoked immediately after she was told she had the right to remain silent, which occurred two hours in. The questions regarding her silence were improper.

People v. Fondron (1984) 157 Cal. App.3d 390, 395-396. In a prosecution for

possession of PCP, the prosecutor asked defendant during cross-examination, "Now, did you tell Deputy Hackney the story that you told the jury, did you tell him that that morning?" In closing argument, "the prosecutor asserted that it would have been 'natural' for appellant to tell the police his side of the story, and that his failure to do so at the time of arrest indicated that his trial testimony was not truthful." Defendant was never read his *Miranda* rights. The court held that these references to defendant's post-arrest silence, even though the defendant was never read *Miranda* rights, was improper.

People v. Fabert (1982) 127 Cal.App.3d 604, 608-609. It was improper for the prosecutor to bring to the jury's attention the fact that the defendant was read *Miranda* rights and invoked the right to an attorney. The evidence was inadmissible even to rebut the defense of diminished capacity.

Commenting on defendant or defense counsel's failure to disclose his alibi to the police:

People v. Lindsey (1988) 205 Cal. App.3d 112, 116-117. In closing argument, the prosecutor stated, "Where was this information [defendant's alibi] until today? It's inconceivable. It goes against common sense, and it is unreasonable to believe that another officer of the court would allow her innocent client to sit in jail for five months and not say anything to anyone." The court found that it was improper for the prosecutor to condemn the defense attorney's failure to previously reveal or discuss the defendant's alibi defense because it was tantamount to the prosecutor commenting on the defendant's post-arrest silence. The court also found that the comments were improper because they disparaged defense counsel and implied that defense counsel participated in the fabrication of a defense.

People v. Galloway (1979) 100 Cal. App.3d 551, 559. It is *Doyle* error for the prosecutor to argue to the jury and imply through cross-examination that the jury should disbelieve the defendant's alibi defense because he did not disclose it until trial.

People v. Crawford (1967) 253 Cal. App.2d 524, 535. The prosecutor improperly stated to the jury, "[Defendant] had tremendous opportunity, opportunity to give his alibi, and yet he never did to the very officer who was investigating the case, the man who could go out and talk to these relatives.... He didn't come up with this thing until recently." This was misconduct, because it violated the rationale of *Griffin* which "implicitly proscribes drawing an inference adverse to the defendant from his failure to reply to an accusatory statement if the defendant was asserting his constitutional privilege against self-incrimination.'"

People v. Reese (1963) 220 Cal.App.2d 143, 146. The prosecutor argued, "He has got all these witnesses to prove where he was that night, but does he tell anybody, does he tell anybody in law enforcement? I don't know who he told. Obviously he discussed it with a lot of his friends and relatives, but does he tell the officer? 'I wasn't there; check out my story.'... Is this the conduct of an innocent man who has been mistaken for somebody else? Is this consistent with innocence?" The court found the argument was patently erroneous and improper, because it implied that the defendant had to disclose his alibi defense in advance of trial, which he does not, and that he was obligated to disclose his alibi to police, which he is not.

Comments or Evidence Violating Defendant's Right to Confrontation

Douglas v. State of Ala. (1965) 380 U.S. 415. A witness refused to testify. The prosecution cross-examined the witness by asking him question after question that effectively was a reading of his statement to police. The court found that because the witness refused to testify, reading the witness's statement this way violated the defendant's Sixth Amendment rights to confrontation and cross-examination.

People v. Barakas (1983) 145 Cal. App.3d 804. The only evidence against a defendant accused of robbery and murder was a weak eyewitness. There was an informant who previously identified the defendant to police but who defense counsel knew would refuse to testify. The prosecutor told the jury in opening statement that the witness identified the defendant but that he might refuse to testify. The witness refused to testify. On cross-examination the prosecutor asked, without being required to show a foundation, whether the witness refused to testify out of fear. The court found that the prosecutor committed misconduct in opening statements and in his cross-examination because he implied to the jury the existence of evidence of which he had no proof. The court found this misconduct violated the defendant's right to confrontation and reversed the conviction.

III. IMPROPER USE OF EVIDENCE AND/OR THE RECORD

Referring to Facts Not in Evidence

Referring to the date an expert witness was hired:

People v. Bordelon (2008) 162 Cal. App.4th 1311, 1322-1323. During closing argument, the prosecutor stated that the defendant had no valid defense, and "[s]o what do they do? Two weeks before this trial begins, two weeks before you were brought in and say there as potential jurors, they hire a doctor." It was misconduct for the prosecutor to refer to the date the doctor was hired as an expert witness because no evidence of that date was on the record. The misconduct was further exacerbated because the date referred to was wrong.

Stating alleged scientific facts not in evidence:

People v. Bell (1989) 49 Cal.3d 502, 531-539. In closing argument, the prosecutor stated, "Those of you who have some medical knowledge know that cocaine is a downer, you get mellow on it. It's not like methedrine which stokes you up and causes you to do irrational acts. Cocaine is a downer. You don't go out and shoot people on cocaine. You make love, you're mellow." The remarks were improper, because they were factually inaccurate, neither based on evidence nor related to a matter of common knowledge, and the prosecutor attempted to appear to be stating scientific fact.

People v. Whitehead (1957) 148 Cal. App.2d 701, 705. In closing argument, the prosecutor stated, "[A]t a certain age period men go through something that causes them to want to find something in the way of sexual gratification other than what normal people go through." He also argued that his experience in the district attorney's office led him to know that unless the defendant was convicted, he would reoffend. The court found that these arguments were improper, because there was no evidence on the record of the predilections of men of the defendant's age to commit offenses

like those charged and no evidence regarding the experience of the district attorney's office and reoffending. The court found that the argument was highly inflammatory and improper. It was improper, because it was based on facts not in evidence.

Suggesting no similar crimes had been committed since defendant's arrest:

People v. Hill (1998) 17 Cal.4th 800, 828. The prosecutor committed misconduct when she stated in closing argument, "[s]ince this defendant was arrested and locked up [a stabbing] hasn't happened over there again." There was no evidence on the record of the reduction in violent crime or in the knife assault rate at that particular location. The statement was improper, because it communicated to the jury that she had information that the jury did not have which pointed to the defendant's guilt.

Referring to prosecutor's own personal history not in evidence:

People v. Mendoza (2007) 42 Cal.4th 686, 704. It was improper for the prosecutor to tell the jury, "I don't know about you, I'm an old war horse. I've been through a lot of these. That choked me up when I saw that testimony." It was improper for the prosecutor to emphasize his long experience as a basis for assessing the testimony and egregiousness of the crime.

People v. Vlez (1983) 144 Cal.App.3d 558, 569-570. In a prosecution for involuntary manslaughter, the prosecutor, referring to the defendant's firearm training as a member of the armed forces, stated, "when I was in the service, we had to take the darn thing [a firearm] apart and reassemble it. We had to know everything about the weapon." The court held that this comment was improper, because the prosecutor's history in the armed service was not in evidence.

Referring to defendant's alleged history not in evidence:

People v. Bolton (1979) 23 Cal.3d 208, 212-214. In a prosecution for assault with a deadly weapon, the prosecutor "twice hint[ed] that, but for certain rules of evidence that shielded defendant, he could show that defendant was a man with a record of prior convictions or with a propensity for wrongful acts." This was improper, because the prosecutor was inviting the jury to speculate about and potentially base its verdict on "evidence" never presented at trial.

People v. Carr (1958) 163 Cal.App.2d 568, 576. In closing argument the prosecutor argued, "these men were driving slowly down Washington Boulevard in a westerly direction with a gun on the floor under each one of them, and I say they were out working at their trade and looking for someone to rob." The court held that because of the lack of evidence of any prior arrests or participation in other robberies, the phrase "working at their trade" was unsupported by facts in evidence. Therefore, the argument was misconduct.

People v. Braun (1939) 14 Cal.2d 1, 6-7. It was misconduct for the prosecutor in cross-examination to ask defendant about the circumstances of his prior conviction, as opposed to solely the existence of the conviction itself.

United States v. Brown (9th Cir. 2003) 327 F.3d 867. Misconduct to use evidence of prior act of "cheating" to argue that the defendant was more likely to commit fraud, because it was a propensity argument meant to inflame the jury.

Making an irrelevant analogy:

People v. Zurinaga (2007) 148 Cal. App.4th 1248, 1255. It was improper for the prosecutor to analogize the facts of a home invasion case to 9/11. In closing argument, the prosecutor projected a chart listing the airlines, flight numbers, times of department, and number of passengers and crew on each plane involved in 9/11. He told the jury, "Counsel's statement was these two men were outmanned, outsized. What are these [?] These are the four airliners that were high jacked [*sic*] on September 11, 2001....[¶] American Airlines Flight 11, 81 passengers and crew; United Airlines flight 175, 56 passengers and crew; American Airlines 77, 58 passengers and crew; United Airlines flight 93, 38 passengers and crew. [¶] Did those three airliners, four–there were five men. I don't remember. One of them only had four men." The appellate court found the argument was inflammatory. Also, it referred to facts not in evidence; while the events of 9/11 are common knowledge, the specific numbers of passengers and crew involved are not. Finally, the court found that the analogy was inapt.

Arguing what a witness would have testified:

People v. Hall (2000) 82 Cal.App.4th 813, 818. It was improper for the prosecution to rebut that the reason they did not call a police officer witness was because his testimony would be cumulative to the other officer's testimony. This argument deprived the defendant of his Sixth Amendment rights to confront and cross-examine.

People v. Johnson (1981) 121 Cal. App.3d 94, 102. There was no evidence whether a witness would have admitted or denied a particular fact, but the prosecutor argued in closing that the witness would have denied the fact, had she been asked. The court held it is impermissible for a prosecutor to state what the answer to a question would be if it had been asked.

People v. Gaines (1997) 54 Cal.App.4th 821, 823-824. In a prosecution for second degree robbery, the prosecutor committed misconduct when he argued to the jury that defendant's alibi witness (who did not testify) would have impeached defendant if he had testified, that the defense had somehow caused that witness to leave, and that the prosecution had tried to get the witness on the stand. All these matters were unsupported by the evidence and therefore improper; the prosecutor cannot tell the jury what a witness would have testified.

Arguing facts in closing which are not in evidence:

People v. Kirkes (1952) 39 Cal.2d 719, 724. Improper for the prosecutor to argue in closing that the reason a witness waited a long time to come forward to authorities was because she was afraid for her life. There were no facts in evidence supporting this argument. The argument was therefore misconduct under the well-settled rule that it is misconduct for the prosecutor to argue facts not in evidence to the jury.

People v. Kasim (1997) 56 Cal.App.4th 1360, 1387. It was improper for the prosecutor to argue in closing that he planned to prosecute the two snitch witnesses after the trial was over, because he knew he would not prosecute them.

People v. Delgado (1938) 28 Cal.App.2d 665, 668. On a homicide case, it was prejudicial misconduct for the prosecutor to argue in closing that defendant carried a gun at other times, that the jury could conclude that she "had something to do with" a prior killing, and that such women as defendant had children "as a means to an end, and they use them in their unlawful business." Such

statements were wholly unsupported by the record, went beyond the scope of legitimate argument, and were for the obvious purpose of prejudicing the defendant in the jury's eyes.

People v. Frye (1998) 18 Cal.4th 894, 976. Prosecutorial misconduct for the prosecutor to argue in closing that the Department of Justice collected evidence relevant to the case which the jury did not hear about.

Implying Nonexistence of Facts the Prosecutor Prevented from Being Put on the Record

People v. Varona (1983) 143 Cal.App.3d 566, 569. In a prosecution for rape and oral copulation, "the prosecutor not only argued the 'lack' of evidence where the defense was ready and willing to produce it, but he compounded that tactic by actually arguing that the woman was not a prostitute, although he had seen the official records and knew that he was arguing a falsehood." The appellate court found this was improper.

People v. Castain (1981) 122 Cal. App.3d 138, 146. In a prosecution for battery on a police officer and resisting arrest, the court stated that the prosecutor committed "obvious misconduct" by arguing that the evidence showed only one prior incident where the police officer used excessive force, after the prosecutor had successfully urged the exclusion of a second incident.

People v. Frohner (1976) 65 Cal.App.3d 94, 108. In a prosecution for selling or furnishing contraband, the prosecutor improperly argued regarding the failure of a prosecution informant to testify. The prosecutor argued that defense "[c]ounsel has subpoenas. If he wanted him here so you could look at him, he could have had him here." The court found this was "inexcusable" misconduct, because the prosecutor knew the subpoenas could not be served on the informant, and the comment's purpose was to improperly suggest to the jury that the defendant had purposely failed to call the informant as a witness.

Implying That There Is More Evidence Not on the Record

Implying authorities had more knowledge:

People v. Bross (1966) 240 Cal.App.2d 157, 171. The prosecutor improperly stated that the "authorities... pretty well determined who was the wrongdoer... and who was the person who was actually causing all of the trouble..." This was misconduct, because it permitted the inference that the district attorney had information not brought out in the case.

Presenting Evidence or Asking Questions Already Known to be Inadmissible

Failing to abide by court rulings and admonitions:

People v. Pigage (2003) 112 Cal.App.4th 1359, 1374. The defendant failed to appear at trial, mid-way through. The court denied a prosecution request to instruct the jury that they could interpret the defendant's absence as consciousness of guilt. The prosecutor told the court that he intended to argue consciousness of guilt to the jury and cross-examine defense witnesses on the issue. The court instructed the prosecutor not to violate its order. The prosecutor told the court he would still argue consciousness of guilt to the jury, because the law said he could. He referenced the defendant's absence in his rebuttal argument. The appellate court held this was prosecutorial misconduct:

The Attorney General further argues Flory's legal position was "right." However, the correctness of the court's decision is not the issue. *"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, 116 Cal.Rptr. 713, italics in original.) As an officer of the court, Flory owes a duty of respect for the court. (Bus. & Prof. Code, § 6068, subd. (b).) Flory's continued bickering with the court and threats of disobedience, even at the risk of a mistrial, cannot be characterized as mere advocacy. His further decision to defy the court s order is outrageous misconduct.

Thomas v. Hubbard (9th Cir. 2001) 273 F.3d 1164, 1176-1177 (overruled on other grounds). The court excluded evidence that the defendant used a gun in committing a prior robbery. Yet, the prosecutor asked the defendant whether he pled guilty to robbery *with a firearm* and whether he robbed someone *with a gun*. The Ninth Circuit found that this was prosecutorial misconduct.

People v. McGreen (1980) 107 Cal. App.3d 504. The prosecutor sought to impeach an expert witness by questioning him on his grades in graduate school and his resignation from a professional organization for an ethics investigation. The court sustained objections. The prosecutor continued and asked the witness about a prior high profile case in which the witness had testified. The prosecutor asked whether his testimony had been stricken in that case. The appellate court found the questioning was improper because, in conjunction with the questions about the ethics investigation, the prosecutor insinuated to the jury that the witness's testimony was stricken because of perjury.

Knowingly asking questions that had inadmissible answers:

People v. Daggett (1990) 225 Cal. App.3d 751, 758-759. The trial court excluded evidence of a prior unrelated allegation of molestation against a defendant charged with molesting a child. The prosecution called a doctor to whom the complaining witness actually denied being molested by the defendant. On direct examination the prosecutor asked the doctor what the nature of the complaining witness's claim was. The doctor testified that the witness reported being molested by the defendant. On cross-examination, it was clear that the doctor read from the wrong report and that actually the complaining witness denied being molested by the defendant. The mistake alerted the jury to the existence of another person who had accused the defendant of molestation which was previously excluded. The Court of Appeal found that the prosecution's question to the doctor about the "nature of the claim" was a subterfuge to elicit previously excluded evidence and was improper. The court reversed the conviction and found that the prosecution breached its "responsibility to try its cases with fairness and integrity."

People v. Bell (1989) 49 Cal.3d 502, 531-539. The defense called an identification expert to testify that an informant's eyewitness identification of the defendant as the perpetrator was unreliable. On cross-examination, the prosecutor asked the expert, "And I take it that you considered the report at page 13, where the witness said that 'suspect had been observed in possession of a small-barreled gun and was cleaning the weapon the day before the crime.'" The statement would not have come into

evidence otherwise, because the parties had stipulated that the informant would not testify. The California Supreme Court found that the question "was clearly misconduct," because the statement and the expert's knowledge of it were irrelevant to assessing the credibility of the expert. Because the expert was called in order to establish the reliability of the identification of the defendant, the informant's information and the witness's knowledge of the informant's statement were irrelevant to his opinion. "'The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct.'" (Quoting *People v. Fusaro* (1971) 18 Cal. App.3d 877, 886.)

People v. Poon (1981) 125 Cal.App.3d 55, 83-884. In the prosecution of numerous sexual offenses, the prosecutor asked the coroner if defendant ever volunteered a blood sample, after the court had already denied as untimely the prosecution's motion made during trial for an order requiring defendant to submit to a blood and saliva sample. The court held that this question constituted an improper attempt to put before the jury evidence that had been ruled inadmissible.

People v. Solis (1961) 193 Cal.App.2d 68, 77-78. When the prosecutor knew that defendant would object on privilege grounds if the prosecutor called defendant's wife to testify, it was error for the prosecutor to call defendant's wife to the stand. The court found the only reason for calling the wife was to unfairly prejudice the defendant.

People v. Aragon (1957) 154 Cal. App.2d 646, 656. Evidence of a lie-detector test is inadmissible. Yet, during cross-examination, the prosecutor referred to a lie detector test: "Q. By Mr. Ritzi: A test was administered, isn't that true? ... Q. As I understand it, you asked how did Goldstein do and he said Goldstein passed the test?" The court held the questioning improper.

People v. Derwae (1909) 155 Cal. 592, 595-596. It was prosecutorial misconduct for the prosecutor to ask, "Did you have such relations, or attempted relations, with your daughter that are unnatural with a parent?"— after the court ruled that his family relationships were not to be considered.

People v. Wells (1893) 100 Cal. 459, 461-462. It is misconduct for the prosecutor to ask defendant questions he knows to be inadmissible, without expectation of answers, for the purpose of prejudicing the jury against defendant.

Impeaching defendant on priors by asking specific questions about priors:

People v. Wagner (1975) 13 Cal.3d 612, 618. It was improper for the prosecution to ask the defendant about specific acts of prior misconduct. The court found that the prosecutor exceeded the scope of permissible impeachment, because although he could ask questions about the name and nature of a prior felony conviction, it was not clear that the prior acts were felony convictions and, if they were, he was not allowed to inquire into the details of the prior crimes, which he did.

Knowingly presenting hearsay:

People v. Baker (1956) 147 Cal.App.2d 319, 322-323. The judge admonished the prosecutor to limit the witness's testimony to a particular subject from a conversation. After the prosecutor asked about that subject, he asked the witness about another conversation which the court previously ruled inadmissible. The appellate court found the question was improper.

People v. Wallace (2008) 44 Cal.4th 1032, 1071. It was misconduct for the prosecutor, in cross-examination of defendant, to expose the jury to hearsay contained in a defense investigator's report which the court had already ruled inadmissible.

Failing to ensure witnesses refrain from volunteering inadmissible testimony:

People v. Schiers (1971) 19 Cal.App.3d 102, 113-114. Police officer testified that the defendant failed a lie detector test. The court held that this testimony was prejudicial error. The court stated that the prosecutor has a duty to warn its witnesses against volunteering inadmissible statements.

People v. Cabrellis (1967) 251 Cal. App.2d 681, 686-688. Prosecution violated duty to ensure that its witnesses refrain from volunteering inadmissible testimony. The prosecutor asked a law enforcement witness what the defendant said during his interrogation. The police officer testified that the defendant said, "Why should I tell you anything that would send me back?" The court found that the statement communicated to the jury that the defendant had a prior offense, and the prosecutor committed misconduct by "inject[ing] inadmissible statements from his witnesses."

People v. Figuiredo (1955) 130 Cal. App.2d 498, 506. The prosecutor promised the defendant that if he admitted his priors and did not testify then the jury would not hear any evidence about them. The defendant admitted his priors and agreed not to testify. A police officer called by the prosecution testified that the defendant met the codefendant in San Quentin. The appellate court found that "the questions by the deputy under circumstances which would permit references to serving time in San Quentin constituted prejudicial misconduct," because "it is reasonable to assume that the deputy district attorney knew that the conversation to be related by the officer would show that [the codefendant and defendant] had been in San Quentin."

People v. Glass (1975) 44 Cal.App.3d 772, 781. The court instructed the prosecutor to warn the officer not to testify about a search warrant for the defendant's person which the officer executed, yet the officer testified about the warrant. The prosecutor admitted that he failed to advise the officer about that specific instruction. The appellate court found, "The conduct of counsel in not specifically and carefully following the court's instructions to properly advise the witness is inexcusable."

Asking a witness about his opinion of the defendant's guilt:

See *In re Rodriguez* (1981) 119 Cal. App.3d 457, 468. Improper to ask an expert medical witness her opinion of the defendant's guilt, based on the state of the evidence.

Introducing evidence that the defendant is in custody:

People v. Robinson (1995) 31 Cal. App.4th 494. The court agreed to let a witness take the stand outside the presence of the jury, so that the jury would not know he was in custody. The prosecutor asked the witness whether he spoke with the defendant about the case while they were in custody and asked whether they were in the same holding cell. The appellate court found these questions were improper and that the prosecutor committed misconduct by asking them.

Failing to Provide Proof of Statements or Justify Unusual Questions

People v. Lo Cigno (1961) 193 Cal. App.2d 360, 388. "It was improper to ask questions which clearly suggested 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 a belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied."

People v. Evans (1952) 39 Cal.2d 242, 247. The prosecutor repeatedly asked leading questions without attempting to prove the truth of the matters asserted. These included, "Did you tell Officer Brown in response to his request that you would tell him the truth about where it occurred in August 12th in the Dimond Park?" and "Well, did they (the officers) mention the fact that the little girl whom you had seen had said that you had a knife when you accosted her in the Dimond Park?" The court found that the only purpose of the form of the question was to get the statements before the jury, which was improper.

People v. Angelopoulos (1939) 30 Cal. App.2d 538, 549 (disapproved on other grounds). It was misconduct for the prosecutor during an arson trial to ask a character witness for the defendant, "Have you ever heard of Mr. Condos being arrested on a white slave charge?" There was no effort to justify the question.

Misstatement of Evidence

People v. Hill (1998) 17 Cal.4th 800, 821, 824. The prosecutor confused the forensic evidence in her closing argument, stating that the defendant's blood was on a knife when only the blood type was analyzed, not a more conclusive test relating the blood to the defendant. The court found this was a mischaracterization of the evidence, and therefore misconduct. The court also found the prosecutor committed misconduct by misdescribing the knives when questioning witnesses, misstating the height of the defendant when questioning witnesses, and mischaracterizing evidence regarding a scar on the victim as caused by the defendant when in fact it was caused by a doctor performing surgery. The court found that the prosecutor created confusion in the jury to give herself an unfair advantage by glossing over inconsistencies.

People v. Carr (1958) 163 Cal.App.2d 568, 573-574. In opening statement, the prosecutor stated that almost all of the victim's stolen property was found in the defendant's car, which was a misstatement. The record indicated that only two of nine items were found in the car. The appellate court found that the statement was prejudicial misconduct, because the prosecutor could not have acted in good faith in representing that all of the stolen property was found in the defendant's car, when only two of the items were found; the court believed the prosecutor must or should have known that not all the items were found in the car.

In *People v. Purvis* (1963) 60 Cal.2d 323, 343-346 (overruled on other grounds), the prosecutor stated in opening that the defendant was involved in a knifing. The prosecutor had no evidence to prove this. The court found that the statement was improper, because the prosecutor made the statement of fact without offering proof for it.

Misuse of evidence on the record:

People v. Daggett (1990) 225 Cal. App.3d 751, 757-758. The trial court excluded evidence that the complaining witness in a child molestation case had told a mental health worker and a doctor that older children had molested him, in addition to the defendant. The complaining witness had a juvenile matter pending at the time of defendant's trial for allegedly molesting someone after the defendant reportedly molested him. The prosecution argued in closing that the complaining witness learned to molest children from the defendant. The appellate court held that this was improper, because the excluded evidence–that the witness had reported being molested by more people than the defendant–would refute the argument that the defendant taught the witness to molest children. The court found the prosecutor "unfairly took advantage of the judge's ruling." (*Id.* at p. 758.)

United States v. Reyes (9th Cir. 2009) 577 F.3d 1069, 1077. It was misconduct for the prosecutor to assert as fact to the jury a proposition that he knew was contradicted by evidence not presented to the jury. The Ninth Circuit stated that the prosecutor had "a special duty not to impede the truth."

United States v. Blueford (2002) 312 F.3d 962, 967-968, 973. It was misconduct for the prosecutor in closing argument to ask the jury to infer from the recent flurry of telephone conversations that defendant and an alibi witness had fabricated an alibi, when the prosecutor could not reasonably assume this, in light of the evidence the prosecutor knew was not on the record.

U.S. v. Romero-Aliva (2000) 210 F.3d 1017, 1021-1022. During closing argument, the prosecutor erred when he stated, "He was unemployed, as you heard. He had no position. And he was hoping to make some money. Now, of course, that's not an element of the offense, not something the Government has to prove, but that's the obvious motive behind it." It was error for the prosecutor to use poverty evidence as motive.

People v. Dickey (2005) 35 Cal.4th 884, 909. It was improper for the prosecutor to knowingly fail to correct a false impression by failing to correct the testimony of a prosecution witness.

Presenting False Evidence

Naupe v. Illinois (1959) 360 U.S. 264. Unconstitutional for the prosecution to knowingly present false evidence.

Giles v. Maryland (1967) 386 U.S. 66. "Under well-established principles of due process, the prosecutor cannot present evidence it knows is false and must correct any falsity of which it is aware . . . even if the false evidence was not intentionally submitted."

Hayes v. Brown (2005) 399 F.3d 972, 979-982. The prosecution violated the defendant's constitutional rights by affirming to the court that no deal had been made with a testifying witness, when a deal had been made, and by failing to correct the witness' testimony at trial that no deal had been made.

IV. MISCELLANEOUS

Voir Dire

Referring to other cases:

People v. Castillo (2008) 168 Cal. App.4th 364, 380, 386. During voir dire, the prosecutor told potential jurors:

> I had a case a few years ago where three teenage girls were killed in Huntington Beach and [it was a] very emotional case. It was about a three week long trial, very strong evidence against the defendant. At the end of the trial the jury went out, and the families were there

> every single day, the families of [the] three girls, and they sat there. The jury didn't come back the first day, and the families started getting very upset and crying, you know. They would [ask] me what is wrong, why, how come they didn't make a decision. I don't know. Next day came back same thing, the families are all upset–[¶] ... [¶] ... The jurors came back and we asked them why–what took so long. Oh, we knew he was guilty the first day, but we wanted to figure out this one other issue.... [¶] ... [¶] ... My question is would any of–if you had other questions but they didn't go to the elements, the actual like 1, 2, 3 elements, if you were convinced beyond a reasonable doubt of the elements, even though you might have some question very interesting, but didn't go to that element [,] would you be able to convict?

The prosecutor's comments constituted misconduct, because they were an attempt to precondition the jurors to return a guilty verdict and improperly referred to evidence outside the record: the experience of the prosecutor and victims' families in other cases.

Attempting to Shift the Burden of Proof

People v. Herring (1993) 20 Cal. App.4th 1066, 1075. In a rape and assault case, the prosecutor stated, "My people are victims. His people are rapists, murders, 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." These remarks constituted misconduct, because they implied that all those accused of crimes whom defense counsel represented are necessarily guilty. Additionally, the prosecutor impliedly denigrated the presumption of innocence and the requirement that guilt be proved beyond a reasonable doubt.

People v. Rodgers (1979) 90 Cal.App.3d 368, 371-372. In a prosecution for forced copulation and burglary, the prosecutor argued to the jury, "[Y]ou have to pause, and you have to say, is Mr. Rodgers here because he's not guilty?" "In fact, as you well know, most people go through their lives without being accused of anything." The appellate court found it was improper to insinuate that the defendant was guilty, simply because he was in court.

People v. Hill (1998) 17 Cal.4th 800, 828-829. The prosecutor committed misconduct when in closing argument, she said that defense, "counsel stood before you ... [and said] that whatever the bunk was, the narcotic was, or anything else in that truck was, I had to prove it beyond a reasonable doubt what it was; and why didn't I bring in anybody to testify as to that? Well, first, I'll tell you that the same way he said people that picked up the blood and analyzed it, and the knife, ... I could have had somebody come in here and analyze that. [¶] ... [But] I don't have to prove anything about that at all." It was misconduct to give the jury the impression that she did not have the burden of proving every element.

United States v. Perlaza (9th Cir. 2006) 439 F.3d 1149, 1169. The prosecution argued in rebuttal:

> [I]n a short period of time, the case will be handed to you. You're going to go back into that deliberation room and that presumption of innocence, that presumption of innocence that these men have all been cloaked with for the last year, the last year while we've litigated motions–you've heard about all the motions that have been held beforehand. That's why it's taken so long to get here. That presumption, when you go back in the room right behind you, is going to vanish when you start deliberating. *And that's when the presumption of guilt is going to take over you* .... [interrupted by objection]

The Ninth Circuit found this was an improper argument, because it shifted the burden of proof to the defense.

Comments Attacking the Criminal Justice System

People v. Patino (1979) 95 Cal.App.3d 11, 29-31. In a prosecution for lynching and obstruction of justice, the prosecutor read the following quotation from a famous judge to the jury in closing argument:

> "Under our procedure, the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose even the barest outline of his defense. He may not be convicted when there is the least fair doubt in the mind of even one juror. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we really need to fear is the archaic formalism and watery sentiment that obstruct, delay, and defeat the prosecution of crime."

Reading the quotation to the jury constituted misconduct, because the statement was an attack on the criminal justice system and the law regulating that system.

People v. Haslouer (1978) 79 Cal. App.3d 818, 834. In a prosecution for sexual molestation of children, the prosecutor commented that it is difficult to get justice any more because of legal technicalities. The court held this remark to be improper.

Misstatements of Law

People v. Le (2007) 158 Cal.App.4th 516, 529-530. It was an improper misstatement of the law for the prosecutor to state that, although the court was giving manslaughter instructions, "It doesn't mean that the judge thinks or I think that there is evidence there of a manslaughter, but it's an option." This remark is a misstatement of law, because the court's giving an instruction for manslaughter indicates that the court believes there is evidence of the lesser included offense.

People v. Mendoza (2007) 42 Cal.4th 686, 702-703. It was improper for the prosecutor in closing argument to state that, "this is a situation where again you have to impose the reasonable person standard. It's not what Mr. Mendoza may have felt, or what he may have gone through. He's not entitled to set up his own standard of conduct. Can you imagine a society that allowed us to do that? Would any of you do what he did here and say that's reasonable? Would any of you do that? No. Would any of you put a gun to people's heads? Would any of you do what he did here? Is that reasonable?" This constituted a misstatement of the law, because the prosecutor was encouraging jurors to use their subjective judgment in place of applying an objective standard.

People v. Mendoza (1974) 37 Cal. App.3d 717, 727. Misconduct to argue that "child molestation case[s], requir[e] very little evidence." Misstatement of

law because the case requires no more or less evidence than any other case.

People v. Hill (1998) 17 Cal.4th 800, 830. The prosecutor committed misconduct when she misstated the law concerning circumstantial evidence. Defendant argued that if the circumstantial evidence concerning the sale of fake cocaine was reasonably susceptible to an interpretation other than robbery, defendant should be convicted of a lesser crime. The prosecutor stated:

> [U]under the theory given to you by counsel, if a robber came up to you, took a knife, put it up to you, held out his hand, not saying a word, not doing anything, he never could be convicted of robbery when he got your money nor murder when he put that knife into you and ripped it, because if there's another meaning to that evidence–which, of course, is circumstantial evidence, and that's all there ever is when it comes to intent–if there's another meaning, you have to walk that murderer, that robber out of the courtroom."

This was improper.

Misstating Reasonable Doubt

People v. Katzenberger (2009) 178 Cal. App.4th 1260. Misconduct for the prosecutor to present a puzzle to the jury, which contained an easily recognizable iconic image (statue of liberty), and then argue that "we know" what the picture is "beyond a reasonable doubt," even though the picture is missing two pieces. The court found that this improperly quantified the concept of beyond a reasonable doubt and was misleading, since most jurors would immediately recognize the statue of liberty with only a few puzzle pieces.

People v. Nguyen (1995) 40 Cal. App.4th 28, 35. Misconduct to argue to the jury:

> [Reasonable doubt] is the standard in every single criminal case. And 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.

The appellate court found that the analogies were improper, because they suggest that the reasonable doubt standard is used in daily life to change lanes or marry, for which the standard is not used.

Misstating Duty of Jury:

United States v. Sanchez (9th Cir. 1999) 176 F.3d 1214, 1224. It was misconduct for the prosecutor to argue to the jurors in closing that they had a duty to convict the defendant. Although it is proper to argue that the jury has a duty to follow the law, which says that the jury must convict the defendant if each element is proved beyond a reasonable doubt, the prosecutor committed misconduct, because he told the jurors that they had a duty to convict without referring to proof beyond a reasonable doubt.

People v. Adams (1939) 14 Cal.2d 154, 161-162 (overruled on other grounds). It was improper for the prosecutor to refer to another notorious and similar child molestation case during closing argument and to implore the jury to "render a verdict such as you will be proud of."

People v. Talle (1952) 111 Cal.App.2d 650, 673-678. It was improper for the prosecutor to argue to the jury that they should "avenge the cruel death of an innocent girl at the hands of . . . a beast."

People v. Hail (1914) 25 Cal.App.342, 357-358. It was improper to tell jurors that they will be afraid to meet their "fellow-men" on the street if they were to acquit.

Personalizing closing argument to particular jurors

People v. Wein (1958) 50 Cal.2d 383, 395-396 (overruled on other grounds). The practice of referring to jurors by their first names during closing argument should be condemned.

People v. Freeman (1994) 8 Cal.4th 540, 517. It was improper for the prosecutor to read to the jury a quote from a sitting juror which he pulled from that juror's answer to a question during *voir dire*.

Testifying

People v. Donaldson (2001) 93 Cal. App.4th 916. It was improper for the prosecutor to ask questions in a way that she was testifying. For example, she asked the witness, "do you remember where we sat and briefly talked before the preliminary hearing? . . . Did I tell you–did I remind you that as a witness you have an obligation to tell the truth?" The court found that the prosecutor testified and that she compounded the problem by arguing in closing that she believed the defendant was guilty. Conviction reversed.

Improper Rebuttal Argument

People v. Robinson (1995) 31 Cal. App.4th 949. It was improper for the prosecutor to give a "perfunctory" closing argument "designed to preclude effective defense reply" and then to give a "rebuttal" argument immune from defense reply. In this case, the prosecution's closing was only three and a half pages of transcript, whereas its rebuttal was 10 times longer. The court held that this tactic is not permitted.

ENDNOTES

1/ Tom Nolan is a criminal defense attorney at Nolan, Armstrong & Barton in Palo Alto. He has been certified as a criminal law specialist by the State Bar of California for more than 30 years, is a past President of the California Attorneys for Criminal Justice, an active member of California Public Defenders Association and both state and local bar associations. Mr. Nolan has also been teaching at Stanford University's School of Law since 1987 as a lecturer and consulting professor in the field of criminal law.

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2/ See Kathleen M. Ridolfi & Maruice Possley, "Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009" (Oct. 2010).

3/ *Id.* at 25.

4/ *Id.*

5/ *Id.*

6/ *Id.*

7/ *Id.* at 10.

8/ *Id.*

9/ *Id.* at 18-19.