

Developing Claims of Prosecution Error on Appeal or Habeas

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Developing Claims of Prosecution Error on Appeal or Habeas

By

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It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent. (People v. Wells (1893) 100 Cal. 459, 465.)

I. Introductory Thoughts.

Given the sophistication of the audience, I'm not going to give a conventional lecture on "here are examples of prosecution error." You all know it when you see it (at least in the arguable sense) and know how to raise issues when properly framed by objections in the record.

What I would like to discuss are ways of developing and arguing these issues. Many of the errors in this area are either not preserved by objection or hidden from the appellate record (*e.g.*, Brady claims). The most obvious way to bring out such issues is to be involved in the case from the start and help set up the trial record.

Perhaps you are contacted just after trial and before sentencing and are given the time to read the record in order to fashion a MNT, a motion for new trial. While such review and motion work will not insert into the record objections *nunc pro tunc*, it will allow for an IAC (ineffective assistance of counsel claim) in the motion and allow it as an appeal issue. (*See* People v. Fosselman (1983) 33 Cal.3d 572, encouraging IAC claims at the MNT stage.)

Far more likely, you'll enter the case post-conviction either on appeal or post-appeal.

A. Reality. The reality is that many prosecution error claims are lost because trial counsel did not adequately preserve the record. If the duty of record preservation were repeatedly pounded into the heads of young trial counsel, many significant issues would not be lost to the record on appeal. One way to accomplish record awareness is to require young trial counsel to handle their own appeals as I was required to do as a young Federal Defender. Nothing concentrates the trial mind on record preservation so much as the fear of having to do an appeal in which you failed to preserve the issues.

Barring that, or in addition to it, is our involvement with the trial bar. We can do much to further the perfection of record making by:

1. Volunteering to train young public defenders and panel attorneys on the issue. Reminding trial counsel that if they do not raise the issue, we will if we can. Even if it comes under the banner of IAC and even if they do not like it, we will pursue it. “An attorney should represent his client to the hilt, even at the cost of professional fraternalism.” (People v. Crawford (1968) 259 Cal.App. 2d 874, 880.)¹

2. More positively, we can meet the trial counsel protest that attention to record making is counter-productive to trial strategy and goals. This is almost always baloney. I have posted on my website articles addressing the point. See publications page at www.charlessevilla.com for downloadable papers including the Mantra Motion for federalizing issues, and a lengthy paper delivered last February 2007 at the Monterey Death Penalty Seminar on “Making a Winning Record.” This discusses common evidentiary issues faced at trial and gives trial counsel a ready-made list of suggested steps to argue the point and make the record.

¹ If we do not raise an arguable issue of prosecution misconduct on appeal, we could be found ineffective. (E.g., examples of inadequate appellate representation by counsel which caused reversal for a new appeal are People v. Lang (1974) 11 Cal.3d 134; People v. Rhoden (1972) 6 Cal.3d 519; In re Banks (1971) 4 Cal.3d 337 [failing to raise Griffin and Cockrell error on appeal]; In re Smith (1970) 3 Cal.3d 192; In re Greenfield (1970) 11 Cal.App.3d 536.)

There is no question a prepared, record-attentive trial counsel is a far more formidable opponent and better *trial* lawyer than those who eschew record making.

3. On appeal, talking to the trial counsel early in the appeal process about the issues is important, not only to gain an understanding of the case and likely issues, but because good trial counsel may invite you to examine his/her performance in not preserving a particular issue. Send copies of the appellate brief to trial counsel. If IAC is raised for failure to preserve the record, the brief will explain why and may provide a learning experience.

4. Since the most preferable course is the one in which trial counsel is attentive to the record, we want to encourage and facilitate that sensitivity. On the issue of prosecution error, there are numerous excellent publications available on the topic. See 57 A.L.R. Fed. 824 (Dismissal of indictment as an appropriate remedy for misconduct); 42 A.L.R. 5th 581 (Disqualification on account of relationship with accused); 88 A.L.R. 3d 449 and 41 A.L.R. Fed. 10 (Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused); 88 A.L.R. 4th 8 (Negative characterization or description of defendant by prosecutor.) Also, in what follows, I will cite the applicable American Bar Association, ABA Standards for Criminal Justice: The Prosecution Function (3d Edition, 1993) [hereafter cited as ABA Standards], and currently available on the internet at the following url: http://www.abanet.org/crimjust/standards/pfunc_toc.html.

For Californians, on-line at the California Public Defender Association's Magazine found at www.cpda.org/claraweb/clarawebforums/index.php, there are downloadable articles by Hank Hall, Matt Braner, Tom Havlena, and others. Trial attorneys should read one of these articles before each trial to get into the record-making mood and be re-sensitized to the many ways in which prosecution error rears its ugly head at trial. See 4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 80, Prosecution Fairness § 80.09 [5] (Matthew Bender).

But despite the above approaches, we inevitably receive appeal cases with issues of prosecution error, imperfectly preserved or not, and deal with them. The rest of this paper discusses strategies for dealing with the issue.

II. An Approach to Developing and Arguing the Issue on Appeal.

Prosecution misconduct is frequently raised on appeal and prone to receive the “oh hum” treatment especially when argued as a personal attack on the integrity of the prosecutor. I have several thoughts for changing the basis of discussion to be more persuasive in arguing this issue: 1. argue this as “error” and not misconduct; 2. inform the court the proper standard of review is one acknowledging that even inadvertent prosecution error may deny due process; 3. where the error is akin to imparting non-record information to the jury, argue the analogous case law from hearsay/confrontation and jury misconduct cases; and 4. remind the court that these errors are important to the defendant and the legal process.

Each one of these approaches removes personal accusation from the issue and argues a more objective assessment of error and damage from the error.

A. Prosecution Error is Serious.² In all manner of ways, the *integrity* of the trial process is directly related to the *intensity* of its review on appeal. Overlooking or diminishing the importance of prosecution error countenances undermining the fair trial guarantee. This issue is quite serious. The California Commission on the Fair Administration of Justice's October 18, 2007 report on “Recommendations on Professional Responsibility and Accountability of Prosecutors and Defense Lawyers,” cites a study of 2,130 cases by Cookie Ridolfi. She found that the courts found prosecution misconduct in 443 (21%) of the cases and in 53 of them (12%) the judgment was reversed. See the Report on the Commission's website: www.ccfaj.org.

We know the State is required to give a fair trial and when the prosecutor errs it undermines the process and sabotages the right to a fair trial. It also can lead to the conviction of the innocent. *See* Barry Scheck, Peter Neufeld and Jim Dwyer, Actual Innocence (New York: Signet-Penguin Books Ltd., 2001), discussing prosecution misconduct as one of the top causes of convicting the innocent: “prosecutorial misconduct played a part in 45%” of the 74 DNA exonerations described in the book. (Id. at 318.)

² We will get to the conviction standards of review, *i.e.*, whether the errors are federal constitutional in magnitude or not under Chapman v. California (1967) 386 U.S. 18, or People v. Watson (1956) 46 Cal. 2d 818, 836.

Because of the power and influence on the jury: “[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State.” (People v. Hill (1998) 17 Cal.4th 800, 820.) Yet, as the Fairness Commission study observes, very few cases involving court findings of misconduct provoke sanctions. This includes failure to refer the miscreant to the State Bar as is required under Bus. & Prof. Code § 6086.7.³

B. What to Call It? Prosecution Error or Misconduct? I have thus far called “prosecution error” what is more often labeled “prosecution misconduct.” I do this for a reason. Having appellate courts agree on the issue of error is, of course, the essential first step to arguing prejudice. Does our language usage have an impact on persuasion in this regard? I think so. In the important case of People v. Hill (1998) 17 Cal.4th 800, 823, fn. 1, the Supreme Court stated the claim of prosecutorial misconduct is more properly called prosecutorial “error.” This is because a federal due process claim of prosecution error does not turn on the existence of maliciousness or malevolent intent; rather, it focuses on the adverse affect on the defendant’s fair trial rights. (Neither do state law claims, as will be discussed under the prejudice section below.)

There may be an advantage to lowering the rhetoric in discussing this claim. Findings of “misconduct” are hard enough to attain. Labeling them “constitutional error” may make them psychologically more acceptable to find. Even in cases of truly outrageous behavior, rather than lacing the argument with numerous pejorative adjectives, detailed descriptions of the conduct are more likely to persuade. Let the court come to the conclusion of error and prejudice based on what you show from the record.

C. Intentionality is Not Necessary for Federal Constitutional Error. This is discussed more fully in the prejudice section, but it bares mention that no

³ And when the rare case is filed for discipline, the treatment is less harsh than the defense might expect. (*See, e.g., Price v. State Bar*, 30 Cal. 3d 537, 550-551 [prosecutor deliberately altered written documentary evidence in a murder trial to assist his witness's testimony and deprive the defendant of impeachment; he destroyed the original and submitted to defense counsel the forged copy. After conviction, he pursued a plan to hide his misconduct by secretly meeting with the defendant in jail to obtain the latter's consent to waive his right to appeal in return for a lighter sentence. Result: two year suspension].)

intentionality need be shown to find constitutional prosecution error. In People v. Hill (1998) 17 Cal.4th 800, 819 the court stated that a federal due process claim of prosecution error does not turn on the existence of intentionality, but rather the adverse affect on fair trial rights. But see below for pure state law claims.

D. Analogies to Confrontation Denial Cases. Many times the prosecutor's error may be viewed as an effort to import non-evidence into the case. In addition to citing the cases already finding this to be prosecution error, an argument should be made to other areas of the law where importing non-evidence has been deemed a federal constitutional error. Thus, for example, in the area of jury misconduct, when a juror imparts non-evidence to the deliberating jury, constitutional considerations are raised: "A juror's communication of extrinsic facts implicates the Confrontation Clause. See Jeffries v. Wood, 114 F.3d 1484, 1490 (9th Cir. 1997) (en banc). The juror in effect becomes an unsworn witness, not subject to confrontation or cross examination. See id." (Sassounian v. Roe (9th Cir. 2000) 230 F.3d 1097, 1108.) Or, perhaps the prosecutor spoke of what a non-witness would have said. This is akin to the production of testimonial hearsay and a violation of the confrontation clause under Crawford v. Washington (2004) 541 U.S. 36. By demonstrating the error is similar to those involving federal constitutional violations, the opportunity to elevate the nature of the claim and obtain an optimal Chapman standard of review is enhanced.

E. De Novo Review If a Constitutional Error. Misconduct in argument affecting a defendant's constitutional rights is subject to *de novo* review. U.S. v. Mares, 940 F.2d 455, 461 (9th Cir. 1991). Otherwise, review is for abuse of discretion. U.S. v. Makhlouta, 790 F.2d 1400, 1403 (9th Cir. 1986).

III. Dealing with a Poorly Made Record on Appeal

A. Dealing with Waiver Problems. "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.]" (People v. Samayoa (1997) 15 Cal. 4th 795, 841.) This is the frequent obstacle to raising the issue. Trial counsel did not object, or objected imperfectly. There are a variety of ways to cope with such imperfections to have the issue reviewed on the merits.

1. Argue the objection made was good enough. (People v. Scott (1978) 21 Cal. 3d 284, 290 ("An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide."))

2. The court should review it even without the objection. (*E.g.*, People v. Malone (1988) 47 Cal. 3d 1, 38 (Supreme Court "assumed" no procedural default and reviewed the merits of the evidentiary issue despite lack of *any* defense objection to prosecution cross-examination of the defendant about whether he had stated to others he had killed someone earlier that day.)

3. If not preserved, argue IAC.⁴ Raising IAC for failure to preserve the record may get merits review even without the court addressing IAC. (*E.g.*, People v. Crittenden (1994) 9 Cal.4th 83, 146, the court held that defense counsel waived issues of prosecution misconduct for failure of trial counsel to object, but then reviewed the issue anyway: "Nonetheless, *in view of the potential claim that counsel's failure to object on the specific grounds urged on appeal denied him his rights under the state and federal Constitutions to the effective assistance of counsel, we review these claims on the merits.*") Italics added.

There are some nice federal cases to cite holding trial defense counsel IAC for not protecting the client from prosecution misconduct. (Hodge v. Hurley (6th Cir. 2005) 426 F.3d 368, 372 (" failing to object to the prosecutor's "egregiously improper closing argument, the prosecutor commented on the credibility of witnesses, misrepresented the facts of the case, made derogatory remarks about the defendant, and generally tried to convince the jury to convict on the basis of bad character"); Martin v. Grosshans (7th Cir. 2005) 424 F.3d. 588, 591-592 (failure to object to three prosecution tactics was IAC including the statement that "even Jeffrey Dahmer" could produce character witnesses); Burns v. Gammon (8th Cir. 2001) 260 F.3d 892, 896 (pre-AEDPA attempted rape case; counsel IA for failing to object to the prosecutor's improper comment in the rebuttal closing argument asking the jury to consider that the defendant, by going to trial, forced the victim to take the stand and relive the attack); Crotts v. Smith (9th Cir. 1996) 73 F.3d

⁴ In federal court, you do not have to resort to IAC. You argue "plain error." Prosecutorial statements to which the defendant objects are reviewed for harmless error, while comments for which no objection is made are reviewed for plain error. (U.S. v. Brown (9th Cir. 2003) 327 F.3d 867, 871.) An error is "plain" if it is: (1) error, (2) clear or obvious, (3) affecting substantial rights, and (4) seriously affecting the fairness, integrity, or public reputation of the judicial proceedings. U.S. v. Blueford, 312 F.3d 962, 974 (9th Cir. 2002).

861, 866 (IAC for failure to object to prosecution's cross-examination of defendant concerning a boastful statement made to another that he had previously "killed a cop" where was no evidence that statement was true.)

4. In various ways, argue an objection would have been futile. This argument may prevail when the trial attorney has tried to curb the misconduct only to be shot down several times by the court. (*E.g.*, People v. Hill, *supra* at 17 Cal.4th 821.) Repeated unsuccessful defense objections obviously harm the defense before the jury and can be argued in tandem with futility. (Id.; *see also* People v. Buchtel (1963) 221 Cal.App.2d 397, 403:

Trial lawyers are well aware that frequently admonitions to a jury to disregard that which has already been implanted in their minds serve only to emphasize and underline and sometimes transform the inconsequential into indelibility. So are the courts aware of this; and reversal will follow where the case is evenly balanced or the error is of such a character that a harmful result cannot be cured. (People v. Lyons (1958)] 50 Cal.2d 245, 262.)

In other words, if there is a pattern of misconduct and some objections, that may excuse the failure to object to all instances of misconduct. People v. Estrada (1998) 63 Cal. App. 4th 1090, 1100, states that when: “the misconduct is part of a pattern, when the misconduct is subtle and when multiple objections and requests for mistrial are made, we conclude it proper for a reviewing court to consider the cited misconduct in evaluating the pattern of impropriety.”⁵

The rule that a defendant must object and request an admonition at trial in order to preserve the issue for appeal "applies only if a timely objection or request for admonition would have cured the harm." Accordingly, the rule is not applicable where any objection by defense counsel would almost certainly have been overruled. (People v. Hamilton (1989) 48 Cal. 3d 1142, 1184, fn. 27.)

⁵ “[W]here improper comments and assertions are interspersed throughout trial and/or closing argument, repeated objections might well serve to impress upon the jury the damaging force of the misconduct. (People v. Kirkes (1952) 39 Cal. 2d 719, 726 [249 P.2d 1].) In such a situation, a series of admonitions will not generally cure the harmful effect of such misconduct. (Ibid.)” (People v. Pitts (1990) 223 Cal. App. 3d 606, 692.)

5. Solvent Green. People v. Green (1981) 27 Cal.3d 1, 34, stands for the proposition that an improper prosecutorial argument which is not timely objected to may not be raised on appeal unless the misconduct is of such a nature that no curative action would have cured the error.

In People v. Johnson (1981) 121 Cal.App.3d 94, the prosecutor told the jury he had personally investigated the case and found the testimony of a defense witness on a certain point to be an outright lie. There was no objection to this argument. The appellate court concluded an objection and admonition would not cure the harm. Finding the error of federal constitutional magnitude because the comment implicitly was a statement of the prosecutor's own personal knowledge, the court reversed.

6. Cautionary Instruction Not Good Enough. Sometimes the conduct is so egregious that even when the trial court interjects an admonition telling the jury to ignore the prosecutor's comment, this will not be enough to save a conviction. In People v. Brophy (1954) 122 Cal.App.2d 638, defense counsel argued the prosecution had not produced a bullet which should have been at the scene. This was true -- no bullet had been introduced. However, during final argument, the prosecutor produced a bullet. The defense objected and the trial court told the jury to ignore the bullet. In reversing the conviction, the appellate court noted the prosecutor's comments were "so highly prejudicial that no admonition of the trial judge to disregard it could erase from the minds of the jurors the undoubted electric effect" of the bullet's production. *See also* People v. Wells (1893) 100 Cal. 459 (an oldie but goody; reversing even though the objections to the content laden improper questions were sustained).

7. Waiver Excused Due to Misconduct by the Prosecutor. (*E.g.*, People v. Hernandez (2003) 30 Cal. 4th 835, 871 ["Defendant did not object to the evidence...or to the prosecutor's argument. But his failure to do so was excusable, in light of the prosecutor's inaccurate representation to the trial court that defendant had been convicted of the assault"].)

8. Prior Misconduct Examples With the Same Prosecutor Aids the Argument. Whether there has been a forfeiture of the claim or not, always check Lexis or Westlaw to see if the same prosecutor has been admonished or cited for misconduct in previous published or *unpublished* cases. *See* People v. Hill (1998) 17 Cal. 4th 800, 847-848: "We take judicial notice of a 1987 unpublished opinion

of the Court of Appeal ... which not only cites [this prosecutor] for prosecutorial misconduct, but identifies her as the offending prosecutor in two other, published appellate court decisions in which the Court of Appeal found prosecutorial misconduct without identifying the prosecutor. [Citations]. As the opinions in these cases make clear, defendant's is not the first case in which this prosecutor committed misconduct.” In Hill, the court approved its citation of unpublished opinions to make its point. Id., at 848, n. 9.

IV. Arguing Prejudice Thematically as Chapman Error Before Watson.

Another dose of reality. Reversals for prosecution misconduct are difficult to attain because even if the conduct is deemed reprehensible, it's held not reversible for lack of prejudice. Judge Jerome Frank, in a dissent, discussed this phenomena:

This court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of 'disapproved' remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court-recalling the bitter tear shed by the Walrus as he ate the oysters -- breeds a deplorably cynical attitude towards the judiciary. [internal cites omitted].

U.S. v. Antonelli Fireworks Co. (2d Cir. 1946) 155 F.2d 631, 661 (Frank, dissenting.)

A. AEDPA (Anti-terrorism and Effective Death Penalty Act): Always raise the issue as one of due process and/or confrontation, or other applicable federal constitutional rights. “When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them.” (Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643.) A federal claim obviously gets the better standard of review for harm. Federalize separately both the prosecution misconduct and the cumulative error issue (see *infra*.)

B. E.g., A Due Process Violation and Perhaps a Confrontation Denial. (People v. Blackington (1985) 167 Cal. App. 3d 1216, 1219 [prosecutor committed misconduct by reading from a prior out-of-court statement made by the co-defendant while cross-examining defendant; held prejudicial under Chapman].)

C. Concentrate Your Forces: Argue The Cumulative Error Was a Prejudicial Due Process Violation. In People v. Hill, *supra*, 17 Cal.4th at 845, the court stated "the sheer number of instances of prosecutorial misconduct *and other legal errors* raises the strong possibility that the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (Italics added.)

The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." (People v. Kronemyer (1987) 189 Cal. App. 3d 314, 349.)

(People v. Cuccia (2002) 97 Cal. App. 4th 785, 795.)

Show how the cumulation of prosecution errors coupled with other errors prejudiced the appellant. (Easier said than done.) Since the Watson standard is by far the more difficult one to overcome on this issue⁶ and most frequently used, the first thrust at prejudice is that a cumulative due process fair trial was denied. The Chapman standard of harmless beyond a reasonable doubt should be the default prejudice argument. See excellent discussion of the cumulative prejudice

⁶ For example, the reviewing court will ask whether the error “made by the prosecutor before the jury, [raises] the question ... whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (People v. Samayoa (1997) 15 Cal.4th 795, 841.)

doctrine in Parle v. Runnels (9th Cir. 2007) 505 F.3d 922. The argument would be that the errors “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” (Donnelly v. DeChristoforo (1974) 416 U.S. 637, 643.)

_____ **D. Arguing over the Curative Instruction.** What if the trial court gives a curative instruction either *sua sponte* or upon objection? As noted *supra*, that may not defeat the claim if the instruction is of the milk toast variety and the misconduct egregious: “Although some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect, the comment in this case is hardly of such character.” (Donnelly v. DeChristoforo (1974) 416 U.S. 637, 644.)

_____ People v. Purvis (1963) 60 Cal.2d 323, 346, aptly notes not all curative instructions will cure the prejudice from misconduct:

The Attorney General does not deny the assertion that the facts in reference to this incident could not be proved and that the record on the two previous appeals showed that this was so, but limits himself to the assertion that all prejudice was cured by the admonition of the court to the effect that statements of counsel are not evidence. Of course, such statements of fact, followed by no offer of proof, constituted misconduct. (People v. Perez, 58 Cal.2d 229). In the present case the prosecuting attorney was told by the court that he had better not state that which he could not prove. Nevertheless the statement was thereafter repeated. If prejudice of this type of misconduct may be removed in the manner suggested, reversal could never be predicated on the most deliberate misstatement of fact in an opening statement. Here the challenged statement was not inadvertent.

_____ **E. Close Case Factors.** When a case is close, a small degree of error in the lower court should be considered enough to have influenced the jury to wrongfully convict the defendant. (*See* People v. Wagner (1975) 13 Cal.3d 612, 621 [prosecutorial misconduct to imply through cross-examination the defendant had previously engaged in similar acts to the charges].)

Argue prejudice with the usual close case factors to make the point that the misconduct was consequential under Chapman and/or Watson. These include such facts as the length of deliberations, questions asked by the jury, requests for re-reads of testimony, expressions of deadlock, inability to convict on all charges, previous hung juries, the timing of the misconduct, and other factors unique to the trial.

F. Intentionality Need Not Be Shown Except in Pure State Law Claims.

As noted previously, intentional misconduct need not be shown for federal or state due process claims. But People v. Hill (1998) 17 Cal.4th 800, 819, stated that pure state law claims involving conduct that does *not* render a trial fundamentally unfair require a showing of deception or reprehensible tactics. The latter passage involving deception or reprehensible tactics must not be confused to require a showing of intentionality by the prosecutor on a due process claim. People v. Bolton (1979) 23 Cal. 3d 208, 213-214, overruled cases requiring a showing of intentional misconduct, stating: “For the purpose of deciding whether to reverse a decision or grant a mistrial, this emphasis on intentionality is misplaced. ‘[Injury] to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.’ (Note, The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case (1954) 54 Colum.L.Rev. 946, 975; see also United States v. Nettl (3d Cir. 1941) 121 F.2d 927, 930.) Therefore, to the extent that cases in this jurisdiction imply that misconduct must be intentional before it constitutes reversible error, they are disapproved.”

People v. Hill, *supra* at 823, endorsed Bolton:

In addition to claiming defendant forfeited all claims of misconduct, respondent also asserts the claims are meritless because defendant makes no showing the prosecutor acted in bad faith. Before 1979, bad faith was a prerequisite to gain appellate relief for prosecutorial misconduct of this type. [Citations.] In that year, however, we overruled these prior cases and held a showing of bad faith was no longer required. (People v. Bolton (1979) 23 Cal. 3d 208, 213-214 [152 Cal. Rptr. 141, 589 P.2d 396] (hereafter Bolton)). In fashioning this new rule, we explained that "this emphasis on intentionality is misplaced. '[I]njury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.'"... Bolton has been the law since 1979 [Citations], and we reaffirm it here.

See also People v. Leonard (2007) 40 Cal. 4th 1370, 1405 (“if the prosecutor had asked a question that was likely to elicit a reference to the Thrill Killer, the question would have been misconduct even if the prosecutor did not intend to elicit such a reference.”)

G. Dealing with State Error (Watson).⁷ Improper prosecutorial argument constitutes prejudicial error when it is reasonably probable that, absent the misconduct, the jury might have reached a result more favorable to the defendant. (People v. Bain (1971) 5 Cal.3d 839, 849.)

Argue the results of these statements, gestures or objections are impactful because although worthless as a matter of law, they are dynamite to the jury because of the special regard it holds for the prosecutor. (People v. Hill, *supra*, 17 Cal. 4th at p. 828.) See People v. Shipe (1975) 49 Cal.App.3d 343, 355 (“It stretches the imagination to believe that the prosecutor's questions did not influence the verdict. [Citation]”).

H. Finally, Argue That the Reasonable Juror Would Have Used the Illicit Argument as a Basis of Finding Guilt. To paraphrase People v. Fletcher (1996) 13 Cal. 4th 451, 471, if the prosecutor, a trained attorney with sufficient experience to be assigned the most serious cases could not correctly limit her argument to permissible inferences from the evidence, there is no reason that jurors would not as well.

V. Issues In Need of Further Investigation.

The following issues probably require investigation and some luck to find and litigate.

A. Brady v. Maryland (1963) 373 U.S. 83, 87: “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the

⁷ The courts may deem an error of federal constitutional dimension and then say it was prejudicial under either Chapman or Watson. “This tactic denied appellant his Sixth Amendment rights to confront and cross-examine an uncalled prosecution witness. Therefore, reversal is required unless we are satisfied beyond a reasonable doubt that the misconduct did not affect the jury's verdict. [Cites.]” (People v. Hall (2000) 82 Cal. App. 4th 813, 817.) That's fine. We'll take a reversal any way we can.

good faith or bad faith of the prosecution." See In re Brown (1998) 17 Cal.4th 873, 879 (prosecutor is responsible for obtaining discovery and Brady material in the hands of the investigating agencies.)⁸

The elements of such claims are showing that the evidence was favorable to the accused, suppressed by the State, and material. (Strickler v. Green (1999) 527 U.S. 263, 281-282.) "Favorable" does not mean evidence of innocence. It is a lower standard requiring only a showing of benefit to the defense. (Gantt v. Roe (9th Cir. 2004) 389 F.3d 908, 912.) Evidence may be favorable under Brady even if it "may seem inculpatory on its face," so long as the defendant can use it to make a point helpful to his defense. (U.S. v. Howell (9th Cir. 2000) 231 F.3d 615, 625 ["That the information withheld may seem inculpatory on its face in no way eliminates or diminishes the government's duty to disclose evidence of a flawed police investigation"]; see also People v. Coddington (2000) 23 Cal. 4th 529, 589-590 [at trial, favorable evidence must be disclosed, that is, "Evidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution"].)

The defendant need not even request the evidence. The prosecution has the duty to produce it. "A rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.... Prosecutors' ... unwarranted concealment should attract no judicial approbation." (Banks v. Dretke (2004) 540 U.S. 668, 696 [a Supreme Court reversal for hiding the status of a key informant witness].)

1. Suppressing Exculpatory Evidence. U.S. v. Jernigan (9th Cir. *en banc* 2007) 492 F.3d 1050 (evidence of an additional bank robber matching Jernigan's description suppressed); People v. Little (1997) 59 Cal.App.4th 426 (motion for new trial granted and affirmed on appeal for failure to turn over felony conviction of witness); People v. Hayes (1992) 3 Cal.App.4th 1238 (error to deny discovery of alleged victim's convictions, pending charges, status of being on probation, any acts of dishonest and prior false reports of sex offenses in spousal abuse case.)

⁸ See ABA Standards, 3-3.11(a): "A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused."

2. Failing to Investigate Exculpatory Evidence. Commonwealth of the Northern Mariana Islands v. Bowie (9th Cir. 2001) 236 F.3d 1083, n.6 (failure to investigate obvious evidence of exoneration -- that the prosecution's own witnesses were conspiring to commit perjury); People v. Martinez (2002) 103 Cal. App. 4th 1071 (defense made a discovery demand for the rap sheet of the key witness after that witness denied he had any felony convictions. The prosecutor claimed they could not run the RAP sheet because he lacked a date of birth and the witness had a common name. On the appeal, the State ran the witness's RAP sheet and discovered he had three prior felony convictions and a misdemeanor DV case. Reversed.)

3. Snitch Rewards and Misconduct. (See Kyles v. Whitley (1995) 514 U.S. 419, 434, an important Brady case involving snitch testimony; U.S. v. Brumel-Alvarez, 976 F.2d 1235 (9th Cir. 1992) [drug conspiracy convictions reversed because the government failed to disclose an internal DEA memorandum which showed that one of its agents thought the key informant was unreliable].) Recent examples:

a. Jackson v. Brown, 513 F.3d 1057, 1070 (9th Cir. 2008) (Brady and Napue error re promises of benefits to snitches and not correcting perjured testimony.)

b. Silva v. Brown (9th Cir. 2005) 416 F.3d 980 (prosecutor makes a deal with a co-defendant for a reduced sentence and a delay in the psychiatric examination, which is not disclosed. Reversed under Brady.)

c. U.S. v. Blanco (9th Cir. 2004) 392 F. 3d 382(failure to disclose snitch's immigration status warrants remand),

d. Singh v. Prunty (9th Cir. 1998) 142 F.3d 1157(prosecutor keeps from defense information regarding the benefits conferred on its major witness which would have demonstrated they he came forward to testify for reasons other than civic duty).

e. Carriger v. Stewart (9th Cir. en banc 1997) 132 F.3d 463 (conviction and death sentence reversed where prosecution withheld from defense the Department of Correction's file of the state's star witness. Because the witness had a long criminal history, the prosecution had the duty to turn

over all information bearing on his credibility. The file contained not only information the witness had a long history of burglaries [the crime the witness was now blaming on the defendant], but also that he had a long history of lying to the police and blaming others to cover up his own guilt.)

4. There is No Good Faith Defense to Brady Error. Whether the withheld evidence was intentional, negligent or innocent makes no difference. (Kyles v. Whitley (1995) 514 U.S. 419, 437-38 [“But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see Brady, 373 U.S. at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable].)

5. Turnover Must Be Timely. In Leka v. Portuondo (2d Cir. 2001) 257 F.3d 89, 106, a murder case, the government’s failure to disclose the name of a crucial eyewitness with information favorable to the defense “until three business days before trial,” and failure to disclose the substance of the witness’ knowledge, violated Brady and warranted reversal. *Accord* U.S. v. Gil (2nd Cir. 2002) 297 F.3d 93 (reversing a conviction for last minute, but before trial, provision of an important Brady document contained within thousands of pages of other discovery.) *See* U.S. v. Alexander (4th Cir. 1984) 748 F.2d 185, 191 (prosecution “fatally compromised the integrity of the proceedings on the new trial motion” by its equivocation on the existence of potential Brady material.) *See also* People v. MacKey (1985) 176 Cal.App.3d 177, 185 (failure to provide timely discovery of Brady evidence, impeachment, before the preliminary hearing deprived defendant of due process and constituted grounds for a motion to dismiss); *accord* Stanton v. Superior Court (1987) 193 Cal. App. 3d 265, 271.

6. The Duty Continues Even After Trial. (People v. Garcia (1993) 17 Cal.App.4th 1169 (finding Brady violation for failure of prosecutors to reveal impeaching information received post-conviction about the validity of prosecution expert's testimony at the trial); Imbler v. Pachtman (1976) 424 U.S. 409, 427, n. 25 (noting continuing prosecutorial duty to disclose after-acquired information that "casts doubt upon the correctness of the conviction"); *see also* Thomas v. Goldsmith (9th Cir. 1992) 979 F.2d 746 (prosecution duty to turn over possible exculpatory evidence on federal habeas to allow defendant to show colorable claim of innocence to defeat bar of procedural default.)

7. Brady Applies to Evidence Supporting Suppression Issues. (U.S. v. Barton (9th Cir. 1993) 995 F.2d 931, 935 (where the defendant alleged the government agents destroyed evidence necessary to impeach allegations in a search warrant affidavit, the appellate court held "that the due process principle announced in Brady and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant"); accord Smith v. Black (5th Cir. 1990) 904 F.2d 950, 965-66, vacated on other grounds, 503 U.S. 930 (1992); see discussion in U.S. v. Stott, 245 F.3d 890, 902 (7th Cir. 2001).

8. Brady Error Where the Investigation\Prosecution is Slipshod or Corrupt Warrants Sanctions Such as an Instruction. (Kyles v. Whitley (1995) 514 U.S. 419 446 n.15 ["when . . . the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it"]; U.S. v. Sager (2000) 227 F.3d 1138, 1145, relying on Kyles: "We agree with Sager that the district court committed plain error and abused its discretion by instructing the jury not to 'grade' the investigation. In one breath, the court made clear that the jury was to decide questions of fact, but in the other, the court muddled the issue by informing the jury that it could not consider possible defects in Morris's investigation. To tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information.")

9. Brady Error is Assessed Cumulatively and Not Item by Item. Kyles v. Whitley, *supra*, 514 U.S. 436; People v. Miranda (May 5, 2008) __ Cal.4th. __.)

10. Prejudice. When "the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." (U.S. v. Agurs (1976) 427 U.S. 97, 113.)

B. Other Areas to Investigate Prosecution Error

1. Telling Witnesses Not To Talk to the Defense, Threatening Them, Having Sex With Them. See ABA Standards, 3-3.1(d): "A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be

advised to decline to give to the defense information which such person has the right to give.”

- a. A prosecuting attorney may not order a prosecution witness to refrain from talking with the defendant or his counsel, and the courts are empowered to direct the prosecution to annul such illegal command or suffer the sanction of contempt. (Schindler v. Superior Court (1958) 161 Cal. App. 2d 513, 520, overruled on other grounds, People v. Garner (1961) 57 Cal. 2d 135, 142; Walker v. Superior Court (1957) 155 Cal. App. 2d 134, 140.)
- b. Threats to defense witnesses may come in blatant (In re Martin (1987) 44 Cal.3d 1 [threatening defense witnesses off the stand warrants grant of habeas corpus], or subtle form, but is misconduct in either event. *See* People v. Bryant (1984) 157 Cal. App.3d 582, 586 (1984) (the prosecutor's remarks to a defense witness at appellant's probation revocation hearing, indicating the witness would be charged with perjury if he testified in accordance with his preliminary hearing testimony, denied due process). *See also* U.S. v. Vavages (9th Cir. 1998) 151 F.3d 1185 (conviction for possession with intent to distribute marijuana reversed because the prosecutor coerced defendant's common-law wife into refusing to testify in his defense).
- c. Having sex with a key prosecution witness may constitute grounds for removal from the case (People v. Garewal (1985) 173 Cal. App. 3d 285 [“The deputy district attorney's behavior certainly would have justified his removal (for having sex with a prosecution witness), and certainly grounds for interesting cross-examination. In Garewal, the prosecutor's entire office had already been disqualified due to a conflict before the prosecutor-witness tryst came to light].)⁹
- d. Sometimes the prosecution bargain with a cooperating witness specifies that the witness shall not consent be interviewed by the defense. This is misconduct and has warranted dismissal. U.S. v. Leung (C.D. Cal. 2005) 351 F.Supp.2d 992.)

⁹ In a related area, *see* People v. Jackson (1985) 167 Cal. App. 3d 829 (the prosecutor began "dating" defense counsel on "a regular basis" throughout the duration of the criminal proceedings against the defendant, unbeknownst to the latter; conviction reversed.)

2. Invasion of the Defense Camp. On a showing the prosecution planted informants or the like in the defense camp, sanctions will be imposed. (Barber v. Municipal Court (1979) 24 Cal.3d 742; Morrow v. Superior Court (1994) 30 Cal.App.4th 1252; Boulas v. Superior Court (1986) 188 Cal.App.3d 422; People v. Moore (1976) 57 Cal.App.3d 437.) *See* U.S. v. Danielson (9th Cir. 2003) 325 F.3d 1054, 1059 ("The prosecution team in this case deliberately and affirmatively took steps, while Danielson was represented by counsel, that resulted in the prosecution team's obtaining privileged information about Danielson's trial strategy.") *See also* U.S. v. Marshank, 777 F.Supp. 1507, 1519 (N.D. CA 1991) (case involving the prosecutor's use and manipulation of defendant's attorney: "The government was aware of this conflict and took advantage of it. ... [It] is not entitled to take advantage of conflicts of interest of which the defendant and the court are unaware.")

3. Grand Jury Misconduct. ABA Standard 3-3.6(b) "No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense." *See* Calif. Penal Code § 939.71 which requires the grand jury be told of exculpatory evidence. (*E.g.*, Berardi v. Superior Court (2007) 149 Cal. App.4th 476 (failing to tell grand jury that a witness stated the defendant did not do the crime). In People v. Backus (1979) 23 Cal.3d 360, 392, the Supreme Court stated, "any prosecutorial manipulation which substantially impairs the grand jury's duty to reject charges which it may believe unfounded is an invasion of the defendant's constitutional rights ... [and] the courts should not hesitate to vindicate the demands of due process." (cites omitted).¹⁰ In Cummiskey v. Superior Court, (1992) 3 Cal.4th 1018, the Supreme Court ruled that section 995(a)(1)(A) may be used to challenge the propriety of legal advice and instruction given to the grand jury, and under section 995 the defendant may move to set aside the indictment on the ground that "the manner in which the prosecutor

¹⁰ In Johnson v. Superior Court (1975)15 Cal.3d 248, the court found an obligation on the prosecutor to disclose known exculpatory evidence to the grand jury. Post-Johnson cases indicate state due process rights *may* be implicated if the grand jury proceedings are conducted in a way that "compromises the grand jury's ability to act independently and impartially." (People v. Thorbourn (2004) 121 Cal. App. 4th 1083, 1089 [involving favorable evidence discovered after the indictment, *citing* People v. Superior Court (Mouchaourab) (2000) 78 Cal. App.4th 403, 435 [defendant may review communications between prosecutor and grand jury to prepare 995 motion], relying on Cummiskey v. Superior Court (1992) 3 Cal.4th 1018 [presentation of irrelevant and incompetent evidence may violate due process, but harmless here]; People v. Backus (1979) 23 Cal.3d 360 [improper instructions given to grand jury].)

conducted the grand jury proceedings ran afoul of ... due process rights under the relevant statutory and common law principles governing indictment by grand juries." (*Id.* at 1022, n.1.) See ABA Standards, 3-3.5(b) "The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury."

4. Vindictive Prosecution. Were the added charges a product of vengeance for the assertion of constitutional rights? See cases cited in U.S. v. Jenkins (9th Cir. 2007) 494 F.3d 1135: "[B]ecause the government could have prosecuted Jenkins for alien smuggling well before she presented her theory of defense at the marijuana smuggling trial, the timing of the charges created the appearance of vindictiveness. The government's assertion that its case against Jenkins was much stronger after her in-court admission does not suffice to dispel the appearance of vindictiveness. We therefore conclude that the indictment should be dismissed." See also U.S. v. Preciado-Gomez (9th Cir. 1976) 529 F.2d 935, 937-940, *cert. denied*, 425 U.S. 953 (discussing standards for vindictive prosecution claim).

5. Extortionate Bargaining, Breaches, Other Coercive Tactics.

a. Package Deals. (e.g., "plead guilty or we'll charge your wife.") In re Ibarra (1983) 34 Cal.3d 277, 277-278 (while a "package-deal" plea bargain is not coercive *per se*, the court must conduct an inquiry into the totality of the circumstances surrounding such a plea to determine whether it has been unduly coerced or is instead freely and voluntarily given.)

b. Locked-in Testimony. People v. Allen (1986) 42 Cal. 3d 1222, 1251-1252 ("[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." (People v. Medina (1974) 41 Cal.App.3d 438, 455.) Thus, when the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to police (*id.*, at p. 450), or that his testimony result in the defendant's conviction (People v. Green (1951) 102 Cal.App.2d 831, 837-839), the accomplice's testimony is "tainted beyond redemption" (Rex v. Robinson (1921) 30 B.C.R. 369) and its admission denies the defendant a fair trial.") See Note: "Let's Make a Deal: a Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements," 67 B.U.L. Rev. 749

(1987).

“A trial is not a scripted proceeding.” (People v. Hammond (1994) 22 Cal. App. 4th 1611, 1624.) Efforts by the prosecutor to program a witness’s testimony by script or like ends is the foundation for the denial of confrontation. “With the testimony in the record showing that the prosecuting witness was coached, we cannot hold that the defendant has had a fair and impartial trial. The jury should have been cautioned to scan such testimony carefully before finding the defendant guilty upon the testimony of a witness who had been told what to say.” (People v. Garrett (1938) 27 Cal. App. 2d 249, 252.)

c. Breaches by the Prosecutor. Obvious bargain breaches are sanctionable. (Santobello v. New York (1971) 404 U.S. 257.) “[T]he People are ordinarily bound by their stipulations, concessions or representations regardless of whether counsel was the Attorney General or the district attorney.” (People v. Mendez (1991) 234 Cal.App.3d 1773, 1783). In In re Kenneth H. (2000) 80 Cal.App.4th 143, the prosecution made an agreement with the juvenile that if he passed a polygraph test, the case would be dismissed, but if he failed, he would agree to plead guilty. He passed. The prosecutor reneged on the deal. On appeal, it was held that because the juvenile had detrimentally relied on the promised bargain, the prosecution could not break its word. The prosecutor was ordered to move for dismissal of the case. agreement. U.S. v. Johnson, 187 F.3d 1129, 1134 (9th Cir. 1999); U.S. v. Myers, 32 F.3d 411, 413 (9th Cir. 1994); U.S. v. Brown, 500 F.2d 375, 377 (4th Cir. 1974). *See* ABA Standards, 3-4.2 (c) “A prosecutor should not fail to comply with a plea agreement, unless a defendant fails to comply with a plea agreement or other extenuating circumstances are present.”

d. Waiver of the Breach by the Prosecutor. U.S. v. Clark (9th Cir. 2000) 218 F.3d 1092, 1095 (plea agreements are contractual in nature and are measured by contract law standards; *see also* U.S. v. De la Fuente (9th Cir. 1993) 8 F.3d 1333,1337.) What if the defendant initially breaches, the prosecutor ignores it in order to get the defendant's performance promised in the deal? Can the prosecutor thereafter claim breach and not perform? No. (U.S. v. Vogt (8th Cir. 1990) 901 F.2d 100, 102-103 (breach waived under such circumstances.)

e. Other Promise Breaking. “[I]t was fundamentally unfair and a violation of due process for the prosecutor in this case to use at trial defendant's July 21, 1987, statement in breach of the prosecutor's promise not to do so. Just as the defendant in Santobello v. New York, supra, 404 U.S. 257, waived his constitutional rights and pleaded guilty in exchange for and in reliance upon the prosecutor's promises in the plea agreement, defendant here waived his constitutional right to remain silent in exchange for and in reliance upon the prosecutor's promise not to use in court anything defendant said.” (People v. Quartermain (1998) 16 Cal. 4th 600, 619.)

f. Telling the Target Corporation That If it Pays Defense Fees for its Employees, it Will Be Indicted. When this causes the corporation not to pay employees defense costs, as was the expectation of the employees in this case, it is misconduct warrant sanctions. (U.S. v. Stein (D.C. N.Y.) 435 F.Supp.2d 330.) Starting at page 356, this case has an excellent discussion of the right to constitutional fair treatment in a criminal case including by the prosecution. *See, e.g.*, the following quote from Coppedge v. United States (1962) 369 U.S. 438, 448-449: “No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.” *See* ABA Standards, 3-3.9 (f) “The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.”

6. Coerced or Bribed Testimony. People v. Boyer (2006) 38 Cal. 4th 412, 444 (“coerced testimony of a witness other than the accused is excluded in order to protect the defendant's own federal due process right to a fair trial, and in particular, to ensure the reliability of testimony offered against him ... the defendant must demonstrate how such misconduct, if any, has directly impaired the free and voluntary nature of the anticipated testimony in the trial itself.”)

As to gifts or compensation to witnesses, *see* ABA Standard 3-3.2 (a): “A prosecutor should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, attendance for depositions pursuant

to statute or court rule, or attendance for pretrial interviews. Payments to a witness may be for transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.” One federal court issued a controversial and short-lived decision in U.S. v. Singleton, 144 F.3d 1343 (10th Cir. 1998), (overturned *en banc* and not been followed in the other Circuits.) The opinion held that based on an interpretation of 18 U.S.C. §201(c)(2), it was a criminal act for a prosecutor to "pay" a cooperating witness to testify against another person in return for sentencing consideration. The decision also held such conduct was unethical under the state ethical rules. Ironically, it is the law that paying cash for witness testimony is illegal but it is permitted for prosecutors to reward a witness with huge reductions in years in prison, dismissed counts, or returns of forfeited crime proceeds. Thus, in U.S. v. Cuellar, 96 F.3d 1179 (9th Cir. 1996), the court upheld a conviction despite the snitch being given a \$400,000 payment bonus after he testified. (He received \$180,000 prior to trial.) The opinion held the jury knew about the first payment, but said that the snitch did not know how much he was going to be given after trial so it could not have been a significant point with the jury. The court also held that paying an informant based on a "bounty" (a percentage of laundered funds he helped find or for "results") was not outrageous government conduct.

7. Prejudicial Pre-trial and Trial Statements to the Media. See ABA Standards, 3-1.4 (a) “A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.” Courts examining claims of prejudice arising from adverse pretrial publicity will consider whether that publicity is generated by acts of the prosecution or its agents. (See Maine v. Superior Court of Mendocino County (1968) 68 Cal. 2d 375, 386-387 [“political factors have no place in a criminal proceeding, and when they are likely to appear, as here, they constitute an independent reason for a venue change”]; Delaney v. United States (1st Cir. 1952) 199 F.2d 107, 113-115 [it is an important consideration whether the government was responsible for the publication of the objectionable material or if it emanated from independent sources]; Silverthorne v. United States (9th Cir. 1968) 400 F.2d 627, 633 [“ . . . federal courts have been sensitive to claims of prejudice arising from publicity when that publicity is created by acts of the Government”]; United States v. Denno (2nd Cir. 1963) 313 F.2d 364, 373 [“The publicity partly sponsored by the prosecution, created opinions of guilt long before trial....”];

Coleman v. Kemp (11th Cir. 1985) 778 F.2d 1487, 1539 ["significantly, the community's ranking law enforcement officer made widely reported and outrageous statements...."]; State v. Bell (Sup Ct. La. 1975) 315 So.2d 307, 31 [prosecution-emanated publicity considered in reversing trial court's venue decision]; State v. Stiltner (1971) 491 P.2d 1043, 80 Wash.2d 47, 52 n. 1 [conviction reversed after "astonishing" fact that state released prejudicial material to news media]; People v. Martin (1963) 19 A.D.2d 804, 243 N.Y.S.2d 343, 344 [change of venue ordered after police sponsored televised media interrogation of defendants].)

8. Prejudicial Conflicts of Interests. See ABA Standards, 3-1.3 (a) "A prosecutor should avoid a conflict of interest with respect to his or her official duties." These are normally the makings of recusal motions under Penal Code §1424, but if the information is late in developing, it may be worthy of a collateral attack. (People v. Eubanks (1996) 14 Cal. 4th 580, 590 ["A prosecutor is 'not impartial or disinterested if he has, *or is under the influence of others who have, an axe to grind against the defendant.*' [Citation]"]; Ganger v. Peyton (4th Cir. 1967) 379 F.2d 709, 714 [conviction held violative of Fourteenth Amendment due process when a part-time prosecutor was prejudicially conflicted because he also represented the defendant's wife in a divorce action].) Also, see ABA Standards, 3-2.11: "A prosecutor, prior to conclusion of all aspects of a matter, should not enter into any agreement or understanding by which the prosecutor acquires an interest in literary or media rights to a portrayal or account based in substantial part on information relating to that matter."

9. Breach of Plea Bargain. (Santobello v. New York (1971) 404 U.S. 257; Buckley v. Terhune, 441 F.3d 688 (9th Cir. en banc 2006) (fifteen years bargained but defendant got 15 to life; reversed); People v. Kaanehe (1977) 19 Cal. 3d 1.)

10. Ex Parte Communications with Judge or Jury. (E.g. In re Calhoun (1976) 17 Cal.3d 75 [sentence reversed where court relied on ex parte communication with prosecutor in imposing sentence]; In re Hancock (1977) 67 Cal.App.3d 943, 949 [same].) See ABA Standards, 3-2.8 (c) "A prosecutor should not engage in unauthorized *ex parte* discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.")

11. Batson v. Kentucky (1986) 476 U.S. 79. A prosecutor's exclusion of

qualified persons based on race or sex is forbidden and "once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation. If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination." (Purkett v. Elem (1995) 514 U.S. 765, 767.) *See also* Snyder v. Louisiana, ___ U.S. ___ (March 19, 2008), reversing based on disbelief of a prosecutor's makeweight explanation for his challenge to a black juror.)

_____ a. Is There a Sufficient Record on Appeal? Indeed, does the appellate record contain the voir dire – probably not unless requested by trial counsel or appeal counsel in an augment). *See* People v. Buchanan (2006) 143 Cal. App. 4th 139, 141: "It should surprise no one that, as a reviewing court, we are only able to consider matters adequately raised in the record." Other than the list of names suggesting the challenged jurors were Hispanic in the case, there was nothing in this record regarding ethnicity of potential, challenged, or seated jurors. Numerous persons with similar names remained on the panel. In short, the record was insufficient to preserve the issue.

_____ b. Raising Batson via IAC. There may be an IAC inquiry into why defense counsel did not object to the prosecutor's use of peremptory challenges to the "reprehensible or unprofessional act" of excluding jurors based on race. (Virgin Islands v. Forte (3d Cir. 1989) 865 F.2d 59, 62-63.) This, of course, is consistent with the general duty of defense counsel to select an unbiased jury. (Hughes v. U.S., 258 F.3d 453 (6th Cir. 2001) (petitioner's counsel was ineffective for failing to challenge the venireperson after her admission of bias.)

12. Suppression of Evidence by Frustrating Discovery. What if the prosecution or investigators tell interrogating agents not to take notes when interviewing friendly witnesses so as not to record a changing or evolving story? It has been held that where the agent of one side would ordinarily have taken notes, it was a contempt to avoid compliance with discovery orders by instructing him not to write a report. (In re Tony Serra (9th Cir. 1973) 484 F.2d 947.) *See* Youngblood v. West Virginia (2006) 126 S. Ct. 2188 (police officer's instruction to destroy potentially exculpatory evidence [note contradicting victims' account and supporting defendant's] states a Brady claim; remanded for hearing. *See also*

Roland v. Superior Court (2004) 124 Cal. App. 4th 154 [defense counsel failed to disclose to the prosecutor relevant statements made by witnesses which included unrecorded *oral* statements; held, discovery a violation.]). See ABA Standards 3-3.11 (a) “A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.”

13. Not complying with discovery requests and then putting on an expert at trial: “where as here the government represents to the defendant that it will comply with Rule 16's requirements pertaining to expert testimony, the government bears the burden of following through on that representation. Cf. Johnson, 228 F.3d at 924-25. In the proceedings below, the government failed to adhere to its representation regarding compliance with Rule 16 when the government did not notify defense counsel that the prosecution would call Tully to testify as an expert witness and nevertheless sought to elicit Tully's expert testimony at Cruz's trial. By doing so, *the prosecution blindsided defense counsel with this testimony and undermined the goals of the very disclosure requirement* which the government had assured defense counsel it would comply with. Under these circumstances, the district court improperly allowed Tully to begin testifying as an expert witness in the face of defense counsel's objections.” U.S v. Cruz, 363 F.3d 187, 196, fn. 2 (2d Cir. 2004); italics added.

14. Discriminatory Prosecution. What if the prosecution charges a defendant while not charging others similarly situated? Assuming there is evidence the client is charged because, unless others, he or she is an outspoken critic of the prosecutor. This could lay the foundation for a motion to dismiss the case. In U.S. v. Steele, 461 F.2d 1148 (9th Cir. 1972), a conviction for refusing to answer questions on the census form was reversed because defendant showed purposeful discrimination by census authorities against those who had publicly expressed their opinions about the census. See Murgia v. Municipal Court (1975) 15 Cal. 3d 286, 290–291. Also, counsel could pursue the issue by first seeking discovery. (E.g., Griffin v. Municipal Court (1977) 20 Cal. 3d 300, 307; U.S. v. Armstrong (1996) 517 U.S. 456.)

C. Getting Resources to Investigate Outside the Record Conduct.

Imagine one or more of the above (or other) issues have emerged and you need to investigate. Do you go to the Court of Appeal and seek funds as was done in the infamous San Diego Syndo Mob case (where it was discovered the prosecution agents entertained the snitch by orchestrating encounters with his lover at the DA's office!), or to the superior court? The general right to such investigative services cannot be doubted at the trial level (Corenevsky v. Superior Court (1984) 36 Cal. 3d 307 [right of trial counsel to ancillary services]; Tran v. Superior Court (2001) 92 Cal. App. 4th 1149 [even retained trial counsel can get appointed ancillary resources for an indigent client]), or, to some extent at least, on appeal. (In re Hwamei (1974) 37 Cal. App. 3d 554, 556-557 [“troubled by the possible failure of counsel to thoroughly investigate the defenses of diminished capacity or insanity, this [appeals] court decided to seek an objective psychiatric evaluation of the defendant’]); In re Ketchel (1968) 68 Cal.2d 397, 401-402 [right to post-conviction psychiatric assistance “of the informed psychiatrist could lead to the possible bases for collateral attack. It certainly could assist counsel in the development of overall strategy. The right to such aid should hardly be conditioned upon a showing of its precise application or utility”].)

VI. Making Your Record on Appeal

A. Federal Appeals. Say you have a Brady error because the government turned over during trial many DVDs of discovery, many in a foreign language, for which the trial attorney had no time to review. You review it after trial and find loads of Brady-Giglio material. How do you get this in the record?

F.R.A.P. Rule 10(e) states:

Correction or Modification of the Record.

- (1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.
- (2) If anything material to either party is omitted from or misstated in the record **by error or accident, the omission or misstatement may be corrected** and a supplemental record may be certified and forwarded:
 - (A) on stipulation of the parties;
 - (B) by the district court before or after the record has been forwarded;or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

Rule 10(e) generally cannot be used to add to or enlarge the record on appeal to include material which was not before the district court. U.S. v. Walker, 601 F.2d 1051, 1054-55 (9th Cir. 1979). However, when error occurs in placing material in the record or where the district court errs in not permitting the material to be added, this falls within the rule's exceptions and thus the matter may be supplemented. The term "error or accident" in Rule 10(e) "should be broadly interpreted to permit the record to be supplemented by any matter which is properly a part thereof. Omissions from the record may result from the error or inadvertence of the parties, the court reporter, the district court clerk or the judge." 9 Moore's Federal Practice, P 210.08[1], at 10-53 (2d ed. 1980).

In U.S. v. Aulet, 618 F.2d 182 (2d Cir. 1980), the appellant raised an ineffective assistance claim on direct appeal for counsel's failure to bring a motion to suppress evidence. The government responded by filing on appeal discovery provided to the trial counsel in the form of Jencks material. Appellant protested this material, although referred to in the trial record, was not in the record itself. The Court of Appeal rejected the appellant's challenge and received the supplement discovery material. It did so to avoid the waste of judicial resources (*i.e.*, a collateral attack), and it would be unfair to the decide the issue omitting the material trial counsel considered in evaluating whether to bring a motion to suppress. Id. at 186. "We see no justification in this case for ignoring these materials which bear heavily on the merits of appellant's claim." Id. at 187. Quoted in U.S. v. Barrow, 118 F.3d 482, 488 (6th Cir. 1997).

See, e.g., U.S. v. Adams, 271 F.3d 1236, 1243 (10th Cir. 2001) ("Because the district court judge did make passing reference to a recently faxed psychologist's report...and because counsel as an officer of the court represents that this is the same report that was before the district court, and because the government does not oppose it, we will grant the motion"); Ross v. Kemp, 785 F.2d 1467, 1473 (11th Cir. 1986) (deposition made part of the record on appeal because it should have been made part of the district court record); *compare* U.S. v. Garcia, 997 F.2d 1273 (9th Cir. 1993) (permitting district court fact findings on suppression issue, entered after the appellant filed his opening brief on appeal, to be added on appeal.)

Needless to say, remands to obtain Jencks or Giglio statements of witnesses may prove decisive to the case outcome. In U.S. v. Service Deli Inc., 151 F.3d 938 (9th Cir. 1998), the defendant corporation had been convicted of a false statement violation stemming from its agent denying price fixing government bids with another bidder. On appeal, the defendant argued error in the district court's refusal to order the government to produce all of its handwritten notes concerning interviews with the corporate agent who made the false statements denying price comparison discussions with the other bidder. The appeals court ordered a limited remand to the district court to examine the unprovided handwritten notes to determine if they contained material information not revealed to the defense. The district court found nothing in the notes that was material but the record was supplemented with the withheld discovery. The conviction was reversed on Brady grounds when the Court of Appeal found material "discrepancies between the [handwritten] notes and the summary memorandum," the latter being the discovery that was turned over to the defense prior to trial. The result of the non-disclosure was that "damning impeachment evidence in fact was withheld by the government." Id. at 944.

B. Motion To Open Sealed Records. Ninth Circuit Rule 27-13(c) states any party during the pendency of an appeal may file a motion with the court requesting an order unsealing all non-sentencing filings in the district court. While information remains sealed, "the government bears the continuing burden of justifying the need for secrecy." United States v. Moten, 582 F.2d 654, 661 (2d Cir. 1978) (in camera testimony of witness should have been released to defendant investigating motion for new trial, even though trial judge believed that the testimony would not be helpful to the defendant.) *See also* People v. Avila (2006) 38 Cal.4th 491, 605-606, where the Court had to review twelve volumes of sealed evidence (Id. at 606 n. 64) and then partially granted the defense motion to allow defense access to "all the sealed records, with a few exceptions, [and that they] be unsealed or otherwise provided to counsel for defendant." (Ibid.)¹¹

C. Asking to Participate in the In Camera Review. Judges are not in the best

¹¹ *See* Calif. Rules of Court, rule 8.328(c)(6): "Unless the reviewing court orders otherwise, confidential material sent to the reviewing court under (4) may be examined only by a reviewing court justice personally; but parties and their attorneys who had access to the material in the trial court may also examine it."

position to note the relevance of discovery materials. In Alderman v. United States, 394 U.S. 165, 183-184 (1969), the court stated:

Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny [required]

See also Dennis v. United States (1966) 384 U.S. 855, 874-875 (“Nor is it realistic to assume that the trial court judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.” In U.S. v. De Los Santos, 819 F.2d 94, 97-99 (5th Cir. 1987), the appellate court observed that trial courts may admit defense counsel into in camera hearing on informant disclosure. See generally, Annotation, Right of Accused to be Present at Suppression Hearing or at Other Hearing or Conference Between Court and Attorneys Concerning Evidentiary Questions, 23 A.L.R. 4th 955 (1983).

VII. Sample Argument Themes.

[A public prosecutor] "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done [i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935).

A. The Baseball Analogy. Over the length of this trial the prosecutor made major efforts to prejudice appellant’s fair trial rights, each time striking "foul blows," not fair ones. (*See* **Berger v. United States** (1935) 295 U.S. 78, 88.)

1. The First Strike: Opening Argument.
2. Second Strike: During Trial
3. Strike Three: Final Argument. Cato the Elder sensed that Carthage defeated, but still standing, would always pose a threat to Greek civilization. He

concluded all his speeches declaring, "*Carthago delenda est!*" This prosecutor had a similar one-track theme. By ignoring judicial rulings and interjecting prejudicial comments declared off-limits by the court, the prosecutor destroyed her own Carthage — appellant's fair trial rights.

B. Not Reasoned and Objective. A prosecutor's final argument to the jury is a critical address, coming as it does from a representative of the People. It "carries great weight and must therefore be reasonably objective [citation]." (People v. Pitts (1990) 223 Cal.App.3d 606, 694.) Prosecutorial statements are assumed to make an impression upon the minds of the jurors because the office "carries such weight with a jury that his statement of fact predicated on his knowledge, rather than on the evidence, constitute reversible error." (People v. Purvis (1963) 60 Cal.2d 323, 341.) See ABA Standards, 3-5.8 (a) "In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw. (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury. (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."

C. Arguing for Dismissal. The appropriate sanction is reversal and dismissal for invasion of the defense camp. In Barber v. Municipal Court (1979) 24 Cal.3d 742, the court found dismissal was the appropriate remedy for government misconduct --invasions of the defense camp -- holding that a lesser remedy would be inadequate because there would be no incentive for state agents to refrain from further violations. (Id. at 759.)

For trial misconduct, in People v. Batts (2003) 30 Cal. 4th 660, 665-666, the Supreme Court held the state double jeopardy is somewhat broader than the federal protection (see below) to bar retrial: "when the prosecution, believing (in view of events that occurred during trial) that a defendant is likely to secure an acquittal at that trial, knowingly and intentionally commits misconduct in order to thwart such an acquittal. In the latter circumstance, however, retrial is barred under the state double jeopardy clause only if a court, reviewing all of the circumstances as of the time of the misconduct, finds not only that the prosecution believed that an acquittal was likely and committed misconduct for the purpose of

thwarting such an acquittal, but also determines, from an objective perspective, that the prosecutorial misconduct deprived the defendant of a reasonable prospect of an acquittal.”

The usual remedy for prejudicial misconduct is a retrial. Federal double jeopardy considerations support dismissal where objections and repeated judicial admonitions did not deter the continued misconduct and the court finds the prosecutor intentionally committed misconduct to gain a mistrial. (Oregon v. Kennedy (1982) 456 U.S. 667, 676 ("Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion."))

In U.S. v. Chapman, __ F.3d __ (9th Cir. May 6, 2008), the court affirmed the dismissal of indictments based on failure to turn over voluminous discovery, concluding:

The district court did not abuse its discretion in dismissing the indictment. The government egregiously failed to meet its constitutional obligations under *Brady* and *Giglio*. It failed to even make inquiry as to conviction records, plea bargains, and other discoverable materials concerning key witnesses until after trial began. It repeatedly misrepresented to the district court that all such documents had been disclosed prior to trial. The government did not admit to the court that it failed to disclose *Brady/Giglio* material until after many of the key witnesses had testified and been released. Even then, it failed to turn over some 650 documents until the day the district court declared a mistrial and submitted those documents to the court only after the indictment had been dismissed. This is prosecutorial misconduct in its highest form; conduct in flagrant disregard of the United States Constitution; and conduct which should be deterred by the strongest sanction available. Under these facts, the district court did not abuse its discretion in characterizing these actions as flagrant prosecutorial misconduct justifying dismissal. Nor did it abuse its discretion in determining that a retrial—the only lesser remedy ever proposed by the government—would substantially prejudice the defendants.

VIII. Specific Examples of Prosecution Error

In addition to those cited above, the following examples, in no particular order, are little nuggets that may be useful in reviewing the record for error.

A. Almost All Trial Misconduct Involves a Prosecutor Putting Improper Matter Before the Jury. “[W]hile prosecutors are not required to describe sinners as saints, they are required to establish the state of sin by admissible evidence unaided by aspersions that rest on inadmissible evidence, hunch, or spite.” (U.S. v. Schindler (9th Cir. 1980) 614 F.2d 227, 228.) See ABA Standards, 3-5.9: “The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.”

B. A Lawyer Cannot Use Subterfuge to Place Before a Jury Matters Which it Cannot Properly Consider. (People v. Daggett (1990) 225 Cal.App.3d 751, 759.) “It is improper to ask questions which clearly suggest the existence of facts which would have been harmful to the defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with the belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied.” (People v. Perez (1962) 58 Cal.2d 229, 241, quoting People v. Lo Cigno (1961) 193 Cal.App.2d 360, 388.) Perez found improper asking a witness if he had been threatened after the latter gave testimony in support of the defendant's denial of guilt. The witness responded in the negative and the prosecutor did not follow up with proof to the contrary. The Supreme Court held the question improper. *Accord* People v. Wagner (1975) 13 Cal.3d 612, 619; People v. Wells (1893) 100 Cal. 459, 465; *see also* U.S. v. Davenport (9th Cir. 1985) 753 F.2d 1460, reversing a conviction for failure of the trial court to require the prosecutor to establish a factual predicate for such questions.

C. A Prosecutor Has the Duty to See That His or Her Witnesses Volunteer No Statement That Would Be Inadmissible and must be especially careful to guard against statements that would also be prejudicial. (People v. Schiers (1971) 19 Cal.App.3d 102, 113-114.) This includes a duty to warn the witness against volunteering inadmissible statements. (*See* People v. Warren (1988) 45 Cal.3d 471, 482-483; People v. Cabrellis (1967) 251 Cal.App.2d 681,

688 [“A prosecutor is under a duty to guard against inadmissible statements from his witnesses and guilty of misconduct when he violates that duty”]; People v. Figueredo (1955) 130 Cal.App.2d 498, 505-506 [“references by the officer to San Quentin deprived defendant of a fair trial”].)

D. No Knowing Use of Perjured Testimony. (Mooney v. Holohan (1935) 294 U.S. 103; U.S. v. Lapage (9th Cir. 2000) 231 F.3d 488.) *See* ABA Standards, 3-5.6 (a): “A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.”

E. Prosecutor Must Abide by Court Rulings and Admonitions. (*See* People v. Glass (1975) 44 Cal.App.3d 772, 781-782 [calling "inexcusable" the failure of counsel to abide by court rulings.] “Where a court has made its ruling, counsel must not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue.” (People v. Diaz (1951) 105 Cal.App.2d 690, 696; *accord* People v. Davis (1984) 160 Cal.App.3d 970, 984; *see also* People v. Pigage (2003) 112 Cal. App. 4th 1359, 1374 [it is an “imperative duty of an attorney to respectfully yield to the rulings of the court, whether right or wrong”].) *See* ABA Standards 3-5.2 (c) “A prosecutor should comply promptly with all orders and directives of the court....”

F. Accusing the Defense of Fabrication. “A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.” (People v. Hill, *supra*, at 832; *see also* People v. Bain (1971) 5 Cal. 3d 839, 845-848, prejudicial error for prosecutor to accuse defendant's attorney of fabricating evidence); People v. Herring (1993) 20 Cal. App. 4th 1066, 1075-1077 (reversible error to argue defense counsel fabricated defense and suborned perjury). Personal attacks on the integrity of opposing counsel constitute prosecutorial misconduct. (People v. Bell (1989) 49 Cal.3d 502, 538.)¹²

¹² "Impugning opposing counsel's integrity is a very serious matter; it should be undertaken only after careful analysis" (U.S. v. Kojayan (9th Cir. 1993) 8 F.3d 1315, 1321.) A defendant has a right to the effective assistance of counsel, and where a prosecutor attacks the defendant's attorney the problem is of constitutional dimension. (Bruno v. Rushen (9th Cir. 1983) 721 F.2d 1193, 1195, *cert.denied*, 469 U.S. 920 (1984).) In Rushen, the prosecutor "...labeled counsel's actions as unethical and perhaps even illegal without producing one shred of evidence to support his accusations." (*Id.* at 1194.) The Ninth Circuit reversed the state

(continued...)

G. Arguing Defense Counsel Does Not Believe in His Case or “Knows the Evidence Shows His Client is Guilty.” It is "improper for the prosecutor to argue to the jury that defense counsel does not believe in his client's [case]." (People v. Thompson (1988) 45 Cal.3d 86, 112.) (*See also* U.S. v. Tutino (2nd Cir. 1989) 883 F.2d 1125 [defense counsel knew his client was guilty; curative instruction given]; Homan v. U.S. (8th Cir. 1960) 279 F.2d 767 [argument that defense counsel knew defendant was guilty deemed improper and curative instruction given]; U.S. v. Kirkland (9th Cir. 1980) 637 F.2d 654 [defense counsel knew their clients were "guilty as sin;" curative instruction given].)

H. Questioning a Witness and Asking “So That Other Witness Lied?” May Be Misconduct. People v. Chatman (2006) 38 Cal. 4th 344, 383; *but see* U.S. v. Sanchez (9th Cir. 1999) 176 F.3d 1214 (finding it error).

I. Threatening or Coercing Defense Witnesses. The prosecution can't threaten or coerce defense witnesses. (Earp v. Ornoski (9th Cir. 2005) 431 F.3d 1158; In re Herman Martin (1986) 44 Cal.3d 1.)

J. Interjecting Her/Himself As An Unsworn Witness. A prosecutor has no business using argument or cross-examination as a basis to testify before the jury. (People v. Hill, *supra*, 827-828.) "When a lawyer asserts that something not in the record is true, he is, in effect, testifying. He is telling the jury: 'Look, I know a lot more about this case than you, so believe me when I tell you X is a fact.' This is definitely improper." (U.S. v. Kojayan (9th Cir. 1993) 8 F.3d 1315, 1321.) It violates the "advocate-witness" rule. (U.S. v. Prantil (9th Cir. 1985) 756 F.2d 759, 764.) In Prantil, the prosecutor interjected his own participation in dealing with witnesses into cross-examination so as to communicate to the jury the testimony was credible. As a result, the questions communicated "assertion[s] of personal knowledge of a testimonial rather than an argumentative character." (Id. at 768.)

K. Vouching for the Credibility of Prosecution Witnesses. *See* U.S. v. Brooks (9th Cir. 2007) 508 F.3d 1205 (questions of a cooperating witness about why he has to tell the truth ("because I promised and if I lie, the government void

¹²(...continued)

conviction and called it "egregious" for a prosecutor to resort to "these reprehensible means to shortcut their responsibility to ferret out all admissible evidence and use only that to meet their burden of proof." (Id. at 1195.)

my deal") is impermissible vouching and by testimony about how Dept. Of Justice and the courts have to approve wiretap applications; the first implied that the State could verify the witness's testimony and force the truth as a condition of plea; the second implied that U.S. agencies determined Brooks was guilty when authorizing the wiretap); U.S. v. Weatherspoon (9th Cir. 2005) 410 F.3d 1142; People v. Padilla (1997) 11 Cal. 4th 891, 945 [suggesting as improper an argument that an officer would never have "risked his whole career of 17 years" by testifying falsely].)

In People v. Hawthorne (1992) 4 Cal. 4th 43, 59, the Court stated these comments in final argument were wrong: "Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime," and "The State has the obligation to present the evidence. Defense counsel need present nothing."

L. Arguing Defense Experts Were Paid and Thus Lied for Their Money. (State v. Smith (N.J. 2001) 167 N.J. 158, 188, 770 A.2d 255 ["On this record, we are persuaded that the prosecutor's egregious comments that the defense experts may have 'shaded their testimony' in the hope of future employment requires a new trial. We note that the prosecutor's comments resulted in an immediate objection by defense counsel, followed by an attempted curative instruction"].)

M. My Witnesses Told the Truth and the Defense Lied. (*See* People v. Ellis (1966) 65 Cal.2d 529, 540 [improper to resort to epithets like "liar" or "perjurer"]; People v. Conover (1966) 243 Cal.App.2d 38, 46 [notes the fundamental rule prohibiting prosecutorial statement of disbelief of defense witnesses especially when the accusation carries with it the "perjury" label]; People v. Johnson (1981) 121 Cal.App.3d 94 [reversing a conviction where prosecutor calls defense testimony an "outright lie"].)

N. Laughing at the Witness. Prosecutor's facial and other gestures as comments on credibility are wrongful comments on the evidence. (People v. Hill, *supra*, at 834 [criticizing prosecutor for laughing at witness.])

O. Impeaching a Witness Without Evidence. (*See* Maniscalco v. Superior

Court (1991) 234 Cal.App.3d 846, 850, fn. 9 ["when an attorney interviews someone alone without a tape recorder, she is in the intolerable position of being unable to impeach the witness without facing potential recusal"]; see generally People v. Guerrero (1975) 47 Cal.App.3d 441.)

P. There Is No Open Door to Misconduct. “Two wrongs do not make a right. Thus, defense counsel's misconduct does not justify a tit-for-tat answering misconduct by the prosecutor.” (People v. Perry (1972) 7 Cal. 3d 756.)

Q. Now it Is Time for You Jurors to Do Your Duty and Convict. This argument is error. While it is probably proper to argue to the jury that if each element of the offense is proven beyond a reasonable doubt, the jury has the duty to convict, it is not proper to simply tell jurors of a duty to convict without tying it to evidentiary proof. (U.S. v. Sanchez (9th Cir. 1999) 176 F.3d 1214.)

R. Calling Upon the Jury to Signal the World That "We do not Tolerate Assassinations" and Similar Arguments. Arguments to the jury to make their verdict a "signal" sent round the world is the quintessential deflection of the trier of fact from its appointed duty -- to find facts and apply the law to those facts. Similar appeals have been held misconduct. (People v. Adams (1939) 14 Cal.2d 154, 161-2 [in child molestation case, prosecutor referred to another notorious similar case and implored jury to "render a verdict such as you will be proud of"]; People v. Mendoza (1974) 37 Cal.App.3d 717, 727 [appeal to jury to "take Mr. Mendoza off the streets"]; People v. Talle (1952) 111 Cal.App.2d 650, 673-78 [appeal to "avenge the cruel death of an innocent girl at the hands of . . . a beast"]; People v. Hail (1914) 25 Cal.App. 342, 357-8 [telling jurors they will be afraid to meet their fellow men if they acquitted, improperly had the effect of putting the jurors on trial].)

But note People v. Zambrano (2007) 41 Cal. 4th 1082, 1178 (“the prosecutor did not err by devoting some remarks to a reasoned argument that the death penalty, where imposed in deserving cases, is a valid form of community retribution or vengeance.”)

S. Addressing Jurors by Name in Argument. People v. Wein (1958) 50 Cal.2d 383, 395-396, states “... while arguments should be addressed to the jury as a body and the practice of addressing individual jurors by name during the argument should be condemned rather than approved....”

T. No Quoting Juror Statements From Voir Dire. People v. Freeman (1994) 8 Cal. 4th 450, 517 (“counsel should not quote individual jurors in their argument to the entire jury.”)

U. Prosecutorial Misconduct for Commenting on Lack of Defense Evidence the Prosecutor Had Successfully Excluded Outside Jury's Presence. (People v. Verona (1983) 143 Cal.App.3d 566; People v. Castain (1981) 122 Cal.App.3d 138; People v. Hernandez (1977) 70 Cal.App.3d 271, 279-280.)

V. No Quoting Bible During Argument. People v. Hill (1998) 17 Cal. 4th 800, 836 [“We cannot emphasize too strongly that to ask the jury to consider biblical teachings when deliberating is patent misconduct”].) *But see* People v. Zambrano (2007) 41 Cal. 4th 1082, 1169 (“A prosecutor may not cite the Bible or religion as a basis to impose the death penalty... On the other hand, we have suggested it is not impermissible to argue, for the benefit of religious jurors who might fear otherwise, that application of the death penalty according to secular law does not contravene biblical doctrine [Citations], or that the Bible shows society's historical acceptance of capital punishment.”)

See also Sandoval v. Calderon (9th Cir. 2000) 241 F.3d 765, 780 [“Because the prosecutor's religion- based closing argument [that execution of Sandoval was sanctioned by god] denied Sandoval a fair penalty phase trial, we remand the case to the district court with instructions to grant the petition for a writ of habeas corpus as to Sandoval's death sentence”].)

W. No Inventing of Evidence Please. In Miller v. Pate (1966) 386 U.S. 1, the prosecutor argued that a pair of shorts allegedly worn by the defendant were soaked in blood. The prosecutor knew the stains on the shorts were paint. The Supreme Court vacated the conviction.

X. No Inventing Conflicts to Disqualify Defense Counsel. We are familiar with U.S. v. Wheat, 486 U.S. 153 (1988) which gives federal district courts discretion to disqualify defense counsel upon a showing of an actual or potential conflict of interest. But maybe not in California, at least as to retained counsel. Rhaburn v. Superior Court (2006) 140 Cal. App.4th 1566, 1571, addressed the issue where prosecutors sought to disqualify (DQ) public defenders based on a witness in the case having been previously represented by the office. The PD office argued these last-minute filed motions to disqualifications were

merely a cover for an unprepared prosecution. The case was not decided on this point. *See also* Alcocer v. Superior Court (1988) 206 Cal. App. 3d 951, 958, noting a prosecutor reluctant to litigate against a specific defense attorney may seek to remove him or her “where there is only the hint of a conflict.”

Y. Relying on Propensity Argument in Non-Sex and DV Cases. Such arguments are designed to show propensity and inflame the jury. (U.S. v. Brown (9th Cir. 2003) 327 F.3d 867.)

Z. Arguing What Non-Witnesses Would Have Testified. People v. Hall (2000) 82 Cal.App.4th 813 (theory of defense was that police planted evidence on defendant and defense counsel’s closing argument suggested that a non-testifying police officer would have contradicted the testifying officer. The prosecutor replied defense counsel could have called him which was a proper rebuttal argument, but not when the prosecutor stated the second officer’s testimony would have been cumulative (defense objection). That told the jury what the testimony would have been, and denied defendant the Sixth Amendment right to cross-examine. Conviction reversed under either Chapman or Watson. People v. Gaines (1997) 54 Cal. App. 4th 821, 822 [“we hold that a prosecutor commits misconduct when he purports to tell the jury why a defense witness did not testify and what the testimony of that witness would have been”].)

AA. Arguing that Prosecution Witnesses Will be Prosecuted After Trial When There Was No Such Plan. People v. Kasim (1997) 56 Cal. App. 4th 1360 1387 (by closing argument, the prosecutor knew he had decided not to prosecute the snitch witnesses and it was misconduct “to tell the jury that these two accomplice-witnesses would be prosecuted after this trial.”)

BB. Commenting on Defendant's Silence at Trial. Long held a no-no. Griffin v. California (1965) 380 U.S. 609. “[A] prosecutor may commit Griffin error by arguing that certain evidence is uncontradicted, if contradiction or denial could be provided only by the defendant....” (People v. Bradford (1997) 15 Cal.4th 1229, 1339.) Griffin error has been found where the prosecutor stated: “The only thing we have heard from the defendant is this roundabout story from... relatives” (People v. Crawford (1967) 253 Cal. App.2d 524, 535), or that “... the law isn’t that you have to make up a defense for him. You are stuck with the evidence you have here... There is no evidence on the other side. It’s as simple as that.” (In re Rodriguez (1981) 119 Cal. App.3d 457, 460-461), or “...no one has

chosen to tell us what the motive was” (People v. Williams (1971) 22 Cal. App.3d 34, 43.) In Rodriguez, *supra*, the court considered as misconduct a prosecutor's repeated comments to the jury they should make no inference about the failure of the defendant to testify. Those comments may have focused jury attention on the very issue (failure to testify) they were not to consider.

CC. Commenting About Exercise of Other Rights Such As Fourth Amendment or Miranda. U.S. v. Prescott (9th Cir. 1978) 581 F.2d 1343, 1352 (“Yet use by the prosecutor of the refusal of entry, like use of the silence by the prosecutor, can have but one objective—to induce the jury to infer guilt”); People v. Keener (1983) 148 Cal.App.3d 73, 78-79; Crofoot v. Superior Court (1981) 121 Cal.App.3d 717, 725[175 Cal.Rptr. 530]; *cf.*, People v. Redmond (1981) 29 Cal.3d 904, 909 (defendant’s caution to his mother not to let police into house not an assertion of rights and issue waived for failure to object to prosecutor’s argument.)

Commenting on assertions of Miranda or right to counsel during interrogation is also constitutional error under Doyle v. Ohio, 426 U.S. 610 (1976); *see* recent case discussion in U.S. v. Caruto, ___ F.3d. ___ (9th Cir. May 12, 2008).

DD. Epithets About the Defendant. *See, e.g.,* People v. Ellis (1966) 65 Cal.2d 529, 540 [improper to resort to epithets like "liar" or "perjurer"]; People v. Conover (1966) 243 Cal.App.2d 38, 46 [notes the fundamental rule prohibiting prosecutorial statement of disbelief of defense witnesses especially when the accusation carries with it the "perjury" label]; People v. Johnson (1981) 121 Cal.App.3d 94 [reversing a conviction where prosecutor calls defense testimony an "outright lie"].) Of course, the same goes for use of racial or ethnic epithets in argument. (Kelly v. Stone (9th Cir. 1975) 514 F.2d. 18, 19.)

EE. Asking Guilt by Association Questions. If there is anything the U.S. Constitution forbids, it is a conviction won with guilt by association evidence. (*See* U.S. v. Polasek (5th Cir. 1998) 162 F.3d 878, 884 [summarizing the near universal rejection of such evidence]; *see also* U.S. v. Garcia (9th Cir. 1998) 151 F.3d 1243, 1244-46 [in reversing a conviction, the court stated it would be contrary to the fundamental principles of our justice system to find a defendant guilty on the basis of his association with gang members].)

FF. Improper to Ask a Witness to Respond to Questions about His Own Reputation for Veracity. (People v. Wagner (1975) 13 Cal.3d 612, 619).

Such a tactic "frustrate[s] the policy underlying Evidence Code section 352 which excludes evidence the prejudicial impact of which greatly outweighs its probative value." (Ibid.)

GG. “The Defendant Sits There In His Practiced Pose of Pathetic Innocence”– References to Defendant or Others Movement in Courtroom. In People v. Heishman (1988) 45 Cal.3d 147, 197, the Supreme Court noted the general rule:

In criminal trials of guilt, prosecutorial references to a non-testifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: 1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. 2) The prosecutorial comment infringes on the defendant's right not to testify. 3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character. [citations].

But the Heishman court found an exception to the above rule and no error in the prosecutor's death penalty trial final argument commenting on the defendant's facial demeanor. It justified the comment because the defendant placed his character as mitigating evidence to argue against the death verdict. See U.S. v. Schuler (9th Cir. 1987) 813 F.2d 978, where the prosecutor argued for the jury to note the defendant's laughter in court when his pre-trial statements were played. The court found the comment violated due process because it violated the right to have guilt or innocence determined by evidence produced in the trial, it constituted improper bad character evidence, and it possibly impinged on the defendant's Fifth Amendment right not to testify. *Accord* U.S. v. Pearson (11th Cir. 1984) 746 F.2d 787, 796 (holding that prosecutor's comment in closing – that the defendant's leg movement during trial demonstrated his nervousness and fear – constituted constitutional error); U.S. v. Carroll (4th Cir. 1982) 678 F.2d 1208, 1210 (prosecutor's reference to the defendant's courtroom behavior constituted constitutional error).

HH. You Jurors Should Consider Yourselves Victims of the Defendant. This too is a no-no. People v. Mendoza (2007) 42 Cal. 4th 686, 706.

II. Consider What the Victim's Last Thoughts and Feelings Were When She Saw the Defendant Aiming the Gun at Her. In Stansbury v. California (1993) 4 Cal. 4th 1017, 1057, *overruled o.g.*, 511 U.S. 318, the prosecutor told the jury, “Think what she must have been thinking in her last moments of consciousness during the assault. [¶] Think of how she might have begged or pleaded or cried. All of those falling on deaf ears, deaf ears for one purpose and one purpose only, the pleasure of the perpetrator.” This Court found that “an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of a trial....” (*Ibid*; italics removed from original.) *See also* People v. Leonard (2007) 40 Cal. 4th 1370, 1407 (“The prosecutor also asked the jurors to imagine the thoughts of the victims in their last seconds of life. We agree with defendant that this was improper.”) *See also* People v. Mendoza (2007) 42 Cal. 4th 686, 704.

JJ. The Decision to Charge and Prosecute Was Not Mine Alone. In U.S. v. Cummings (9th Cir. 1972) 468 F.2d 274, a prosecutor made an argument that the evolution of the charges stemmed from an agent going to a prosecutor who, if he felt there was a law violation would take the case to the grand jury, and the latter would find the charges worthy of being brought.

The court should have stopped him the instant that he embarked on this line of argument. Its purpose could only have been to persuade the jury to convict, regardless of how weak the government's evidence might be; to persuade the jury that the defendant must be guilty, else he would never have been indicted. After such an argument, where is the presumption of innocence, where the requirement that the jury consider only the evidence in the case, where the government's burden to prove its case beyond a reasonable doubt? We have difficulty imagining an argument less proper or more surely prejudicial. (*Id.* at 278.)

As another court put it: “The statement ‘we try to prosecute only the guilty’ is not defensible. Expressions of individual opinion of guilt are dubious at best... This statement takes guilt as a pre-determined fact. The remark is, at the least, an effort to lead the jury to believe that the whole governmental establishment had already determined appellant to be guilty on evidence not before them.” (Hall v. U.S. (5th Cir. 1969) 419 F.2d 582, 587; *see also* Cargle v. Mullin (10th Cir. 2003) 317 F.3d 1196, 1218 [“It is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted.” [Citations].])

KK. Misstating the Law. (*E.g.* People v. Najera (2006) 138 Cal. App. 4th 212 [describing voluntary manslaughter as a legal fiction was misleading; misstating that sudden quarrel heat of passion was second degree murder and misstating that it only applied if the defendant's conduct was reasonable; all error but harmless and forfeited].) *See* People v. Mendoza (2007) 42 Cal. 4th 686, 703 (misstating the law on manslaughter “reasonable person” standard.) *See also* U.S. v. Bohle, 445 F.2d 54, 70 (7th Cir. 1971) (misstating the law on the presumption of sanity in a jury trial).

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

MM. Prosecution's Shifting Theories of Prosecution to Uphold Verdict Warrants Habeas Relief. “The government has, throughout this prosecution, adopted shifting theories of guilt. This inconstancy of position impeded Siddiqi's defense at trial and has severely hampered judicial consideration of this matter. At this final stage, in order to rebut a claim of ineffective assistance, the government now embraces a theory that is legally insufficient. A miscarriage of justice having occurred, we vacate the conviction.” Siddiqi v. United States (2d Cir. 1996) 98 F.3d 1427, 1427-1428 . “The government's theory of criminal conduct has been a target that moves opportunistically when confronted by contrary evidence or telling argument.” *Id.*, at 1437.

NN. “The Jury Verdict of Acquittal is an Outrage!” *See* ABA Standards, 3-5.10 “The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.”

OO. All Around Bad Conduct. (*E.g.*, People v. Hudson (1981) 126 Cal. App. 3d 733, 735 [“the deputy district attorney, resorted to inflammatory rhetoric, violated the trial court's rulings, brought out inadmissible matters in the guise of questions and statements, used extremely vulgar forms of argumentative questions and injected prejudicial innuendo by his editorial comments in front of the jury”]; *see also* People v. Criscione (1981) 125 Cal. App. 3d 275, 284-292.)

CONCLUSION

Issues of prosecution misconduct go to the core of the fairness of the trial. Trial and appellate attorneys have the obligation to vigorously pursue such issues when presented in the defense of both the client and the due process promise of the U.S. Constitution. “Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.” Mapp v. Ohio, 367 U.S. 643, 659 (1961).

As stated in U.S. v. Agurs (1976) 427 U.S. 97, 110-111:

For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he [or she] must always be faithful to his client's overriding interest that “justice shall be done.” He is the “servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”

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