

Successfully Developing and Litigating Prosecution Errors at Trial & Beyond

A criminal trial is not an experimental forum for prosecutors to test the outer limits of ethical advocacy.

"The prosecutor's job isn't just to win, but to win fairly, *staying well within the rules.*" (U.S.v. Kojayan (9th Cir. 1993) 8 F.3d 1315, 1323; italics added.)

“It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win.’ [Citation] It is not.” (United States v. Blueford (9th Cir. 2002) 312 F.3d 962, 968.)

The function of the prosecutor under the federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of the people as expressed in the laws and give those accused of crime a fair trial."

(Donnelly v. DeChristoforo (1974) 416 U.S. 637, 648-49 (dis.opn. of Douglas, J).)

“[S]trict adherence to the rules of evidence and appropriate prosecutorial conduct is required to ensure a fair trial.” (Martin v. Parker (6th Cir. 1993) 11 F.3d 613, 616-617.)

"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. Roldan (2005) 35 Cal.4th 646, 719 (quotations and citations omitted.)

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Successfully Developing and Litigating Prosecution Errors at Trial & Beyond

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.

The never ending spate of revelations of prosecution misconduct in high profile cases challenges one's belief in social evolution, that is, the notion that over time individuals and institutions learn and improve from past mistakes, case commandments, ethical mandates and common sense. Yet, the incidence of prosecution misconduct seemingly never goes away. Indeed, misconduct is part "of an alarming trend." (People v. Pigage (2003) 112 Cal.App.4th 1359, 1374.)

To name just several of the outrageous very public examples over the past few years:

1) The mistrial declared in a federal district court in December 2017 in the Cliven Bundy case for willful suppression of evidence (location of snipers and surveillance cameras); 2) The dismissal of rape charges against members of Duke men's lacrosse team for a plethora of prosecution unethical conduct (the prosecutor was later disbarred and held in contempt); 3) The dismissal of charges against Senator Ted Stevens following his conviction due to the prosecutor hiding basic Brady impeachment evidence.¹ Ironically, that case was prosecuted by the "Integrity Unit" of the Department of Justice; and 4) In the Broadcom option backdating case, Santa Ana federal judge Cormac Carney dismissed the entire case based upon findings of on-going prosecution intimidation of witnesses. 5) The huge on-going scandal in Orange County in People v. Dekraai replicates and exceeds the informant-jail debacle in Los Angeles in the 1980s continues. It led to the appellate court approval of the trial judge's recusal of the entire office from Dekraai's capital case and then the superior court, in the face of more misconduct, taking death off the table as a sentencing outcome. Given these high profile cases, one wonders, is hiding evidence something that prosecutors can't help doing?

¹ See U.S. v. Kohring, 637 F.3d 895 (9th Cir. 2011)(reversal due to use of same cooperator as in Stevens case in an Alaska prosecution where Brady information, the cooperator's child molestations and attempts to obstruct investigation, was withheld.)

The above examples are but the tip of the ice-berg. The above were well-funded defenses where heightened measures were taken to defend the client. If prosecutors in such high profile cases will break the law to gain convictions, what about their conduct in the more mundane “off the radar” cases? We know it goes on in these cases too and we can only hope that the incredible revelations and occasional sanctions for misconduct deter further abuses.

Unfortunately, the past seems a prologue for more misconduct. On September 23, 2010, *USA Today* published a report of its investigation of this issue. Focusing primarily on federal prosecutors, the report provides a litany of examples. “[T]he violations the paper documented go beyond everyday missteps. In the worst cases, say judges, former prosecutors and others, they happen because prosecutors deliberately cut corners to win.” This is no surprise to those of us who labor in the justice vineyard, but the most important point of the article was this:

USA TODAY found a pattern of "serious, glaring misconduct," said Pace University law professor Bennett Gershman, an expert on misconduct by prosecutors. "It's systemic now, and ... the system is not able to control this type of behavior. **There is no accountability.**"
[Bolding added.]

See http://www.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm.² Therein lies the problem. Judicial, state bar and intra-office sanctions for prosecution misconduct are rare, yet we all know that the instances of misconduct are not rare at all. As summarized in a recent thoughtful law review:

The overall picture is bleak. Meaningful accountability may best be described as rare. It is rare for courts to grant defendants new trials for prosecutorial misconduct. It is extraordinarily rare for law-breaking prosecutors to face criminal liability. It is extremely rare for courts to subject prosecutors to civil liability. It is rare to encounter evidence that District Attorneys discipline employees who have violated defendants' rights. It is rare for disciplinary bodies to sanction prosecutorial misconduct. And, it is rare for an electorate to vote an incumbent out of office because

² Another article in *USA Today* discusses relief under the Hyde Amendment where, following an acquittal in a federal case, a defendant can seek reimbursement for legal fees. The law awards attorneys' fees in federal cases under 28 U.S.C. § 2412 in limited contexts. See “Va. bankers scored a rare victory against federal prosecutors.” <https://www.scribd.com/document/38933828/Va-Bankers-Scored-a-Rare-Victory-Against-Federal-Prosecutors-USATODAY>

of misconduct committed on his watch.
Sarma, "Using Deterrence Theory to Promote Prosecutorial Accountability," 21 Lewis & Clark Law Review 596, 573 (2017).

Bottom line: it is up to us to expose it and insist on a sanction that gives our clients relief.

This will not be a conventional paper on "here are examples of prosecution error," although there will be some of that. You know it when you see it (at least in the arguable sense) but just in case, the end of this paper contains a goodly number of examples which trial counsel should peruse before every trial to acquaint or refresh oneself in the great varieties of ways misconduct can occur.

I will also discuss are ways of preserving the issue at trial and on appeal. Unfortunately, many of these errors are either not preserved by trial objection or are hidden from the 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 aware of the need to make a record. Trial judges often do not have sensitivity to the issue and the only way to sensitize them is to point out that it is judicial error and judicial misconduct not to preside over an impartial trial. (*See* People v. Vance (2010) 188 Cal.App. 4th 1182, 1201 ["the possible prejudicial effect of the improper comments by the prosecutor was exacerbated by the trial court's passive reaction³ to them"]; People v. Harbolt (1988) 206 Cal.App.3d 140, 157 [suggesting the trial court should not tell the prosecutor how to lay a foundation while not doing the same for the defendant – "We agree the record does disclose incidents in which the trial court advised the prosecutor and we do not condone such practice for it is essential to the administration of justice that trials be conducted with the utmost fairness

³ **Remind the court of its duty to reign in a misbehaving prosecutor.** See Martinez v. Dept. of Transportation (2015) 238 Cal.App.4th 559, 569 [counsel's ignoring the judge's admonitions made "inevitable that the jury would conclude it did not have to pay attention to the trial judge either. After all, ... counsel was repeatedly ignoring what he [the judge] told her in front of their very eyes and getting away with it. He took no corrective action whatsoever"]; U.S. v. Sturgis, 578 F.2d 1296, 1300 (9th Cir. 1978) ["No doubt, the district judge mis-spoke himself when he said he only interfered with closing arguments of the attorneys when the remarks were 'legally wrong.' Not only should a judge interfere with an attorney's closing argument when it is 'legally wrong,' but he should also limit, for example, attorneys' remarks outside the record or unduly inflammatory"]; Smith v. United States, 305 F.2d 197, 205 (9th Cir.), cert.denied, 371 U.S. 890 (1962) [the court "has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies".]

and impartiality"]; *see also* California Canons of Judicial Conduct, Canon 3, “A judge shall perform the duties of judicial office impartially and diligently.”)

If you are an appellate attorney, perhaps you are contacted just after trial and before sentencing and are given the time to read the record in order to fashion a motion for new trial (MNT). 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.)

Important legislation: Penal Code section 1473 was amended and went into effect on January 1, 2017. It allows a writ of habeas corpus to be prosecuted when, "(3) (A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." This can be used at the time of a motion for new trial (or later in a habeas petition) when Brady evidence arises post-trial.

But the far better way of handling these issues is to grapple with them at trial.

A. However ... 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 as much as the fear of having to do an appeal in which you failed to preserve the issues for appellate review.

Barring that, or in addition to it, is appellate counsel’s involvement with the trial bar. This offers potential to set up issues and 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, appellate counsel will have to even if it comes under the banner of IAC. “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.)⁴

⁴ If appellate counsel does not raise an arguable issue of prosecution misconduct on appeal, he or she could be found ineffective. (*E.g.*, examples of inadequate appellate representation by counsel which caused reversal for a new appeal are People v. Lang (continued...)

2. More positively, we can meet some trial counsels' protest that attention to record making is counter-productive to trial strategy and goals. This is almost always incorrect. 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 at the Monterey Death Penalty Seminar on "Making a Winning Record" (updated December 2015). This paper 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.

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. Prosecutors are far less likely to try to take advantage of a defense attorney who is ready to pounce on misconduct by objections and calls for sanctions.

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

⁴(...continued)
(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.)

(CLARA) there are downloadable articles by Hank Hall, Matt Braner, Tom Havlena, and others.⁵ 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 also* 4 Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 80, Prosecution Fairness § 80.09 [5] (Matthew Bender).

A number of websites monitor prosecution misconduct and are worth visiting. E.g., The National Registry of Exonerations reports that 43% of the exonerations it has covered were due to official (prosecution/police) misconduct.

<http://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

See also The Center for Prosecution Integrity, <http://www.prosecutorintegrity.org/>.

Despite the above approaches, issues of prosecution error often appear in trial records accompanied by imperfectly preserved issues (or not preserved at all). The rest of this paper discusses strategies for dealing with the issue both on appeal and at trial.

II. AN APPROACH TO DEVELOPING AND ARGUING THE ISSUE

Prosecution misconduct is frequently raised on appeal and prone to receive the “oh hum” treatment, especially when argued just 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 (unless particularly egregious and demonstrable); 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’s fair trial rights and the integrity of 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.

⁵ Note: just filing a list of common prosecution errors prior to final argument accomplishes nothing. (*See People v. Ervine* (2009) 47 Cal.4th 745, 806-807 [no pre-argument list of common prosecution errors in argument filed before the argument can take the place of contemporaneous objections].)

A. Prosecution Error is Serious and Frequent.⁶ 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. The Fairness Commission (the California Commission on the Fair Administration of Justice) October 18, 2007 report: “Recommendations on Professional Responsibility and Accountability of Prosecutors and Defense Lawyers,” cites a study of 2,130 cases by Cookie Ridolfi. Her study determined that the courts found during the period of study 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.

The Northern California Innocence Project issued a report discussing the ever expanding rule of absolute prosecutorial immunity from lawsuits beginning with Imbler v. Pachtman (1976) 424 U.S. 409 (absolute for prosecutors); Van de Kamp v. Goldstein, 129 S.Ct. 855 (2009) (prosecutor’s supervisors get same immunity). In Connick v. Thompson (2011) 131 S. Ct. 1350, the court held that a defendant victimized by misconduct cannot sue the District Attorney’s office based on a failure-to-train theory where the proof is but a single Brady violation. There must be a showing of a pattern of similar violations, and that deliberate indifference to the violations was part of an official policy.

The Supreme Court dismissed as moot an appeal from McGhee v. Pottawattamie County, 547 F.3d 922, 933 (8th Cir. 2008) [holding “[w]e find immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not ‘a distinctly prosecutorial function’”].) After oral argument in the Supreme Court, the parties settled the case with the two plaintiffs, McGhee and Harrington, receiving \$12 million dollars in recompense for 25 years of unlawful incarceration produced by convictions based upon prosecutorial misconduct. The Supreme Court case was dismissed. (130 S.Ct. 1047 (2010).) “Professionally and scholarly speaking, the dismissal is demoralizing. As a citizen, it's even more demoralizing to reflect on the fact that the prosecutors who knowingly had an innocent man convicted are still practicing law. The prosecutors were never punished. The unethical prosecutors won't even write any checks, as taxpayers will foot the bill.” (<http://tinyurl.com/csd5g5w>.)

⁶ We will get to the conviction standards of review, *i.e.*, whether the errors are federal constitutional in magnitude under Chapman v. California (1967) 386 U.S. 18, or only state law errors to be considered under the more forgiving standard of People v. Watson (1956) 46 Cal.2d 818, 836.

With civil suits by wronged defendants blockaded by a prosecutor's absolute immunity, the Supreme Court suggested other alternatives would suffice to control prosecution conduct:

Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

How's that working out? The report by the Northern California Innocence Project (NCIP) shows: "the investigation reveals a criminal justice system in which prosecutors commit misconduct inside and outside of courtrooms across the State of California, without fear of discipline or reprimand." *NCIP Newsletter*, "Boundaries of Prosecutorial Immunity to be Tested in Upcoming Supreme Court Case," Summer 2010, p. 16.

The State Bar disciplinary process has not served as a credible form of deterrent. That leaves the courts, but the judicial remedy is limited. First, the misconduct must play out in the courtroom (or otherwise be brought to the court's attention by habeas or other motions). Given that over 90% of cases settle short of trial, misconduct will often be overlooked. Second, the reality is that even when they see it, the courts do little by way of sanctioning the misconduct. One can hardly believe that the repeated refrain of "harmless error" pricks the conscience of the wayward prosecutor to induce self-reform.

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.)

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 California Fairness Commission observed, 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 § 6086.7.⁷ See Zacharias, “The Professional Discipline of Prosecutors” (2001) 79 North Carolina L. Rev. 721, 723 (“in light of the frequent references to prosecutorial misconduct in the case law, the lack of ensuing discipline is surprising.”)

In the October 2010 release by the Northern California Innocence Project of its comprehensive report on the problem (entitled, “Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009,” authored by Professor Kathleen (Cookie) Ridolfi and Maurice Possley (Pulitzer prize winning journalist), the Executive Summary⁸ concludes:

The failure of judges, prosecutors and the California State Bar to live up to their responsibilities to report, monitor and discipline prosecutorial misconduct fosters misconduct, undercuts public trust and casts a cloud over those prosecutors who do their jobs properly. The problem is critical. (Id. at 4.)

* * * * *

...prosecutors continue to engage in misconduct, sometimes multiple times, almost always without consequence. And the courts’ reluctance to report prosecutorial misconduct and the State Bar’s failure to discipline it empowers prosecutors to continue to commit misconduct. (Id. at 5.)

For the time being, the trial and appellate courts are the only realistic forum to reign in errant prosecutors, and they are not doing a very good job of it. Defense counsel must necessarily make their cases there, always with the vigorous reminder that prosecutors have a duty to play fairly and stay within the rules:

"It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win." United States v. Kojayan, 8

⁷ 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 (1982) 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].)

⁸ The Executive Summary of the report may be found at the following url: <https://veritasinitiative.wordpress.com/?s=prosecutorial+misconduct>.

F.3d 1315, 1324 (9th Cir. 1993). It is not. An attorney for the government is a "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." Berger v. United States, 295 U.S. 78, 88, 79 L.Ed. 1314, 55 S.Ct. 629 (1935), overruled on other grounds, Stirone v. United States, 361 U.S. 212, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960). Put differently: "The prosecutor's job isn't just to win, but *to win fairly, staying well within the rules.*" Kojayan, 8 F.3d at 1323.

U.S. v. Blueford, 9th Cir. 2002) 312 F.3d 962, 968 (italics added).

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. Our language usage has an impact on persuasion. The courts are more likely to find "error" than misconduct.

Having appellate courts agree on the issue of error is, of course, the essential first step to arguing prejudice. In 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.) *Accord* People v. Jasso (2012) 211 Cal.App.4th 1354, 1361-1362.)

There may be an advantage to lowering the tone of 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.

CAVEAT: What is stated above about how to characterize the error applies to language usage on appeal. While trial counsel must make objections to misconduct, a trial court can forbid the usage of the phrase "prosecution misconduct" in front of the jury. This only means that counsel must object with a less conclusionary basis: *e.g.*, stating "not in the record," "denies confrontation," "inflammatory and irrelevant," *etc.* (People v. Ward (2009) 173 Cal.App.4th 1518.)

C. Intentionality is Not Necessary for Federal Constitutional Error. This is discussed more fully in the prejudice section, but it bears mention that no 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. (See below for pure state law claims.)

D. Analogies to Confrontation Denial. 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 for 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. Makhoulta, 790 F.2d 1400, 1403 (9th Cir. 1986).

F. Call upon the Rules of Professional Conduct. 28 U.S.C. § 530B reads: "(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." This means federal government attorneys are to abide by the rules of professional conduct governing attorneys in the state in which the attorney practices. There are any number of California Rules of Professional Conduct that govern ethical practice and should be cited. *E.g.*, Rule 5-200, Trial Conduct; Rule 5-220 Suppression of Evidence; Rule 5-310, Prohibited Contact With Witnesses. See especially new RPC 5-110 regarding the prosecutor's duty pre-trial to turn over exculpatory evidence. See also Bonus Material on the "New Rule of Professional Conduct for California State and Federal Prosecutors Compels Pre-trial Discovery of all Exculpatory Evidence" at the end of this paper.

III. DUTY TO OBJECT AT TRIAL AND MAKE A RECORD OF PROSECUTORIAL MISCONDUCT

A. The Right to Make A Record (Cooper). You rise to object that the prosecutor's final argument that "defense counsel knows his client is guilty." You cite misconduct,⁹ but the judge not only overrules your objection but announces that in his court one does not interrupt opposing counsel during the sacred hour of final argument. All objections are to be reserved for a side-bar session following arguments.

You know that the law requires an immediate objection or the issue is waived on appeal except for perhaps under the theory of incompetence of trial counsel.¹⁰ You also know as a matter of common sense that allowing the prosecutor to proceed unrestrained will irretrievably corrupt the jury against you and your client. You respectfully say to the judge:

Since it is the lawyer's duty to make his objections and other points in his client's behalf, it must follow that he is entitled to a timely opportunity to make them. From this it necessarily follows that the judge is without power

⁹ This is surely error although it has been deemed harmless error because trial courts gave curative admonitions. (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]. It is "improper for the prosecutor to argue to the jury that defense counsel does not believe in his client's defense."] However, in People v. Thompson (1988) 45 Cal.3d 86, 112-114, it was argued on appeal but because defense counsel did not object, it was held not error and that it could have been cured if it were error.

¹⁰ Countless cases hold a claim of misconduct is waived for lack of objection. (E.g., People v. Gonzales (2011) 51 Cal. 4th 894, 920; People v. Samayoa (1997) 15 Cal.4th 795, 841; People v. Gionis (1995) 9 Cal.4th 1196, 1215; People v. Green (1980) 27 Cal.3d 1, 24.) There are rare exceptions such as in People v. Hill (1998) 17 Cal.4th 800, where the misconduct was pervasive, a few objections were made, and it would have been fruitless to continue to object. Leaving the issue to an ineffective assistance of counsel claim on appeal is not an acceptable alternative given that the standard of review changes from Chapman v. California (1967) 386 U.S. 18, where federal constitutional violations require reversal unless the beneficiary of the error can prove beyond a reasonable doubt that it did not affect the result, to the much less generous standard of Strickland v. Washington (1984) 466 U.S. 668.

to foreclose that opportunity by any order or admonition to sit down or to be quiet or not to address the court. The power to silence an attorney does not begin until reasonable opportunity for appropriate objection or other indicated advocacy has been afforded."

The above "sound principle" is a direct quote taken from Cooper v. Superior Court (1961) 55 Cal.2d 291, 298. There, legendary defense counsel Grant Cooper was defending in the notorious Finch-Tregoff murder case. It was the second trial, the first having ended in a hung jury after long jury deliberations. Now, the second jury was out several weeks in deliberations when the judge did an extraordinary thing. Without discussion with counsel, the judge called out the jury to give them his view of the evidence which included the following: "the explanation given by the defendant Finch as to the circumstances surrounding the firing of the fatal shot to me does not sound reasonable in any of its aspects, and it appears to me to have been concocted by him in an attempt to justify what is shown by the evidence, in my opinion, to be a willful and deliberate taking of human life." (Id. at 297.)

At this, Cooper twice sprang to object to the invasion of the province of the jury and twice the court slapped him down with contempts, stating that Cooper could make his record later outside the presence of the jury. Cooper did not take the contempts lightly. He took them to the California Supreme Court and won. The Supreme Court observed: "This was the first opportunity counsel had to object to the unusual procedure. An attempt to cure the error by again recalling the jury and instructing them to disregard the comments would be like an attempt to unblow a blown horn." (Id. at 300.) See U.S. v. Blueford, 312 F.3d 962, 974 (9th Cir. 2002) ("Where a party has 'no opportunity to object to a ruling or order,' he may not be prejudiced for failing to do so.")

This holding has direct application to our problem. To permit unanticipated and outrageous jury arguments by the prosecution without immediate objection and correction is extremely prejudicial to the client. Counsel is required to object and move for a judicial admonishment if not a mistrial.¹¹

Waiting until it is all over to make objections means zero likelihood of getting a ruling that can undo the damage. It is literally "all over." Further, waiting will likely waive the issue for appeal. It also may make the record appear that the comment was not so awful given the silence of defense counsel after it was made.

¹¹ "One of defense counsel's most important roles is to ensure that the prosecutor does not transgress those bounds [of proper conduct]." Washington v. Hofbauer (6th Cir. 2000) 228 F.3d 689, 709.)

Perhaps prior to argument the court will say something like, "I'm going to ask the lawyers to try and avoid interrupting one another during the argument, and if either attorney should misstate the evidence or the law, and I know that neither would do that intentionally, you are to rely on the evidence as it was presented in the trial and the law as I will be giving it to you." This was the statement the trial court gave in People v. Wilson (2005) 36 Cal.4th 309, 337 n. 6. There, the Supreme Court held this did not relieve defense counsel from the duty to object to the misconduct during final argument because the court's statement did not specifically preclude objections during argument, it only suggested it.

Therefore, in addition to preparing your own final argument, be prepared to object when the prosecutor goes off the reservation into the land of misconduct. Have the cites to Cooper and Wilson at the ready to explain to the court that barring objections during argument undermines counsel's duty to object immediately to stave the prejudice before it irrevocably saturates and prejudices the jury. In convincing the trial court to allow objections during argument, inform the court that it is not only the duty of the court to monitor the fairness of the trial, but when the court gives curative instructions for misconduct, it usually eliminates reversible error.¹² Judges like to have reversal proof convictions so appealing to that motivation may make them receptive to curing misconduct on the spot.

B. If the Prosecutor Uses Power Point During Argument, Insist that You See it in Advance (And Then Make Objections). In many cases, perhaps most, the prosecutors are going to use Power Point or the like during final argument. This is because studies have shown that jurors retain far more information which is conveyed visually and orally. So it's a powerful means of getting the message across. (State v. Hecht (Wa. 2014) 319 P.3d 836; Watters v. State (Nev. 2013) 313 P.3d 243, 245; In re

¹² To cure misconduct on the spot, have the court take a cue from People v. Bolton (1979) 23 Cal.3d 208, 215, fn. 5: "But when the defense counsel requests cautionary instructions, the trial judge certainly must give them if he agrees misconduct has occurred. He should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks. In the present case, such a counterbalancing statement might have taken the following form: 'Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks.'"

Glasman (Wa. 2012) 286 P.3d 673 [all three cases reversing for misuse of PPT during final argument].) Defense counsel must insist that before anything is shown the jury during final argument, that defense counsel has the time to review it and make objections. As example of the importance of pre-screening PPTs: in People v. Sandoval (2015) 62 Cal.4th 394, the prosecutor showed the penalty jury victim impact slides of the deceased police officer combined with a stirring musical background. This was error: "We hold that because background music in victim impact presentations provides no relevant information and is potentially prejudicial, it is never permitted."

C. Make the Objections. When objecting, remember: "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.)

D. No Compliments Please. It goes without saying (but I'm saying it) that where there are questions about prosecutorial conduct, the issue will be severely undermined by gratuitous complements. An infamous example is the Rosenberg treason trial raised issues on appeal about prosecution misconduct, but their own words at trial contradicted the assertion:

Nothing in his summation concerning the defendants seems to have exceeded the liberal limits of legitimate partisanship and argumentation our courts customarily allow counsel. It is of some significance that Sobell's counsel himself, at the end of the trial, indicated that he thought the prosecutor had conducted himself fairly: 'I am willing to shake his hand after a job that we both had to do.' Similarly the Rosenbergs' counsel at the end of the trial acknowledged the good behavior of the prosecutor.

(U.S. v. Rosenberg (2d Cir. 1952) 195 F.2d 583, 602.)

E. Federalize Objections. Finally, federalize all objections by arguing that the prosecutor's comment "so infected the trial with unfairness as to ... [be] a denial of due process" under the 14th Amendment to the U.S. Constitution. (Donnelly v. DeChristophero (1974) 416 U.S. 637, 643 [questionable argument by the prosecution that the defense wanted the jury to find guilt on a lesser deemed cured by a specific corrective jury instruction.]

IV. DEALING WITH A POORLY MADE RECORD ON APPEAL

A. Dealing with Forfeiture 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 on appeal. 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. Argue:

1. 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, then it is IAC.¹³ 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.

Federal cases holding trial defense counsel IAC for not protecting the client from prosecution misconduct include: 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

¹³ In federal court, one may also argue "plain error." Prosecutorial statements to which the defendant objects are reviewed for harmless error. Unobjected to comments 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 affects the fairness, integrity, or public reputation of the judicial proceedings. U.S. v. Blueford, 312 F.3d 962, 974 (9th Cir. 2002).

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 IAC 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 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.)

Forcing trial counsel to repeatedly object to repeated misconduct in front of the jury is a “win-win” for the prosecutor. If the repeated objections are sustained, the prosecutor has put out the toxic message via the question and forced the defense counsel to look like an obstructionist with repeated objections. If the objection is overruled, so much the better. As Judge Jerome Frank once wrote: “I believe that a prosecutor ought not deliberately and repeatedly, as here, put defendant's lawyer in such an awkward dilemma- where his client will suffer if the lawyer does not object or if he does. If, without attaching any practical consequences to such tactics of the prosecutor, we simply express disapproval of them, we do nothing to prevent their repetition at the new trial of this case or in trials of other cases. U.S. v. Grayson, 166 F.2d 863, 871 (2d Cir. 1948) (concurring).

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 are made, that fact 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.”¹⁴

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. 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.

See also this old chestnut on the futility of cautionary instructions being curative. In People v. Valliere (1899) 127 Cal.65, 66-67, after an interjection of personal knowledge by the prosecutor, the court said: “the [DA’s] examination was inexcusable, and the statements contained in the closing address were an *outrage upon justice*, which ought not to be allowed to pass. The court promptly rebuked the attorney, but that did not cure the injury. Rebukes do not seem to have any effect upon prosecuting officers, and probably as little upon juries. The only way to secure fair trials is to set verdicts so procured aside.” (Italics added.)

6. Cautionary/Curative 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

¹⁴ “[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.)

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. Holt (1984) 37 Cal.3d 436, 458 ("While the jury was instructed at the conclusion of the guilt phase that the subject of penalty or punishment was not to be discussed and must not affect the verdict the instruction did not negate the improper reference to punishment by the prosecutor.")

People v. Wells (1893) 100 Cal. 459 (an oldie but goody; reversing even though the objections to the content laden improper questions were sustained); Donnelly v. DeChristoforo (1974) 416 U.S. 637, 644 ("some *occurrences* at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect".)

Other helpful cases are People v. Naverrette (2010) 181 Cal.App.4th 828 (police officer's blurring out prejudicial statement not cured by cautionary instruction); People v. Gomez (1957) 152 Cal.App.2d 139 (trial court's striking of evidence of the defendant's juvenile prior conviction and instruction that the jury disregard it did not escape reversible error). *See also* Berger v. U.S. (1935) 295 U.S. 78, 85, "It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken." *See* U.S. v. Sanchez, 659 F.3d 1252 (9th Cir. 2011) (finding the "curative" no cure in this plain error case of prosecution misconduct where the prosecutor argued that if the jury acquitted defendant based on his duress defense, the verdict would in effect send a message to other drug couriers to use that defense themselves.)

Also, there is **no default** for not seeking a curative instruction **if** the court overrules the objection to the misconduct. People v. Johnson (2015) 61 Cal.4th 734, 781 fn. 15 ("the requirement that a defendant also seek a curative instruction to alleviate the effect of improper argument applies only if the court sustains the defense objection as to its impropriety.")

As Judge Jerome Frank wrote, some comments are of "such a character that no one can say that the judge's warnings effectively removed their poisonous consequences. Indeed, as experienced trial lawyers have often observed, merely to raise an objection to such testimony- and more, to have the judge tell the jury to ignore it- often serves but to rub it in." (U.S. v. Grayson (2d Cir. 1948) 166 F.2d 863, 871 (concurring in reversal); *see* U.S. v. Davenport (9th Cir.1985) 753 F.2d 1460, 1464 ("A limiting instruction would be ineffective in preventing an unjustified innuendo from coming to the attention of the jury."))

7. Forfeiture 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.)

See also U.S. v. Weatherspoon, 410 F.3d 1142, 1148 (9th Cir. 2005) ("it is surely worth noting that the selfsame prosecutor has engaged in exactly the same kind of vouching conduct in two instances that has led other panels of this court to upset convictions obtained by that prosecutor.")

V. ARGUING PREJUDICE 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.)

Nevertheless, the words of a prosecutor have impact and words of misconduct are often prejudicial. Because of this, prosecutors are held to a high standard.

There is good reason for such a high standard. A "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." United States v. Young, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (citing Berger v. United States, 295 U.S. 78, 88-89, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)).

U.S. v. Reyes, 577 F.3d 1069, 1077 (9th Cir. 2009) (thus, "it is improper for the government to present to the jury statements or inferences it knows to be false or has very strong reason to doubt." United States v. Blueford, 312 F.3d 962, 968 (9th Cir. 2002) (citing United States v. Kojayan, 8 F.3d 1315, 1318-19 (9th Cir. 1993)).) "It is the duty of counsel to state the facts fairly." (People v. Nelson (1964) 224 Cal.App.2d 238, 252.)

A. AEDPA (Anti-terrorism and Effective Death Penalty Act of 1996): 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.*) See "Supreme Court's Views as to What Courtroom Statements Made by Prosecuting Attorney During Criminal Trial Violate Due Process or Constitute Denial of Fair Trial," by Thomas J. Oliver, 40 L. Ed. 2d 886 (2008).

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.) And "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (People v. Hill, *supra*, at p. 844.)

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 the more difficult one to overcome on this issue¹⁵ and most frequently used, the first thrust at prejudice is that a cumulative due process fair trial was denied. The Chapman standard of harmlessness beyond a reasonable doubt should be the default prejudice argument. See excellent discussion of the cumulative prejudice 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.) See also People v. Herring (1993) 20 Cal.App.4th 1066, 1075 ["these statements by themselves and absent timely and specific objection would not be cause for reversal since a timely admonition likely would have cured the harm," but "we must weigh the cumulative effect of the improper statements that pervaded the prosecutor's closing argument"].)

In Taylor v. Kentucky, 436 U.S. 478 (1978) the Supreme Court found that several errors, some involving prosecution misconduct and none of which individually rose to constitutional dimensions, could have a cumulative effect of denying a defendant a fair trial. Taylor involved a direct appeal from a state court conviction of robbery which had been affirmed by the Kentucky Court of Appeals. The Supreme Court reversed based on the following: 1) the trial judge rejected the defendant's presumption of innocence instruction; 2) the prosecutor was allowed to read the indictment to the jury in the absence

¹⁵ 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.) But see the "reasonable chance" version of this discussed elsewhere in this paper.

of an instruction to the jury that the indictment did not constitute evidence; 3) *the prosecutor improperly made comments linking the defendant to every defendant previously sentenced to prison*; and 4) the instructions given by the judge were "skeletal, placing little emphasis on the [state's burden] to prove the case beyond a reasonable doubt and none at all on the jury's duty to judge [the defendant] only on the basis of the testimony heard at trial." The Court found that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence."

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; *see also* Berger v. U.S., 295 U.S. 78, 85 (1935): "It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken".

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.

See also People v. Wagner (1975) 13 Cal.3d 612, 21 ["neither the admonition nor the form instruction were sufficient to cure the prejudicial effect of the prosecutor's repeated insinuations regarding defendant's past conduct"].)

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 for 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.”)

Of course, showing that the prosecutor’s action was calculated to draw out prejudicial testimony, is very helpful to convincing the court the conduct was purposefully down to harm the defendant’s trial rights. See People v. Ozuna (1963) 213 Cal.App.2d 338, 341 (prosecutor's question to draw out the inadmissible testimony about the defendant’s prior conviction, that was not asked in the first trial, was calculated to win the second trial and held prejudicial.)

G. Dealing with State Error (Watson).¹⁶ 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.)

What does this mean? If there is a *reasonable chance* of a more favorable result absent the repeated incidents of improper conduct, relief is warranted. The following cases cite for the reasonable chance Watson doctrine. In College Hospital Inc. v. Superior Court (1994) 8 Cal. 4th 704, 715:

For example, trial error is usually deemed harmless in California unless there is a "reasonabl[e] probab[ility]" that it affected the verdict. (People v. Watson (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) We have made clear that a "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. (Id., at p. 837; cf. Strickland v. Washington (1984) 466 U.S. 668, 693-694, 697, 698 [80 L.Ed.2d 674, 697-700, 104 S.Ct. 2052] ["reasonable probability" does not mean "more likely than not," but merely "probability sufficient to undermine confidence in the outcome"].)

Accord: People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888, 918; People v. Blakeley (2000) 23 Cal.4th 82, 99; People v. Soojian (2010) 190 Cal.App.4th 491, 519; People v. Eid (2010) 187 Cal.App.4th 859, 882; People v. Racy (2007) 148 Cal.App.4th 1327, 1335; People v. Elize (1999) 71 Cal. App.4th 605, 616.

¹⁶ 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.

Argue the results of these prosecutor's statements, gestures or objections are impactful (there's a reasonable chance of a different outcome) 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 for 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.

VI. ISSUES IN NEED OF FURTHER INVESTIGATION.

The following issues usually require investigation and some luck to find and litigate. First and foremost is the failure of the prosecution to provide exculpatory/impeachment evidence. Government withholding impeachment evidence of a government star witness occurs in the most watched cases,¹⁷ but it is a pervasive problem not restricted to high profile cases. California recently passed Penal Code 1424.5 giving trial courts mandates to deal with prosecutor's withholding evidence. See Appendix with the entire statute at the end of this paper.

In Brady v. Maryland (1963) 373 U.S. 83, 87, the Supreme Court quoted the inscription on the wall of the Department of Justice, "The United States wins its point whenever justice is done its citizens in the courts." In the adjoining footnote 2, it cited the words of a former Solicitor General, who stated that his job was "not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice." Unfortunately, these high-minded aspirations are often just that and prosecutors lose sight, in the heat of preparing cases, of their legal obligations. "There is an epidemic of Brady violations abroad in the land. Only judges can put a stop to it." U.S. v. Olsen, 737 F.3d 625 (9th Cir. 2013) (dissent from denial of en banc hearing in panel decision at 704 F.3d 1102.)

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

¹⁷ In moving for dismissal in the Sen. Ted Stevens case, the Dept. of Justice said it 'recently discovered' that prosecutors withheld from the defense notes about an interview last April with the state's star witness, Bill Allen, that contradicted his subsequent testimony." Wall Street Journal, April 2, 2009, "The Ted Stevens Scandal."

the evidence is material either to guilt or punishment, irrespective of the 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.)¹⁸

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].)

NOTE: Some prosecutorial offices have "secret" lists of bad cops, *e.g.*, San Diego: "'Brady index' identifies untrustworthy witnesses for prosecutors, but not the public." San Diego U-T, July 28, 2014. Every discovery motion should have a request for information about the existence of such a list and for discovery of whether the police involved in your case are on it.

1. Suppressing Exculpatory Evidence. Smith v. Cain, 565 U.S. 73 (2012) (Smith was convicted of five murders on the strength of testimony of a witness who identified Smith as the first gunman to come through the door during a robbery. However, the witness had earlier told a detective that he could not identify the perpetrators. The investigative notes recounting the conversation were not disclosed in Smith's trial.

¹⁸ *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."

Reversed); Wearry v. Cain, 577 U.S. ___, 194 L.Ed.2d 78 (2016), summarily reversing a state's postconviction denial of claim where evidence withheld undermined the snitch, but state court evaluated it piecemeal instead of cumulatively—even though “the undisclosed information may not have affected the jury’s verdict”! [fn. 6]. U.S. v. Jernigan (9th Cir. *en banc* 2007) 492 F.3d 1050 (evidence of an additional bank robber matching Jernigan’s description suppressed; suppression of evidence of an alternate suspect is a Brady violation); In re Bacigalupo (2012) 55 Cal.4th 312 (defense claimed he killed because the Columbian Mafia threatened to kill him and his family if he didn't. The prosecution had evidence supporting the claim, didn't turn it over, and the prosecutor argued to the penalty jury there was no evidence to support the duress claim; penalty reversed); 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.)

See In re Mark Collin Sodersten (2007) 146 Cal.App.4th 1163, 1219, a case where the prosecution failed to turn over impeaching tape recordings. In language which could be apt for any Brady error, the court reversed:

We do not know whether petitioner killed Julie Wilson. Under our judicial system, it is not we, but the jury, who must be convinced of guilt. Where the system works as it is meant to, we defer to the jury's judgment. Thus, in affirming petitioner's convictions on appeal and denying his initial petition for writ of habeas corpus, we presupposed that all material information was disclosed to the parties and before the trial court and, subject to the rules of evidence and criminal procedure and informed tactical decisions of counsel, before the trier of fact. As we shall explain, however, petitioner has since demonstrated that, in his case, the system failed in a way that has now completely undermined our confidence in the verdict, making such deference no longer proper or appropriate. We defer to the jury's judgment when that judgment is obtained fairly under the rules of our criminal justice system. We do not know what the jury would have done, had the undisclosed information been presented to it. What we do know is that, because the information was not disclosed to the defense, petitioner did not receive a fair trial.

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); Russo v. City of Bridgeport, 479 F.3d 196, 208 (2d Cir. 2007) (in a

civil rights case, held: a defendant has a right to be free from “sustained detention stemming directly from the law enforcement officials' refusal to investigate available exculpatory evidence”); 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.)

Civil cases based on Brady violations are instructive. In White v. McKinley, 605 F.3d 525 (8th Cir. 2010), the defendant (now plaintiff) was prosecuted, convicted, re-prosecuted, and, after spending five years in custody, eventually acquitted of the alleged molestation of his adopted daughter. *See State v. White*, 81 S.W.3d 561, 571 (Mo. Ct. App. 2002) (reversing his conviction for Brady violations). He won his freedom after it was revealed that the investigating officer violated his due process rights by withholding exculpatory evidence (failing to preserve the daughter's diary as evidence and also failing to disclose his romantic involvement with the defendant's ex-wife while the investigation was on-going). Mr. White won 14 million in compensatory and 1 million in punitive damages which were upheld on appeal.

In Tatum v. Moody, 768 F.3d 806, 819 (9th Cir. 2014), cert. denied 191 L.Ed.2d 978 (2015), the police officers knew that a series of distinctive demand-note robberies continued after they arrested Michael Walker. They also knew another man named Smith had confessed to some of the demand note robberies. *Id.* at 809. Evidence showed that the robber misspelled the same word in the same way on all the demand notes. Not only did the cops not disclose that information to the defense (or the prosecutor), they falsely asserted in reports that the demand-note robbery crimes ceased with Walker's arrest. (*Id.*) After Walker spent twenty-seven months in pretrial detention, defense counsel learned the above facts which led to the dismissal of the criminal case against Walker. He was then found factually innocent (Smith's fingerprints were found at some of the robberies attributed to Walker). At the 1983 civil suit against the cops, a federal jury found them liable for failure to disclose the exculpatory evidence. They awarded Walker \$106,000 and his attorneys were awarded over \$348,000 in fees plus costs of suit. The Ninth Circuit affirmed noting a “police officer's continuing obligation to disclose highly exculpatory evidence to the prosecutors to whom they report is widely recognized in the circuits.” (*Id.* at 819.)

To the same effect is Garcia v. City of Riverside (9th Cir. 2016) 811 F.3d 1220. There, in a civil rights action under 42 U.S.C. § 1983, Garcia was detained based on inaccurate use of a warrant involving a person who was obviously not Garcia. Held, while the police do not have a duty to investigate every unsupported assertion of

innocence of detained individuals, when a detainee claims misidentification and there is clear physical inconsistency between a warrant subject and a booked individual, officers should explore readily accessible identity checks to insure they are not holding the incorrect person.

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); Shelton v. Marshall (9th Cir. 2015) 796 F.3d 1075 (suppression of secret deal government made with its key witness to insure he did not undergo a psychiatric evaluation before testifying against defendant held a reversible Brady violation.)

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.)

e. Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002) (the State's key witness gave perjured testimony, the prosecution failed to disclose impeachment evidence on the snitch, and that the prosecution violated Doyle v. Ohio, 426 U.S. 610 (1976) by

improperly referring to petitioner's post-arrest silence. Conviction reversed); accord Hurd v. Terhune, 619 F.3d 1080, 1091 (9th Cir. 2010).

f. Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002) (Washington capital case, the Ninth Circuit affirmed the district court's grant of relief on petitioner's claim that the prosecution violated Brady by failing to disclose evidence undermining the testimony of its jailhouse snitch.)

g. Maxwell v. Roe (9th Cir. 2010) 628 F.3d 486 (Sydney Storch, "The Neophyte" snitch gave false testimony and lots of it; the Brady violations included: a) he denied deals--even the one he secretly negotiated with the DA himself! b) prosecution did not disclose his informant status in prior cases). Similarly, see Sivak v. Hardison (9th Cir. 2011) 658 F.3d 898.

h. Amado v. Gonzales (9th Cir. 2013) 758 F.3d 1119 (California prosecutor failed to turn over evidence of its key witness's prior robbery felony, being on probation for that felony, and that he was a member of a rival gang of the defendant's. Case is notable as a reversal under AEDPA and because the district court sat on a magistrate recommendation for relief for 8.5 years before he denied relief and a certificate of appealability – only to be reversed for not recognizing prejudicial Brady error.)

i. Evidence of Coaching. Evidence of coaching a witness with "critical details about the case" was Brady material and was not turned over leading to habeas relief. Lewis v. Conn. Comm'r of Corr., 790 F.3d 109, 124 (2d Cir. 2015)

j. Penal Code section 1111.5. So many cases have involved misconduct and Brady errors with snitches that on August 1, 2011, Governor Jerry Brown signed legislation (SB 687 [Leno]) to prohibit uncorroborated testimony by jailhouse informants to be sufficient evidence to convict.

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].) As the U.S. Supreme Court has said: prosecutors "are ethically bound to know what Brady entails and to perform legal research when they are uncertain." (Connick v. Thompson (2011) 131 S. Ct. 1350.)

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. 'Disclosure must be made "at a time when [it] would be of value to the accused.' United States v. Davenport, 753 F.2d 1460, 1462 (9th Cir. 1985)." Gantt v. Roe, 389 F.3d 908, 912 (9th Cir. 2004). *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 (permitting bringing a non-statutory motion to dismiss).¹⁹

NOTE: Evidence actually presented at trial is *not* considered suppressed for Brady purposes, even if that evidence had not been previously disclosed during discovery. "[T]he applicable test [then] is whether defense counsel was 'prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case.'" (People v. Mora & Rangel (2018) 5 Cal. 5th 442, 467.)

6. Turnover Must Not Be a Buried Treasure Hunt. The defense of the prosecution to Brady requests is often: "we provided access to the evidence room which contains several hundred boxes of material." But when the prosecution team knows, or reasonable should know of specific Brady materials, it cannot rely on such gamesmanship to fulfill its obligations. *See* U.S. v. Bortnovsky, 820 F.2d 572, 575 (2d Cir. 1987) ("The Government did not fulfill its obligation merely by providing mountains of documents to defense counsel who were left unguided as to which documents would be proven falsified

¹⁹ In Stanton, the DA failed to provide Brady information. At the PC 995 hearing, a non-statutory motion to dismiss was the manner in which the issue was litigated (given that the suppression was not of record at the prelim). On appeal, it was upheld and that it would deprive the defendant of due process not to allow the non-statutory motion to dismiss. "At the hearing on the nonstatutory motion to dismiss, Stanton was properly granted the opportunity to make an evidentiary showing she had been deprived of a substantial right at the preliminary hearing. " "However, where, as here, the deprivation of a substantial right is not shown in the transcript of the preliminary hearing, the nonstatutory motion to dismiss is the proper device to raise the issue."

or which of some fifteen burglaries would be demonstrated to be staged.")

In Milke v. Ryan (9th Cir. 2013) 711 F.3d 998, an Arizona death penalty case was reversed for prosecution failure to turn over numerous impeaching records of the key prosecution witness, the officer who took the “confession” while alone with the defendant; this was the only evidence against her. The records showed numerous confirmed incidents of lying under oath and court orders suppressing evidence. The court noted that it would have been impossible for trial counsel to accumulate these records prior to trial as it took many months and nearly 7000 hours of time to find them post-conviction.

7. Before Trial,²⁰ The Issue for Turn-over is Not Materiality, but Rather if the Evidence is Exculpatory. The showing that defendants must make to establish a violation of the prosecution's duty to disclose exculpatory evidence differs from the *showing necessary merely to receive the evidence*. For example, Penal Code section 1054.1, subdivision (e), requires the prosecution to disclose “[a]ny exculpatory evidence,” *not* just material exculpatory evidence. To prevail on a claim the prosecution violated this duty, defendants challenging a conviction would have to show materiality, but they do not have to make that showing just to be entitled to receive the evidence before trial.” (Barnett v. Superior Court (2010) 50 Cal.4th 890, 901; restated in People v. Cordova (2015) 62 Cal.4th 104, 124.)

Accord U.S. v. Price (9th Cir. 2009) 566 F.3d 900, 913 n. 14, citing U.S. v. Acosta, 357 F.Supp.2d 1228, 1239-40 (D. Nev. 2004); U.S. v. Sudikoff, 36 F.Supp.2d 1196 (C.D. Cal. 1999) (discovery turnover based on exculpatory nature without regard to materiality.) As has been stated:

A trial prosecutor’s speculative prediction about the likely materiality of favorable evidence, however, should not limit the disclosure of such evidence, because it is just too difficult to analyze before trial whether particular evidence ultimately will prove to be “material” after trial. Thus, “there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge.” United States v. Agurs, 427 U.S. 97, 108 (1976). As this court has noted, some trial courts therefore have concluded that the retrospective definition of materiality is appropriate only in the context of appellate review, and that trial prosecutors must disclose favorable information without attempting to predict whether its disclosure might affect the outcome of the trial. See

²⁰ See People v. Gutierrez (2013) 214 Cal.App.4th 343 (Brady applies to preliminary hearings.)

Price, 566 F.3d at 913 n.14 (noting favorably “the thoughtful analysis set forth by two district courts in this circuit” on the matter and citing United States v. Acosta, 357 F.Supp.2d 1228, 1239–40 (D. Nev. 2005) (“[T]he ‘materiality’ standard usually associated with Brady for pretrial discovery purposes . . . should not be applied to pretrial discovery of exculpatory materials.”), and United States v. Sudikoff, 36 F. Supp. 2d 1196 (C.D. Cal. 1990) (The standard of whether evidence would have changed the outcome “is only appropriate, and thus applicable, in the context of appellate review. . . . [I]t obviously cannot be applied by a trial court facing a pretrial discovery request.”)). See also United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) (“The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed — with the benefit of hindsight — as affecting the outcome of the trial.”)

United States v. Olsen (9th Cir. 2013) 704 F.3d 1172, 1183 fn. 3.)

See also Wearry v. Cain, 577 U.S. ___, 136 S.Ct. 1002; 194 L.Ed.2d 78 (2016) where the Court noted that Wearry's conviction could be reversed "even if, as the dissent suggests, the undisclosed evidence might not have affected the jury's verdict." The majority concluded that the possibility that the undisclosed evidence may have led jurors to doubt the credibility of two government witnesses required a new trial because: "Even if the jury-armed with all of the new evidence-could have voted to convict Wearry, we have no confidence that it would have done so." This case undermines the materiality (affect the verdict) standard even on appeal. It surely undermines it at the trial level.

8. The Prosecutor Does Not Get to Say, “Oh, That’s Not Credible Information under Brady.” It is not a prosecutor’s prerogative to evaluate the credibility of a piece of evidence to determine whether it must be disclosed for to allow that would be to “appoint the fox as henhouse guard.” (DiSimone v. Philips, 461 F.3d 181, 195 (2d Cir. 2006).

Aguilar v. Woodford, 725 F.3d 970 (9th Cir. 2013) (history of dog scent misidentifications is Brady material; case reversed.)

U.S. v. Sedaghaty, 728 F.3d 885 (9th Cir. 2013) (not turning over 12 of 20 interviews with key witness warrants reversal.)

Comstock v. Humphries, 786 F.3d 701 (9th Cir. 2015) (failure to turn over theft victim’s inconsistent statement to police that he was not convinced he was actually a victim of a theft was Brady error.)

9. 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.) *See also* ABA Model Code of Conduct, 3.8 (revised February 2008 to mandate even late turn over of discovery and duty to act where innocent defendant is involved.) **NOTE: New Rule of Professional Conduct 5-110** which largely repeats ABA 3.8's ethical requirement that exculpatory evidence be turned over prior to trial without an assessment of materiality (that being an appeal standard).

10. 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). In People v. Harrison (2017) 16 Cal. App. 5th 704, the prosecution committed Brady error by failing to provide the defense with a video showing that defendant invoked his Miranda rights in a case where the detective testified that he waived his rights and made admissions. *Cf.*, Magallan v. Superior Court (People) (2011) 192 Cal.App.4th 1444 (defense has a right to pre-preliminary discovery to prove a Fourth Amendment violation.)

11. Brady Requires Prosecutor to Inspect Officer's File for Pitchess Material. Under its duty to learn of favorable information, the prosecutor has to duty to review the officer's file for it upon the filing of a Pitchess v. Superior Court (1974) 11 Cal.3d 531, motion. People v. Superior Court (Johnson) (2015) 61 Cal.4th 696, discusses the procedure for disclosure to the defense of potential Brady material in an officer's personnel file: DA tells the defense there could be Brady in the officer's file, and the defense makes a Pitchess motion. But the DA can take the concern about confidentiality to the court and satisfy the Brady duty. (61 Cal.4th 716-717.) It seems very questionable whether such an in camera court review "satisfies" Brady. *See* Browning v. Baker (9th Cir. 2017) 875 F.3d 444, 460 [reversal for failure to turn over exculpatory/impeaching evidence: "the prosecutor's personal knowledge does not define the limits of constitutional liability. Brady imposes a duty on prosecutors to learn of material exculpatory and impeachment evidence in the possession of state agents, such as police

officers.”)

12. 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"]; See 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.”) Accord Carriger v. Stewart, 132 F.3d 463, 481 (9th Cir. 1997); U.S. v. Aguilar Noriega, 831 F. Supp. 2d 1180, 1203 (C.D. Cal. 2011) .

13. Brady Error is Assessed Cumulatively and Not Item by Item. (Kyles v. Whitley, *supra*, 514 U.S. 436; In re Miranda, 43 Cal. 4th 541, 580 (2008).

14. Brady\Youngblood Interplay. In People v. Alvarez, 229 Cal.App.4th 761 (2014), the police failed to preserve potentially exculpatory videotape evidence- the department's own video surveillance footage depicting purported crime scene. The state's "duty to retain . . . potentially exculpatory evidence is somewhat different" than its duty under Brady to disclose existing exculpatory evidence. California v. Trombetta, 467 U.S. 479 (1984); Arizona v. Youngblood, 488 U.S. 51 (1988). When destroyed evidence is merely "potentially useful" to the defense, a due process violation arises if the state destroys the evidence "in bad faith." Youngblood, 488 U.S. at 58. A state's negligence is not sufficient to meet the "bad faith" standard." Id. In this case, the police and the DA had been requested to preserve the video tapes, but nothing was done and they were destroyed. Case dismissed as to two defendants. Accord U.S. v. Zaragoza- Moreira, 780 F.3d 971 (9th Cir. 2015) (failure to preserve border entry tapes that could have corroborated defense of duress results and was “potentially useful evidence” – a fact readily apparent to the agent-- in dismissal on appeal.) See also U.S. v. Leal-Del Carmen (9th Cir. 2012) 697 F.3d 964 (deporting a witness violates the constitution where the government acts in bad faith resulting in prejudice; case reversed for trial court to rule on dismissal.)

15. Sanction May Include Dismissal. The federal legal standard for the dismissal determination is stated by U.S. v. Chapman, 524 F.3d 1073, 1084 (9th Cir. 2008). The supervisory authority of the court to dismiss does not require a finding of "willful

misconduct" in the sense of intentionality. Rather, a finding of a "reckless disregard for the prosecution's constitutional obligations" satisfies that standard for dismissal, that is, a "finding of 'flagrant' prosecutorial misconduct even if the documents themselves were not intentionally withheld from the defense." (*Id.*, at 1085.) In California, dismissal prior to trial for a Brady violation is limited to federal due process violations. (People v. Superior Court (Meraz) 163 Cal.App.4th 28 (2008).

In People v. Uribe (2011) 199 Cal.App.4th 836, the trial court found outrageous misconduct in the prosecutor's suppression of a SART exam in a molest case (Brady material) and then lying about it in court. On appeal, the court reversed the sanction of dismissal for lack of a showing of prejudice to the defendant's fair trial rights.

In People v. Bowles (2011)198 Cal.App.4th 318, the Court of Appeal reversed a trial judge for granting a new trial as a discovery sanction based on newly discovered evidence; the court said that the trial court did not review the matter under the appropriate standard of whether the newly discovered evidence would make a different result probable on retrial. Because this standard is very similar to the standard for a Brady violation, the court could not conclude that the trial court would have granted a new trial motion.

More on Sanctions. "The court must impose appropriate sanctions in such a case [of intentional suppression of material evidence] in order to uphold defendant's right to a fair trial and to deter prosecution attempts to defy or circumvent judicial authority" (People v. Zamora (1980) 28 Cal.3d 88, 96). As the Zamora court noted, the severity of the sanction depends upon the circumstances of each case (*Id.* at 100; see also Mendibles v. Superior Court (1984) 162 Cal.App.3d 1191, 1198; U.S. v. Sivilla (9th Cir. 2013) (non-bad faith destruction of relevant evidence warrants a remedial jury instruction). See also People v. Wimberly (1992) 5 Cal.App.4th 773, 791-792 (trial court instructed jury that improper destruction of evidence could support an inference adverse to the prosecution, which may be sufficient to raise a reasonable doubt as to the defendant's guilt); People v. Sassounian (1986) 182 Cal.App.3d 361, 395 (proper to instruct jury it could presume destroyed evidence was unfavorable to the People.) See no. 12 *supra* for Kyles based instructions.

16. Money Sanction: 42 U.S.C. 1983 Suits for Brady Violations. In White v. McKinley, 605 F.3d 525 (8th Cir. 2010), the defendant was prosecuted, convicted, re-prosecuted following a reversal. After spending five years in custody, White was eventually acquitted of the charged molestation of his adopted daughter. See State v. White, 81 S.W.3d 561, 571 (Mo. Ct. App. 2002) (reversing the conviction for Brady violations). White won his freedom after it was belatedly revealed the investigating officer violated his due process rights by withholding exculpatory evidence (failing to

preserve the daughter's diary which stated the defendant was a good father, but stating she hated her mother; also failing to disclose the investigating officer's own romantic involvement with the defendant's ex-wife while the investigation was ongoing). White filed a 42 U.S.C. 1983 civil suit against the cop and his wife. He won \$14 million in compensatory and \$1 million in punitive damages. These awards were upheld on appeal. The cop was held personally liable for his bad faith in not preserving the diary and not honestly disclosing his relationship with White's wife. The officer's cert. petition. McKinley v. White, 562 U.S. 1091 (2010). Another police Brady violation case is Russo v. City of Bridgeport, 479 F.3d 196, 208 (2d Cir. 2007). This 1983 civil rights case stemmed from the defendant's robbery arrest. The robbery was videotaped and the cops saw the tape. Russo, the arrestee, continually protested that the tape would show his distinctive arm tattoos which would differentiate him from the alleged robber. Neither Russo nor his defense counsel were given the tape to view. During discovery, the tape went "missing." It was eventually found in the desk of one of the arresting cops. It clearly showed the actual robber was free of arm tattoos. The prosecutor dismissed the case soon after viewing the tape, but by this time Russo had served 217 days. When Russo sued, the district court dismissed, but the Court of Appeal reversed and held that a person has a right to be free from "*sustained detention stemming directly from the law enforcement officials' refusal to investigate available exculpatory evidence.*" (Id. at 208; italics added.)

In Tatum v. Moody, 768 F.3d 806, 819 (9th Cir. 2014), cert. denied, 191 L.Ed.2d 978 (2015), police officers knew that a series of distinctive demand-note robberies continued after they arrested Michael Walker for one of them. They also knew another man named Smith had confessed to some of the demand-note robberies. (Id. at 809.) Evidence also showed that the robber misspelled the same word in the same way on the demand notes on the robberies. Not only did the cops not disclose this information to the defense (or the prosecutor), they falsely asserted in reports that the demand-note robberies ceased with Walker's arrest. (Id.) After Walker spent twenty-seven months in jail, defense counsel learned the above facts which led to the dismissal of the criminal case. Walker was then found factually innocent.. At Walker's 1983 civil suit against the cops, a federal jury found them liable for failure to disclose the exculpatory evidence. They awarded Walker \$106,000. His attorneys were awarded over \$348,000 in fees plus costs of suit. The officers appealed to the Ninth Circuit and lost. It held that the officers' conduct violated Walker's due process rights. The Court said relief is warranted when there are "detentions of (1) unusual length, (2) caused by the investigating *officers' failure to disclose highly significant exculpatory evidence to prosecutors*, and (3) due to conduct that is culpable in that the officers understood the risks to the plaintiff's rights from withholding the information or were completely indifferent to those risks." (Id. at 819-20.) A "police officer's continuing obligation to disclose highly exculpatory evidence to the prosecutors to whom they report is widely recognized in the circuits." (Id. at 819.)

17. 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.) Also, given that a Brady error *on appeal* requires a showing of materiality, that finding goes a long way to prove the error made a difference in the outcome.

B. Other Areas to Investigate for 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 (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). More recently, see U.S. v. Juan, 704 F.3d 1137, 1142 (9th Cir. 2013) (prosecutorial intimidation of its own witnesses can be misconduct too); Yates v. Ortiz (9th Cir. 2012) 704 F.3d 1026 (trial court refused to allow a defendant in a assault case to have a witness, his wife and the alleged assault victim, state she felt threatened by a message from the prosecutor saying if she didn't tell the truth at the preliminary hearing she could be sent to jail and should think about her baby growing up without parents. This preclusion violated the Confrontation Clause of the Sixth Amendment.) See section 6 below for more examples.

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].²¹

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.)

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]; Breceda v. Superior Court (2013) 215 Cal.App.4th 934 [duty applies even where deputies did not know of exculpatory documents but the office did].) 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).²² In Cummiskey v.

²¹ 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.)

²² In Johnson v. Superior Court (1975) 15 Cal.3d 248, the court found an obligation
(continued...)

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 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\Retaliatory Prosecution. Were the added charges filed in retaliation 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).

In People v. Puentes (2010) 190 Cal.App.4th 1480, the court found vindictiveness where a jury had hung on a stat rape allegation but convicted of a misdemeanor. On appeal, the misdemeanor was reversed so the DA refiled the charge as a felony stat rape. Held: vindictive prosecution; accord In re David B. (1977) 68 Cal.App.3d 931, 935; accord Johnson v. Superior Court (2016) 4 Cal.App.5th 937 (prosecution failed to carry its burden to overcome presumption of prejudice for added charges following successful appeal).

²²(...continued)

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].) In McGill v. Superior Court (2011) 195 Cal.App.4th 1454, the court granted relief for failure of the prosecutor and the grand jury to call witnesses.

Remember, in this area (and others) it is well to remind the court and the prosecutor that the latter must have a good faith belief he/she can prove guilt beyond a reasonable doubt. (See People v. Robinson (1995) 31 Cal.App.4th 494, 500 n. 5 ["...according to the *Uniform Crime Charging Standards* (1974 California District Attorneys Association) "The prosecutor, before deciding whether to charge should insist on as complete an investigation as is reasonably feasible." (*Id.* at p. 14.) Further, "The prosecutor, based on a complete investigation and on a thorough evaluation of all pertinent data readily available to him, should be satisfied that the evidence shows the accused is guilty of the crime to be charged." (*Ibid.*))"

5. Extortionate Bargaining, Breaches, Other Coercive Tactics.

Generally, a prosecutor is empowered with the discretion either to prosecute or to decline to prosecute an individual when there is probable cause to believe he has committed a crime. And the prosecutor can bring additional charges for which defendant was plainly subject to prosecution if the defendant refuses a plea bargain on lesser offenses. (See, e.g., Bordenkircher v. Hayes (1978) 434 U.S. 357, 364.)

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).

c. Coached or Scripted Testimony. "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.)

The law permits cross-examination regarding how a witness prepared for his or her testimony. *See In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 668 (3d Cir. 2003) (“Nonetheless, we believe Wood may be asked whether his anticipated testimony was practiced or rehearsed. But this inquiry should be circumscribed. As with all discovery matters, we leave much to the sound discretion of the District Court.”); *see also Geders v. United States*, 425 U.S. 80, 89-90, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976) (“A prosecutor may cross-examine a defendant as to the extent of any ‘coaching’ during a recess, subject, of course, to the control of the court.”) However, prosecutors cannot just level coaching allegations out of thin air. The Supreme Court has stated that “such locutions as ‘coached testimony’ are to be avoided when there is no evidence of ‘coaching.’” (People v. Thomas (1992) 2 Cal.4th 489, 537.) In People v. Bain (1971) 5 Cal.3d 839, the prosecutor implied defense counsel had coached the defendant to lie. Held to be misconduct. Similarly, in People v. Herring (1993) 20 Cal.App.4th 1066, the prosecutor implied defense counsel had suborned perjury by instructing the defendant to invent a consent defense to a rape charge. Held: misconduct.

Also, evidence of coaching a witness can be Brady material and lead habeas relief. Lewis v. Conn. Comm'r of Corr., 790 F.3d 109, 124 (2d Cir., 2015)

d. 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. *See also U.S. v. Johnson*, 187 F.3d 1129, 1135 (9th Cir. 1999)[“We see no way to view the introduction of McDonald's [a prior bad act victim] statement other than as an attempt by the prosecutor to influence the court to give a higher sentence than the prosecutor's recommendation”]; 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.” However, if the bargain offer is made but the client does not detrimentally rely on it in some way, the DA can withdraw it. (People v. Trejo (2011) 199 Cal. App. 4th 646.)

In U.S. v. Mark (9th Cir. 2015) 795 F.3d 1102, the government agreed to an immunity from prosecution deal for Mark’s cooperation. Later, it indicted him. He asked for dismissal claiming there was no basis for indictment and declaring a breach of the immunity agreement. Denied. On appeal, the court found the reasons for the declaration of a breach were flimsy and controverted by the defendant. (There was a phone call where Mark was supposed to have turned uncooperative, but phone records had no evidence of such a call and an FBI agent didn’t recall it. The court found “dumbfounding” the lack of any record of this call or notes concerning it.) The government bore the burden to prove breach. It failed. Reversed and dismissed.

Note that the breach can be implicit as when the prosecutor agrees to a low term sentence but then uses inflammatory language to characterize the defendant and insure that the bargain won’t be followed:

The government’s promise to recommend a particular disposition can be broken either explicitly or implicitly. See Whitney, 673 F.3d at 971. The government is under no obligation to make an agreed-upon recommendation “enthusiastically.” Johnson, 187 F.3d at 1135. However, it may not superficially abide by its promise to recommend a particular sentence while also making statements that serve no practical purpose but to advocate for a harsher one. See Whitney, 673 F.3d at 971; United States v. Mondragon, 228 F.3d 978, 981 (9th Cir. 2000); Johnson, 187 F.3d at 1135. That is, the government breaches its bargain with the defendant if it purports to make the promised recommendation while “‘winking’ at the district court” to impliedly request a different outcome. United States v. Has No Horses, 261 F.3d 744, 750 (8th Cir. 2001). An implicit breach of the plea agreement occurs if, for example, the government agrees to recommend a sentence at the low end of the applicable Guidelines range, but then makes inflammatory comments about the defendant’s past offenses that do not “provide the district judge with any new information or correct factual inaccuracies.” Whitney, 673 F.3d at 971 (quoting Mondragon, 228 F.3d at 980).

U.S. v. Morales Heredia, 768 F.3d 1220 (9th Cir. 2014).

e. 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.)

f. 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.)

g. 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 warranting sanctions. (U.S. v. Stein (2d Cir. 2008) 541 F.3d 130, affirming the dismissal of the case against 13 defendants at U.S. v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). Starting at page 356, the district court opinion 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 that are necessary to fairly reflect the gravity of the offense.”

h. Prosecution Threats to Charge Defense Investigator Creates Conflict. The defense investigator interviewed the victim who recanted in a recorded video. On learning this, the prosecutor claimed the investigator wasn't licensed and that the defense attorney's giving the investigator the name of the victim was illegal. Wrong. The DA threatened to file charges against the investigator and perhaps counsel. The defense agreed not to call the investigator who could have testified the victim wasn't recanting because she was coerced. The Court of Appeal agrees this was wrong and finds the issue created a conflict between the defendant and

counsel. But the court claims that People v. Doolin (45 Cal.4th 390) only permits reversal of a conviction for a conflict which involves counsel representing multiple defendants concurrently. That wasn't the conflict here. The court asks the Supremes to change that rule. People v. Almanza (2015) 233 Cal.App.4th 990. The petition for review was denied 4-3. (People v. Almanza, 233 Cal. App. 4th 990 (2015)).

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.”)

What about a plea bargain with a codefendant that requires him *not* to testify in the defendant's case? That is the essence of coercion and if the resulting suppressed testimony of the codefendant is material and favorable, it is federal constitutional error warranting reversal unless shown harmless beyond a reasonable doubt. (People v. Treadway (2010) 182 Cal.App.4th 562.) Similar, but less obvious suggestions by prosecutors to witnesses to not testify for the defense, have been held improper. (People v. Warren (1984) 161 Cal.App.3d 961 [prosecutor threatened a defense witness during voir dire that “if he testified he not only could but probably would be prosecuted by the district attorney's office”]; U.S. v. MacCloskey (4th Cir. 1982) 682 F.2d 468 [prosecutor called a codefendant's lawyer and told him “that he would be well-advised to remind his client that, if she testified at [the defendant's] trial, she could be reindicted if she incriminated herself during that testimony”].)

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) (over- turned *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.²³

7. Prejudicial Pre-trial and Trial Statements to the Media. The most recent example of prosecutorial misconduct in secretly using the media to post anti-defendant propaganda is U.S. v. Bowen (5th Cir. 2015) 799 F.3d 336. There, the Circuit, 2-1, affirmed the district court's grant of a new trial finding the prosecution cyberbullying and "online anonymous postings, whether the product of lone wolf commenters or an informal propaganda campaign, gave the prosecution a tool for public castigation of the defendants that it could not have used against them otherwise, and in so doing deprived them of a fair trial. The district court's steady drip of discoveries of misconduct infecting every stage of this prosecution, combined with the government's continued obfuscation and deceit." (Id. at 355.) The problem was painstakingly revealed by the district court despite the best efforts of the government to obfuscate. "Their misdeeds are compounded by the government's insouciant investigation, which leaves open only three inferences concerning this prosecutorial breakdown: the government is not serious about controlling extracurricular, employment-related online commenting by its officials; the government feared what it might uncover by a thorough and timely investigation; or the government's investigation was incompetent. Exerting professional discipline on three individual government lawyers does nothing to solve the systemic problem, and it is not a sufficient answer to the miscarriage of justice in this case." (Id. at 358.) *This case is important in that it reverses without having to find prejudice: the errors infected the integrity of the prosecution to a degree warranting a new trial irrespective of prejudice.*

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

²³ *But see* U.S. v. Batres-Santolino, 521 F.Supp. 744 (N.D. Cal. 1981), where the court determined that the DEA persuaded the defendants to create an organization and thus manufactured a crime to warrant a dismissal for outrageous government conduct. In U.S. v. Russell, 411 U.S. 423, 431-2 (1973), the Court said in *dictum* such conduct would "absolutely bar the Government from invoking judicial processes." But the Court has never ruled on the merits of such a case. (See People v. Smith (2003) 31 Cal.4th 1207, 1227; People v. Peppers (1983) 140 Cal.App.3d 677, 685-686].)

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].)

In People v. McKinzie (2012) 54 Cal.4th 1302, in a death penalty case during jury selection the defendant said about the prosecutor, “I’ll tear his head off.” The prosecutor sought to use the statement as evidence in aggravation at the penalty phase and filed a notice of intent to offer it. He also *directed the press* to his filed notice which produced a story in the paper about the defendant's threat. The judge excluded the evidence. This was misconduct: “Whether intended to influence the trial court's pending decision regarding the admissibility of defendant's statements or to put before prospective jurors potentially prejudicial and inadmissible evidence regarding defendant's character, [prosecutor] Glynn's conduct derogated from his duty to act as an impartial public fiduciary sworn to promote the even-handed administration of justice.” (Id. at 1327.) Harmless error.

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]”]; People ex rel. Clancy v. Superior Court (1985) 39 Cal.3d 740 [court disqualified attorney Clancy because of his contingent fee financial arrangement with the City to bring nuisance abatement suits -- his hourly fee doubled when he won and thus was awarded

attorney fees. In striking this arrangement, the court emphasized the need for prosecutorial “neutrality” to insure a fair outcome for the litigants (*id.* at 476), something that was compromised by this fee arrangement]; Bullen v. Superior Court (1988) 204 Cal.App.3d 22, 25 [where the court found that the prosecution had a formal relationship with the third party crime victim in representing her in writ proceedings challenging defense access to the crime victim's dwelling; the office was ordered recused from the case]; 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.”

The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. "The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name." (Corrigan, *On Prosecutorial Ethics* (1986) 13 *Hastings Const.L.Q.* 537, 538-539.) Thus the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large, and *not under the influence or control of an interested individual.* (People v. Superior Court (Greer), *supra*, 19 Cal. 3d at p. 267.) [Emphasis added.]
(People v. Eubanks (1996) 14 Cal.4th 580, 589-590.)

Under Penal Code §1424, a conflict of interest must be shown such that there is a "reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." (Eubanks, *supra*, quoting People v. Conner (1983) 34 Cal.3d 141, 148.) The conflict must be "so grave as to render it unlikely that defendant will receive fair treatment." (Eubanks, *supra*, at p. 594, quoting Conner, *supra*, 34 Cal.3d at p. 148.)

Three California Supreme Court cases found no disqualifying conflict, or at least no abuse of discretion in the trial court’s denial of disqualification, in these two situations: *a*) prosecutor writes a novel with the plot surrounding a heroine; the prosecutor's decision whether to try a rape case involving an intoxicated victim; the novel is published shortly before the prosecutor’s scheduled prosecution of a rape of an

intoxicated victim. (Haraguchi v. Superior Court (2008) 43 Cal.4th 706); **b**) no abuse of discretion to not disqualify prosecutor who, while tracking a fugitive defendant in a capital case gave case files (some confidential) to a screenwriter to make a movie based on defendant's alleged life and crimes. (Hollywood v. Superior Court (2008) 43 Cal.4th 721.) In People v. Superior Court (Humberto S.) (2008) 43 Cal.4th 737, the Court reversed the trial court's disqualification order based on the prosecutor arguing against the release of the complaining witness's therapy records, unsuccessfully filing writ relief, and asking the trial court to appoint a guardian ad litem to represent the child's interests. The Court held that the prosecution's involvement in the third party subpoena hearings was permitted by statute and did not amount to representation of third party interests.

However, in Packer v. Superior Court (2013) 219 Cal.App.4th 226, the court held that the refusal to allow an evidentiary hearing on a recusal issue was permitted because the defense did not supply required declarations to make a prima facie case. The defense noted that it was hobbled in this effort by the refusal of people to provide declarations; thus, an evidentiary hearing with subpoena power would solve the problem. Denied.

In People v. Dekraai (2016) 5 Cal. App. 5th 1110, the court upheld a trial court recusal of the entire prosecutor's office after hearing 39 witnesses over six months concerning the pattern of intentional Massiah violations in the county jail. The State's appeal of this ruling was denied as "nonsense," "reckless" and "grossly unfair." Id. at 528.

9. Breach of a Plea Bargain. (Santobello v. New York (1971) 404 U.S. 257; Buckley v. Terhune, 441 F.3d 688 (9th Cir. en banc 2006) (15 years was the bargain 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, 552 U.S. 472, 128 S.Ct. 1203 (2008), reversing based on disbelief of a prosecutor's makeweight explanation for

his challenge to a black juror; *accord* People v. Long (2010) 189 Cal. App. 4th 826 (deference to trial court findings ends when one of the DA reasons relied upon is demonstrably false.)

a. Is There a Sufficient Record on Appeal? Does the appellate record contain the *voir dire* – probably not unless requested). *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 is consistent with the duty of defense counsel to select an unbiased jury. (Hughes v. U.S., 258 F.3d 453 (6th Cir. 2001) (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 [a 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."

A prosecutor should not frustrate a defendant's effort to subpoena relevant evidence. *See* Gordon v. United States (1953) 344 U.S. 414, the Supreme Court noted: "[A]n accused is entitled to production of such [relevant] documents. ... 'The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in

convicting accused parties on the testimony of untrustworthy persons.' " (*Id.* at 419, fn. omitted, quoting Judge Cooley in People v. Davis (Mich. 1884) 52 Mich. 569, 573.)

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.*, U.S. v. Johnson [(8th Cir. 2000) 228 F.3d 220, 924-25 (suppressing expert testimony was reversed where defendants failed to request pre-trial disclosure of the expert witnesses so the government's obligation to disclose was not triggered)]. 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.

Note also that the prosecutor's failure to provide notice for discovery of other crimes evidence prior to trial can bar it from coming into evidence during trial. U.S. v. Vega, 188 F.3d 1150 (9th Cir. 1999) (dealing with FRE 404(b) evidence).

14. Misuse of Immunity Grants. In United States v. Straub, 538 F.3d 1147 (9th Cir. 2008), the Ninth Circuit held that use immunity must be offered a defense witness when relevant (*i.e.*, would impeach the prosecution witness granted immunity) and where the prosecution has offered it to its witnesses. Because such an unfair distribution of immunity distorts the fact-finding process, immunity must be given the defense witness. *See U.S. v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991) (if the prosecution intentionally causes a witness to invoke the Fifth Amendment, the law compelled a grant of use immunity); U.S. v. Lord, 711 F.2d 887 (9th Cir. 1983): Cocaine case and conviction where the prosecutor told a witness (Cook) that whether he would be prosecuted depended on what he would say. (Cook was vulnerable to prosecution given that he helped Lord deliver drugs, *i.e.*, he could have been a “target” and the prosecutor told him that while he viewed his role as “minor,” he would prosecute depending on his testimony). The prosecution's notion of fairness was that if Cook testified for the government, that was truthful testimony and he would be okay. The case was remanded for a hearing for clarification of what the prosecutor told Cook. If the prosecutor's statements to Cook pressured him to invoke the Fifth (and thus deny Lord favorable evidence) then a sanction would be in order. *See also* “The State of Federal Prosecution: The Defense Witness Immunity Doctrine: The Time Has Come to Give it Strength to

Address Prosecutorial Overreaching,” 43 Am. Crim. L. Rev. 1189 (2006).

15. Discriminatory Prosecution. What if the prosecution charges a defendant while not charging others similarly situated? Assume there is evidence the client is charged because 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.)

16. Arguing Differing Facts on the Same Case but With Separate Defendants in Separate Trials. See In re Sakarias (2005) 35 Cal.4th 140, 145 (“We agree with Sakarias that the prosecutor violated his due process rights by intentionally and without good faith justification arguing inconsistent and irreconcilable factual theories in the two trials, attributing to each petitioner in turn culpable acts that could have been committed by only one person. We also agree this violation prejudiced Sakarias, entitling him to relief. We do not decide whether the prosecutor's conduct was a due process violation as to Waidla, as we conclude any such violation was harmless in his case.”)

17. Estoppel: The Law Forbids A Prosecutor Taking One Position Before a Trial Court and Then Another On Review. Calif. Evidence Code §623, titled “Misleading Statement or Conduct,” states:

Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

There are many cases, federal and state, in which the courts as a matter of judicial integrity, enforce this rule: “It is, of course, well established that the defendant is bound by the stipulation or open admission of his counsel and cannot mislead the court and jury seeming to take a position on issues and then disputing or repudiating the same on appeal.” (People v. Pijal (1973) 33 Cal.App.3d 682, 697.) And, “[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). See also U.S. v. Stites (9th Cir. 1995) 56 F.3d 1020, 1025-1026 (“nothing in our professional ethics permits an advocate to tell a court one set of facts today and a contradictory set of facts tomorrow.”)

C. Get the Resources to Investigate Outside the Record.

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”].)

VII. 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 FRAP 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.)²⁴

C. Asking to Participate in the *In Camera* Review. Judges are not in the best 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), trial courts may admit defense

²⁴ *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.”

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).

VIII. FINAL ARGUMENT NOTES & REMEDIES:

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."

Arguing for Dismissal for Misconduct. As noted above, 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.)

Double Jeopardy. 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.”²⁵

However, People v. Bell (2015) 241 Cal.App.4th 315, reluctantly held that after a mistrial for misconduct, the defense plea of once in jeopardy *warrants a jury trial on that issue*. Penal Code sections 1041(3)-1042 state that factual issues pertaining to such a plea trigger a jury trial right. The defense entered a plea of once in jeopardy, arguing that the DA had provoked the defense into making a motion for a mistrial, thereby triggering the Oregon v. Kennedy (see *infra*) rule that jeopardy bars a retrial when the defense makes a mistrial motion because they were forced to by the prosecutor’s misconduct.

Collusive Double Jeopardy. Say the defendant is convicted in state court of being a felon in possession of a firearm. After he completes his sentence, the federal government files its own felon-in-possession charge based on the same conduct. The defendant argues double jeopardy. In U.S. v. Lucas, 841 F.3d 796, 803 (9th Cir. 2016), the Ninth Circuit recognized that this could be a jeopardy issue but only if there was collusion between the state and federal prosecutors ("Cooperation is constitutional; collusion is not. Impermissible collusion may be found when the prosecutors of one sovereign 'so thoroughly dominate[] or manipulate[]' the prosecutorial machinery of the other 'that the latter retains little or no volition in its own proceedings.'") Such collusion may occur when a second prosecution "is not pursued to vindicate the separate interests of the second sovereign, but is merely pursued as a sham on behalf of the sovereign first to prosecute." This is a difficult standard to meet given that the defense will have to get discovery to show collusion and the governments, state and federal, surely won't be volunteering it.

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

²⁵ People v. Whitaker (2013) 213 Cal.App.4th 999, 1011 (“We agree with defendants that the People improperly announced ‘ready’ before commencing jury selection, without knowing whether their key witnesses were available, instead of seeking a continuance.... However, this impropriety does not show intentional manipulation of the proceedings [to warrant double jeopardy issue], as opposed to ignorance or neglect. Further, any error was not structural, and defendants fail to show any prejudice flowing from the dismissal and refile of the charges.”)

trial after having succeeded in aborting the first on his own motion.") See U.S. v. Lopez-Avila, 678 F.3d 955 (9th Cir. 2012) discussing Kennedy's exception but holding it inapplicable where the prosecutor misrepresented a drug defendant's prior statements when trying to impeach her trial testimony which stated she had been forced to smuggle contraband. Remanded to consider dismissal (where it was dismissed). This case is notable for the following:

When a prosecutor steps over the boundaries of proper conduct and into unethical territory, the government has a duty to own up to it and to give assurances that it will not happen again. Yet, we cannot find a single hint of appreciation of the seriousness of the misconduct within the pages of the government's brief on appeal." Id. at 965.

In U.S. v. Chapman, 524 F.3d 1073, 1090 (9th Cir. 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.

Fraud on the Court. In a case involving active fraud on the court by two IRS attorneys in a tax case, the court stated that the judiciary has a duty in such cases to act and that the government cannot argue its fraud had no effect after the fact.

Courts possess the inherent power to vacate or amend a judgment obtained by fraud on the court, Toscano v. CIR, 441 F.2d 930, 933 (9th Cir. 1971),

but that power is narrowly construed, applying only to fraud that defiles the court or is perpetrated by officers of the court. When we conclude that the integrity of the judicial process has been harmed, however, and the fraud rises to the level of "an unconscionable plan or scheme which is designed to improperly influence the court in its decisions," we not only can act, we should. England, 281 F.2d at 309; Levander v. Prober, 180 F.3d 1114, 1119 (9th Cir. 1999); Intermagnetics Am., Inc. v. China Int'l Trust and Inv. Corp., 926 F.2d 912, 916-17 (9th Cir. 1991).

“Fraud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced. Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989). Furthermore, the perpetrator of the fraud should not be allowed to dispute the effectiveness of the fraud after the fact.”)

Dixon v. Comm'r, 316 F.3d 1041, 1046 (9th Cir. 2003)

IX. SPECIFIC EXAMPLES OF PROSECUTION ERROR

A. General Theme. 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. It bears repeating however: “[A] reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial. ‘To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.’ [Citations.]” (People v. Gionis (1995) 9 Cal.4th 1196, 1215.)

So, object. In making objections to prosecution arguments such as those that follow, the prosecutor may compound the problem by commenting to the jury that the defense is objecting to keep him from telling them the truth. This too is misconduct. (People v. Vance (2010) 188 Cal.App.4th 1182.)

1. 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.” See U.S. v. Reyes (9th Cir. 2009) 577 F.3d 1079 (prosecutor asserted as fact a proposition that he

knew was contradicted by evidence not presented to the jury); U.S. v. Blueford (9th Cir. 2002) 312 F.3d 962, 973 (“We conclude that the prosecutor at trial improperly asked the jury to infer that the pattern of calls in late December demonstrated that Blueford was using the calls to concoct an alibi with prospective witnesses”); People v. Woods (2006) 146 Cal.App.4th 106, 117 (“Jones's statement that “defense witnesses” “were conjured up” was either false or based upon matters not in evidence”); People v. Johnson (1981) 121 Cal.App.3d 94, 103 (“The effect of such remarks is to lead the jury to believe that the district attorney, a sworn officer of the court, has information which the defendant insists on withholding; or that they may consider matters which could not properly be introduced in evidence. (Citations).”

2. 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. People v. Hernandez (1977) 70 Cal.App.3d 271, 281 (“Avowedly for the purpose of establishing bias on the part of defendant's witness Melendrez, the prosecutor asked him: “Well, haven't you been arrested a number of times for --” Held “obviously” objectionable.

“[W]e hold that the prosecutor's **repeated misstatements regarding the likelihood of Sechrest's release** from prison by parole were he to be sentenced to life without the possibility of parole violated Sechrest's due process right to a fair trial.” Sechrest v. Ignacio, 549 F.3d 789, 808 (9th Cir. 2008).

In Dow v. Virga, 729 F.3d 1041 (9th Cir. 2013), the prosecutor argued to the jury that the defendant had asked that his scar be hidden during a line-up; thus, so the argument went, this meant he was demonstrating consciousness of guilt. In reality, it was his defense counsel who asked that all members of the line-up wear a bandage in the location where Dow had a scar. At trial, a detective erroneously testified that Dow had asked for everyone to wear a bandage. The prosecutor not only failed to correct the officer, but went on to argue the “evidence” as proof of Dow's guilt. Held: this was the

presentation of false evidence and reversible even on federal habeas AEDPA review.

3. DA Cannot Prove a Case Simply by Repeatedly Asking Questions the Witness Refuses to Answer. The prosecutor called a witness to the stand who refused to answer any questions. The asked the witness more than 100 leading questions about statements the witness had made out of court. The witness answered none of them. Conviction reversed as the defendant was denied a fair trial for lack of cross examine and despite the instruction that the questions weren't evidence (given there were no answers, there was no evidence presented, yet the prosecutor's "questions" overpowered the proceedings and created the illusion of testimony). People v. Murillo (2014) 231 Cal.App.4th 448.

4. 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. Figuirodo (1955) 130 Cal.App.2d 498, 505-506 ["references by the officer to San Quentin deprived defendant of a fair trial"].)

5. 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, 492: ("All perjury pollutes a trial, making it hard for jurors to see the truth. No lawyer, prosecutor, or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false. Where the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts ... By contrast, in this case, the prosecutor sat silently as his witness lied and sat silently as his witness evaded defense counsel's ineffectual cross-examination because the prosecutor delayed the correction until rebuttal argument, the defense could no longer explain why the lie...was important.") *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."

a. Presenting false evidence and failing to correct it is misconduct. In Napue v. Illinois, 360 U.S. 264 (1959), the basis of such a claim was set forth. Essentially, "the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the

prosecution knew or should have known that the testimony [or evidence] was actually false, and (3) that the false testimony [or evidence] was material." (U.S. v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003).)

People v. Garner (1989) 207 Cal.App.3d 935: the sole prosecution witness, Phillips, testified at the preliminary hearing that the defendant shot the victim. "At trial, however, it was stipulated in open court that Phillips told the deputy district attorney in charge of this prosecution, 'that at the preliminary hearing he did make a positive identification of the defendant, but that he was lying when he did so.'" (Id. at p. 938, fn. 1.) Phillips refused to testify because he would be vulnerable to a perjury charge. He was declared unavailable and his preliminary hearing testimony was admitted. Guilty verdict reversed: "[w]hen the People wish to go forward in reliance upon the testimony of a recanting witness, fundamental fairness would require, at a minimum, that the jury (1) be advised precisely why the witness is being allowed to refuse to testify, *i.e.*, an alleged fear of a perjury prosecution, and (2) be instructed that they should draw all reasonable and appropriate inferences therefrom concerning the witness's credibility and the guilt or innocence of the accused." (Id. at p. 941.)

b. Laundering false testimony is still false testimony. In Hayes v. Brown, 399 F.3d 972, 980-82 (9th Cir. 2005) (en banc), where a government witness testified that he was still subject to criminal charges even though the prosecutor had made a secret deal with the witness's attorney to dismiss the charges and had instructed the attorney not to notify the witness. The prosecution was deemed to have presented false evidence. (Id. at 981.) Accord Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001) (reversed for a hearing on the issue).

6. 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 Thomas v. Hubbard, 273 F.3d 1164, 1180 (9th Cir. 2001)(California murder case where relief was granted in part because of intentional prosecutorial misconduct in eliciting testimony that petitioner had previously been convicted of robbery with a gun despite a pretrial ruling that only the fact of the existence of the prior robbery conviction would be admitted.) See ABA Standards 3-5.2 (c) "A prosecutor should comply promptly with all orders and directives of the court."

7. 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.)²⁶ See also Stumbo v. Seabold, 704 F.2d 910 (6th Cir. 1983) (reversal where prosecutor referred to the defendant as "Johnny Murder Boy," suggested a conspiracy between him and his cousin-- without evidence--, and told the jury that if they believed his "cock-and-bull" story, cases would be "stacked up" in the county.) (People v. Pike (1962) 58 Cal.2d 70, 97 [it “is manifestly incorrect, indeed, repugnant to the duty declared, to infer therefrom that counsel may knowingly allow a witness to testify falsely, whether he be a criminal defendant or otherwise”].) See U.S. v. Rodrigues, 159 F.3d 439, 451, amended opinion at 170 F.3d 881 (9th Cir. 1998) (“The last thing the jurors heard ... was that the representative of the United States held defense counsel to be a liar who from the beginning of the case had set out to mislead them.”)

See People v. Seumanu (2015) 61 Cal.4th 1293, 1337-1338, and cases cited on the issue of calling the defense lawyer out for presenting a “sham” defense– held misconduct.)

“The prosecution may not, as happened here, portray itself as a guarantor of truthfulness. [U.S. v.] Roberts, 618 F.2d [530] at 537 [(9th Cir. 1980)].” U.S. v. Simtob, 901 F.2d 799, 806 (9th Cir. 1990).

In U.S. v. Friedman (2d Cir. 1990) 909 F.2d 705, 709, the prosecutor's remarks "invited" jury to ignore presumption of innocence and proof beyond a reasonable doubt saying, “While some people . . . go out and investigate drug dealers and prosecute drug dealers and try to see them brought to justice, there are others who defend them, try to get

²⁶ "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 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.)

them off, perhaps even for high fees."

8. 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].) Accord People v. Seumanu (2015) 61 Cal.4th 1293, 1337 [prosecutor improperly impugned the integrity of defense counsel by suggesting in argument that defense counsel knew his client was guilty and presented a "sham" defense.]

9. Questioning a Witness and Asking “So That Other Witness Lied?” May Be Misconduct. People v. Chatman (2006) 38 Cal.4th 344, 383 (“In its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions.”) *But see* U.S. v. Sanchez (9th Cir. 1999) 176 F.3d 1214 (finding it error to argue that only if the officers lied could the defendant be innocent). In federal court, it is black letter law that a prosecutor may not ask a defendant to comment on the truthfulness of another witness, United States v. Combs, 379 F.3d 564, 572 (9th Cir. 2004), United States v. Geston, 299 F.3d, 1130, 1136 (9th Cir. 2002).

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

11. 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.)²⁷

In U.S. v. Rangel-Guzman, 752 F.3d 1222, 1225 (9th Cir. 2014), the prosecutor interviewed the defendant prior to trial (with an agent) and then cross-examined him at trial by putting her own credibility at issue. This was plain error: "But the prosecutor's invocation of her own personal knowledge during cross-examination was unquestionably improper. Even absent objection, the court should have recognized this and put a stop to it. *See Henderson v. United States*, 133 S.Ct. 1121, 1129–30 (2013)."

As stated in People v. Talle (1952) 111 Cal.App.2d 650, 677-678: "[Prosecuting] attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. It is their duty to see to it that those accused of crime are afforded a fair trial . . . [para.] It would be a sad day for the administration of justice if this court were to condone the substitution of the personal belief of the district attorney . . . that the accused should be convicted because the district attorney thinks he should, for what the law guarantees -- a fair jury trial." (Also quoted in People v. Criscione (1981) 125 Cal.App.3d 275, 292-293.)

In U.S. v. Wright (9th Cir. 2010) 625 F.3d 583, the court found error in the prosecutor's argument that the defense included a "trifecta" of bogus claims that he'd never seen in prosecuting before. This was an improper denigration of the defense as a sham based on the prosecutor's allusion to his own experience and thus outside the record.

See People v. Blacksher (2011) 52 Cal.4th 769, 838:

"prosecutor also implied he had evidence that defendant was not insane, but did not want to bore the jury or waste its time with not just two, but four expert witnesses. This was improper. (People v. Boyette (2002) 29 Cal.4th 381, 452 [misconduct where the prosecutor suggested "she had evidence in her possession that supported her line of questioning, but simply chose not to present it in the interest of saving the jury time"]; People v. Hill (1998) 17 Cal.4th 800, 829 [misconduct where the prosecutor told the jury, " 'I could have had somebody come in here and analyze [the alleged narcotics].' " (italics omitted)].)

²⁷ "An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable. An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all." (Peo. v. Chatman (2006) 38 Cal.4th 344, 384.)

Interjecting as a Sworn Witness. See People v. Donaldson (2001) 93 Cal. App.4th 916 (defense counsel found IAC for failure to object to the prosecutor testifying to her interview with a key prosecution witness, the latter's credibility, and that she believed the defendant guilty).

12. Vouching for the Credibility of Prosecution Witnesses.²⁸ 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 voids my deal") and that Dept. of Justice and courts have to approve wiretap applications implying U.S. agencies determined Brooks guilty when authorizing the wiretap); U.S. v. Weatherspoon (9th Cir. 2005) 410 F.3d 1142; accord U.S. v. Preston (9th Cir. 2017) 873 F.3d 829, 843; 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].)

E.g., People v. Hawthorne (1992) 4 Cal.4th 43, 59: "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."

See also People v. Huggins (2006) 38 Cal.4th 175, 206-207: "it is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. [Citations] Specifically, a prosecutor's reference to his or her own experience, comparing a defendant's case negatively to others the prosecutor knows about or has tried, is improper. [Citation] Nor may prosecutors offer their personal opinions when they are based solely on their experience or on other facts outside the record." Accord United States v. Francis, 170 F.3d 546, 551 (6th Cir. 1999) (improper "bolstering occurs when the prosecutor implies that the witness's testimony is corroborated by evidence known to the government but not known to the jury.") Ditto People v. Woods (2006) 146 Cal.App.4th 106, 113 (A "prosecutor may not suggest the existence of 'facts' outside of the record by arguing matters not in evidence.")

²⁸ Newer vouching reversals: People v. Rodriguez (2018) 26 Cal.App.5th 890 (improper vouching in arguing that correctional officer witnesses would not lie because lying would destroy their careers and lead to their prosecution for perjury); U.S. v. Alcantara-Castillo, 788 F.3d 1186 (9th Cir. 2015), prosecutor asked defendant to comment on a Border Patrol Agent's veracity during cross-examination and then in final argument (rebuttal) vouched for the agent's credibility by referring to "facts not before the jury to convince it in this credibility showdown.")

13. 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”].) But argument has been upheld where the argument is that the experts were biased as paid witnesses, but not to call the expert a “washed-up doctor” for which there was no evidence. (People v. Parson (2008) 44 Cal.4th 332, 362-363.) *See also* People v. McGreen (1980) 107 Cal.App.3d 504, 514-519) (insinuation that a defense expert was a perjurer.)

Referring to a defense expert witness in the case at hand as "that high falootin' expert" and his testimony as an "infomercial" was improper, analogous to the abusive remarks condemned in Sipsas. Based on McGuire, it was also improper for the State to twice remark about how much money the defense experts were being paid for their testimony. And the State's remarks further implied that Butler was wasting taxpayer dollars by calling James Esten as an expert witness. We conclude that these final remarks were again improper

Butler v. State, 120 Nev. 879, 899 (Nev. 2004)

Sizemore v. Fletcher, 921 F.2d 667, 671-672 (6th Cir. 1990), reversing state conviction where prosecutor argued wealth:

Similarly, statements by the prosecutor at Sizemore's trial suggested to the jury that the defendant could afford to buy justice in court through the use of expensive exhibits and multiple defense attorneys. The prosecutor's references to the defendant's "money", his "multitude of attorneys", and the statement that Sizemore "would rather kill two men than to give them a raise" were all calculated to generate a class bias in the jurors' minds against the defendant. Such appeals to class prejudice must not be tolerated in the courtroom. "The defendant was charged with murder, and not with being wealthy, and no reference should have been made to his station in life." Goff v. Commonwealth, 241 Ky. 428, 44 S.W.2d 306, 308 (1931). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239-40, 84 L. Ed. 1129, 60 S. Ct. 811 (1940); United States v. Stahl, 616 F.2d 30, 32-33 (2d Cir. 1980).

See also People v. Buffington (2007) 152 Cal.App.4th 446, 455-456 (improper to try to impeach a defense expert simply by saying he testified in three other SVP cases for the defense; the jury had no basis to evaluate that information.)

See State v. Hughes (1998) 193 Ariz. 72, 84; 969 P.2d 1184, where the prosecutor went "out of bounds, and outside the record, to argue that psychiatrists create excuses for criminals." The prosecutor in Hughes argued that defense counsel paid a doctor for a result: "[the doctor] knows the result he's looking for, and that's it. He knows the result he is looking for. Subject comes in with schizophrenic --potential schizophrenic diagnosis. He knows right there what he is looking for, and \$950 later, yes, that's what he's got..... . . He knows the result for he knows the result he wants." The appellate court held: "It is improper for counsel to imply unethical conduct on the part of an expert witness without having evidence to support the accusation." (Id., at 86.) The case was reversed for this and other instances of misconduct.

14. 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".])

15. 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.])

16. 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.)

17. 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. Pic'l (1981) 114 Cal. App.3d 824, 871, *overruled on other grounds*, People v. Pic'l (1982) 31 Cal. 3d 731, ["Two wrongs do not make a right. Thus, defense counsel's misconduct does not justify a tit-for-tat answering misconduct by the prosecutor. We consider this to be the teaching of People v. Perry (1972) 7 Cal.3d 756 [790]"] Accord People v. Poletti (2015) 240 Cal.App.4th 1191, 1216 (prosecution misconduct cannot be justified on the ground that the defense "started it.") See also: The prosecutor's argument that the defense invited the response was dismissed: "the prosecution is not allowed to use improper tactics even in response to similar tactics by the defense." United States v. Sarkisian, 197 F.3d 966, 990 (9th Cir. 1999).

18. Misstating Reasonable Doubt: *E.g.*, “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.)

19. Trivializing Reasonable Doubt. The leading important case is People v. Centeno (2014) 60 Cal.4th 659 (this case will be known for criticizing the DA argument on the “puzzle” argument in the shape of the State of California with missing pieces as showing proof beyond a reasonable doubt. But the true value of this case may be in finding the argument also wrong by arguing proof BRD if the DA theory of evidence was “reasonable.”) See also People v. Ellison (2011) 196 Cal.App.4th 1342 (arguing that the BRD standard requires the jury to find the defendant’s innocence was *reasonable* is misconduct). People v. Johnson (2004) 119 Cal.App.4th 976, 983 (“In argument to the jury, the prosecutor took his cue from the court’s reasonable doubt instructions, characterized a juror who could return a guilty verdict without ‘some doubt’ about Johnson’s guilt as ‘brain dead,’ and equated proof beyond a reasonable doubt to everyday decision making in a juror’s life”); People v. Nguyen (1995) 40 Cal.App.4th 28, 35 (“the jails and prisons are full, ladies and gentlemen. [¶] It’s a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you’re driving. If you have reasonable doubt that you’re going to get in a car accident, you don’t change lanes”); see People v. Cowan (2017) 8 Cal.App.5th 1152 (DA told the jury that the presumption of innocence applies only until the charges are read to the jury at the outset of the case. The DA also told the jury that the decision of guilt or innocence was just an ordinary decision of the kind that folks make a hundred times a day. Relying on Centeno, reversed). But see People v. Romo (2016) 248 Cal.App.4th 682, which finds it OK to tell the jury the presumption can disappear *when they deliberate and find proof beyond a reasonable doubt*. See also People v. Daveggio & Michaud (2018) 4 Cal.5th 790, 840-1 (jurors can rely on common sense: “it is hard to see how jurors could perform tasks such as evaluating witness credibility without keeping common sense in mind”).

Puzzle Cases. People v. Katzenberger (2009) 178 Cal.App.4th 1260 (DA pulls two pieces out of an eight piece puzzle and argues that because the picture of the Statue of Liberty was discernible, that was proof beyond a reasonable doubt); People v. Otero (2012) 210 Cal.App.4th 865 [to illustrate proof beyond a reasonable doubt the prosecutor used a diagram with the outline of the state of California and 8 pieces of information showing the State’s outline; any one of the pieces could be used to identify the state; this implied the jury could convict on the basis of 1/8th of the information necessary to be certain which is error and misconduct; held harmless but, “[p]rosecutors would be wise to avoid such devices”]; People v. Centeno (2014) 60 Cal.4th 659 (finding the puzzle

argument misconduct and defense counsel IAC for not objecting); *see* People v. Medina (1995) 11 Cal.4th 694, 745 (in voir dire and without objection, prosecutor used a chart with two lines, one representing 100% certainty and one underneath representing proof beyond a reasonable doubt; the court notes problems with this – “perils undoubtedly would attend a prosecutor's attempt to reduce the concept of guilt beyond a reasonable doubt to a mere line on a graph or chart” but holds no “prejudicial misconduct” because later instructions would have cleared it up). In U.S. v. Frederick (9th Cir. 1996) 78 F.3d 1370, 1379, the court reversed based on cumulative error which included prosecutorial comments backhandedly complimenting defense counsel on his skill in confusing the alleged victim when examining her, and telling the jury that the defense will ask the jury to “look at little bits and pieces” of the evidence, while the government and the judge will ask the jury to consider “all of the evidence -- a “serious misstep” contributing to reversal).

In Mahorney v. Wallman (10th Cir. 1990) 917 F.2d 469, 473-474, the court overturned a state conviction for prosecutorial statements in voir dire and closing argument stating that the presumption of innocence was designed to protect those who were not guilty and that original presumption of innocence had been removed by the evidence in this case. Similarly, in Floyd v. Meachum (2d Cir. 1990) 907 F.2d 347, 353-354, another state conviction was overturned because of a number of improper remarks including that “the burden of proof beyond a reasonable doubt is a shield for the innocent . . . not a barrier to conviction for the guilty.” *See also* U.S. v. Segna, 555 F.2d 226 (9th Cir. 1977), during argument the prosecutor misstated the burden of proof concerning the defendant's mental defense. Because the case was extremely close, and given the timing of the error, the Circuit court found it highly probable that the argument materially affected the verdict and reversed the conviction; *accord* U.S. v. Sandoval-Gonzalez, 642 F.3d 717, 726-727 (9th Cir. 2011), and U.S. v. Perlaza, 439 F.3d 1149 (9th Cir. 2006) (cases reversing convictions for prejudicial prosecution arguments on presumptions). *See* People v. Booker, 51 Cal.4th 141,185 (2011) (**OK** to argue the presumption of innocence lasts until the contrary is shown and disappeared days ago in this case; nevertheless: “a defendant is entitled to the presumption of innocence until the contrary is found by the jury”).

In People v. Hill (1998) 17 Cal.4th 800, 832, the court held: “we conclude it is reasonably likely Morton's comments, taken in context, were understood by the jury **to mean defendant had the burden of producing evidence to demonstrate a reasonable doubt of his guilt**. Accordingly, we conclude Morton committed misconduct by misstating the law.”

Telling the jury it can acquit only by finding defendant innocent. In final argument, the DA argued that if the jury found in favor of self-defense, they would be in

effect labeling the defendant's conduct "absolutely acceptable. The DA told the jury that a not guilty verdict "means you didn't commit a crime." Both statements were prosecutorial misconduct by lowering the State's burden of proof by stating jury could only acquit if it found the defendant actually innocent and ignoring the law that the defendant need only raise a reasonable doubt. Reversed. (People v. Lloyd (2015) 236 Cal.App.4th 49.)

20. Calling Upon the Jury to Signal the World That "We do not tolerate [the crime]". 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]; U.S. v. Solivan, 937 F.2d 1146, 1153 (6th Cir.1991) [improper references to the "war on drugs."])

But note in capital cases 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."

A nice summary of the law in this area is:

"[P]rosecutors may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence." United States v. Nobari, 574 F.3d 1065, 1076 (9th Cir. 2009) (quoting Koon, 34 F.3d at 1443) (internal quotation marks omitted). Similarly, prosecutors may not "point to a particular crisis in our society and ask the jury to make a statement" with their verdict. United States v. Leon-Reyes, 177 F.3d 816, 823 (9th Cir. 1999); see also United States v. Williams, 989 F.2d 1061, 1072 (9th Cir. 1993) (improper to exhort jury to "[t]ell these defendants that we do not want [methamphetamine] in Montana" (alteration in original)). Nor can prosecutors comment on "the potential social ramifications of the jury's reaching a . . . verdict."

Weatherspoon, 410 F.3d at 1149 (improper for prosecutor to say that "finding this man guilty is gonna protect other individuals in this community"). Further, it is improper to make "statements designed to appeal to the passions, fears and vulnerabilities of the jury." Id.
United States v. Sanchez, 659 F.3d 1252 (9th Cir. 2011)(decrying prosecutor's "send a memo" to the drug cartels to tell their couriers just to claim duress upon arrest.)

21. 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...."

22. 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.") See also People v. Riggs (2008) 44 Cal.4th 248, 324-326 (improper to use jury statements on questionnaire in final argument of death penalty phase.)

23. Commenting on Lack of Defense Evidence the Prosecutor Had Successfully Excluded or Hid. 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, or withheld from the defense. (In re Bacigalupo (2012) 55 Cal.4th 312, 335.)

24. 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"]; accord People v. Roybal (1998) 19 Cal.4th 481, 520.) *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"].) In People v. Roybal (1998) 19 Cal.4th 481, 520, bible reference misconduct was deemed harmless, but then found prejudicial on federal habeas. See Roybal v. Davis, 148 F.Supp.3d 958 (S.D. Ca. 2015).

25. No Inventing 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.

In one particularly outrageous case, the prosecutor "deliberately altered an interrogation transcript to include a confession that could be used to justify charges carrying a life sentence, and he distributed it to defense counsel during a period of time when Murray [the DA] knew defense counsel was trying to persuade defendant to settle the case." The trial judge dismissed the case and the appellate court affirmed the dismissal concluding: "dismissal is an appropriate sanction for government misconduct that is egregious enough to prejudice a defendant's constitutional rights." Importantly, the Court stated that "egregious violations of a defendant's constitutional rights are sufficient to establish outrageous government misconduct." (The Court rejected the AG argument that if the conduct wasn't *physically brutal* it would not permit dismissal under the "shocks the conscience" standard.) Sneaking into the discovery a fabricated confession caused defense counsel to try to get the defendant to plead which undermined the trust the client had in counsel. Further, in litigating motion to dismiss, the PD's office had to bring in other counsel, which had the effect of removing the original PD as the defendant's counsel. People v. Velasco-Palacios; (2015) 235 Cal.App.4th 439.

26. 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."

27. Relying on Propensity Argument in Non-Sex and DV Cases. Such arguments, designed to show propensity and inflame the jury, are not permitted in non-Evidence Code 1108 or 1109 cases in California. (*See also* U.S. v. Brown (9th Cir. 2003) 327 F.3d 867.)

Arguing that the defendant is a lesbian as to urge that sexual orientation as a motive for her to commit child molestation is misconduct. (People v. Garcia (2014) 229 Cal.App.4th 302.)

28. 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 that 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. 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"].)

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

30. 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. *Accord* People v. Guzman (2000) 80 Cal.App.4th 1282 (held that the prosecutor impliedly invited the jury to consider defendant's failure to testify as proof that his actions were criminal; reversed.) In People v. Sanchez (2014) 228 Cal.App.4th 1517, the court found Griffin error in the prosecutor's argument that the defendant was "hiding" from the jury and it was for the jury to pull him out of his hiding place. The court found the only plausible interpretation of the comment was that the defendant hid by not testifying. In People v. Denard (2015) 242 Cal.App.4th 1012, the Court found Griffin error where prosecutor argued the "defendant clearly does not want to take responsibility for his actions," and "[h]e has put it upon [Rosa] to testify" [against him]...He has not taken responsibility himself. That is

the kind of man he is." The Court found these statements "cannot reasonably be interpreted as anything other than a comment on appellant's silence." (Id. at 1021.)

31. 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. Wood (2002) 103 Cal.App.4th 803, 808; 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 her garage not an assertion of *his* rights and the 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* discussion in U.S. v. Caruto, 532 F.3d. 822 (9th Cir. 2008). In People v. Lindsey (1988) 205 Cal.App.3d 112, the court found prejudicial error where the prosecutor argued the *defense attorney* should have revealed an alibi known to her before trial. The prosecutor stated the defendant had gone "through a Preliminary Examination when the alibi was there all the time and this man was in jail and this woman [defense counsel] allowed him to sit in jail without coming to the District Attorney's Office, without coming to the police department" with the alibi evidence. (Id. at 116.) *See also* People v. Hollingquest (2010) 190 Cal.App.4th 1534 (DA refers to defendant's silence in discussions with friends; held harmless).

32. Prosecution Commenting on Non-present Witness Who Would Take the Fifth if Called to Testify. Of course the prosecutor can't do that. But he/she can if the record isn't perfected that the witness will invoke. In People v. Ford (1988) 45 Cal.3d 431, 435-6, the Supreme Court said that if the defense wants protection from final arguments where the prosecution argues that the jury never heard from a witness (e.g., a co-defendant who was severed from the defendant's trial), a record must be made that the witness *will* take the Fifth Amendment if called. If this is established before or during trial (e.g., by stipulation) then it is improper to comment on the witness not appearing for trial by subpoena. *See* Evid. Code section 913 (no comment on the exercise of a privilege).

33. Epithets or Racist Comments 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.)

See Zapata v. Vasquez, 788 F.3d 1106, 1111, 1123 (9th Cir. 2015) holding that defense counsel's "failure to object to the prosecutor's inflammatory, fabricated and ethnically charged epithets, delivered in the moments before the jury was sent to deliberate Zapata's case, constituted ineffective assistance of counsel." See also Bennett v. Stirling, 842 F.3d 319 (4th Cir. 2016)(calling the black defendant "King Kong" reversible error.)

In Calhoun v. United States, 568 U.S. 1206; 133 S.Ct. 1136, 1137-1138 (2013), on the *denial of cert.*, Justice Sotomayor wrote a statement concurring with the denial of cert. (because the claim was defaulted for lack of defense objection!) about a prosecutor who, while questioning an African-American defendant in a drug case, asked: "You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you - a light bulb doesn't go off in your head and say, this is a drug deal?" Justice Sotomayor wrote:

By suggesting that race should play a role in establishing a defendant's criminal intent, the prosecutor here tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation. There was a time when appeals to race were not uncommon, when a prosecutor might direct a jury to "consider the fact that Mary Sue Rowe is a young white woman and that this defendant is a black man for the purpose of determining his intent at the time he entered Mrs. Rowe's home," Holland v. State, 247 Ala. 53, 22 So. 2d 519, 520 (1945), or assure a jury that "I am well enough acquainted with this class of niggers to know that they have got it in for the [white] race in their heart," Taylor v. State, 50 Tex. Crim. 560, 561, 100 S. W. 393 (1907). The prosecutor's comment here was surely less extreme. But it too was pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason.

It is deeply disappointing to see a representative of the United States resort to this base tactic more than a decade into the 21st century. Such conduct diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice. In discharging the duties of his office in this case, the Assistant United States Attorney for the Western District of Texas missed the mark.

34. 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].)

There is no place in our system of justice for the notion of guilt by association or guilt for the acts of others. (*People v. Galloway* (1979) 100 Cal.App.3d 551, 563; *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1071-1072.) "Guilt by association is a thoroughly discredited doctrine; personal guilt, on the other hand, a fundamental principle of American jurisprudence, inhabiting a central place in the concept of due process." (*People v. Chambers* (1964) 231 Cal.App.2d 23, 28; *see also Uphaus v. Wyman*, 360 U.S. 72, 79; *Bridges v. Wixon*, 326 U.S. 135, 163, conc. opn.)

(*People v. Arredondo* (2018) 21 Cal.App.5th 493 [relentless use of the term cockroaches to describe defendants became the major collective guilt theme of the prosecutor's argument and was misconduct: "while . . . people are asleep in their beds these cockroaches are out there running around and committing crimes and victimizing the people of Riverside County." Guilt by association is a "thoroughly discredited" doctrine].)

35. No Badgering the Witness.

Badgering and interrupting a witness, name-calling, predicting that the defendant will lie on the stand, and stating before the jury that the defendant is in need of psychiatric help are tactics so deplorable as to define the term "prosecutorial misconduct." Furthermore, closing arguments that appeal to class prejudices, encourage juror identification with crime victims, or vouch for the defendant's guilt would each be deemed beyond ethical bounds. To combine all three prejudicial ploys in one argument only compounds the error.

Boyle v. Million, 201 F.3d 711, 717 (6th Cir. Ky. 2000)

36. 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.*)

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

In criminal trials of guilt,²⁹ 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); People v. Garcia (1984) 160 Cal.App.3d 82, 91-92 (courtroom demeanor of non-testifying defendant is not evidence); People v. Houston (2012) 54 Cal.4th 1186, 1223 (“it was misconduct for the prosecutor to ask the jury to note defendant's lack of crying, which in this context implied a lack of remorse.”) In an NGI trial, it was error to argue the defense didn't call experts because it would have wasted the jury's time, but it was OK to argue the defendant's courtroom demeanor (here, laughter) as relevant to sanity. (People v. Blacksher (2011) 52 Cal.4th 769, 840.)

²⁹ See People v. Valencia (2008) 43 Cal.4th 268, 308-309, allowing defense or prosecution argument in penalty phase on a non-testifying defendant's demeanor. In People v. Vance (2010) 188 Cal.App.4th 1182, 1201, a prosecutor's criticism of the defendant's appearance and demeanor were criticized in a non-capital trial.

38. You Jurors Should Consider Yourselves Victims of the Defendant or Asking the Jury to do What the Victim's Family Wants. It is improper to ask the jurors to consider themselves the defendant's victims. (People v. Mendoza (2007) 42 Cal. 4th 686, 706.) So too is arguing, even in a capital case, "[Y]ou will do what the victim's family asks you to do...and that is to impose [the death sentence]." The court held "there is little doubt that the statements were improper," both because they lacked record support and because any such evidence would have been inadmissible. (U.S. v. Lighty, (4th Cir. 2010) 616 F.3d 321.)

The prosecutor's efforts to equate the jurors with the defendant's victim, to emphasize the mistaken idea that the defendant himself, in a misguided play for power, personally inconvenienced each and every juror by forcing them to travel from a neighboring county for trial, and to play upon the defendant's relative advantages in power, wealth, and prestige could not help but prejudice the jury against the defendant. Boyle v. Million, 201 F.3d 711, 718 (6th Cir. 2000),

39. Argument Designed to Offend and Intimidate Jurors. In People v. Sanchez (2014) 228 Cal. App. 4th 1517, the prosecutor told the jury that the defendant hopes you "will be gullible enough" to buy his arguments and let him go so he can "have a good laugh at your expense." Held: misconduct.

40. 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. Seumanu (2015) 61 Cal.4th 1293, 1344 (misconduct); 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; People v. Kipp (2001) 26 Cal.4th 1100, 1130 ["[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt"].) In People v. Vance (2010) 188 Cal.App.4th 1182, in final argument, the prosecutor argued the "golden rule," *i.e.*, that the jury should put itself in the victim's position and imagine what the victim experienced. The prosecutor also argued to the jury about the impact of the crime on the victim's family. The judge refused to give any instructional admonition to the jury. Reversed.

Similarly, appeals to the jury to “**adopt**” the victim as part of their family, to feel collective shame for society’s failure to protect her and other abused children, deflected the capital jury from their “proper role of rational deliberation on the statutory factors governing” sentencing. The emotional argument (given as a “letter to the victim”) for the jury to take on the role of a protective family were “plainly improper” but harmless. (People v. Gonzales (2011) 1 Cal. 4th 894, 952.)

Similarly, it is misconduct to refer to the murder victim's family as the prosecutor’s “**clients.**” Prosecutors work for the public not for individuals. (People v. Seumanu (2015) 61 Cal.4th 1293, 1345.)

People v. Enraca (2012) 53 Cal.4th 735, 765, found prosecution misconduct where in final argument the prosecutor asked for death out of concern for feelings of the victim's families about the verdict. Held: potential impact of the jury's death or LWOP decision on the victim's families is irrelevant to the jury decision.

41. “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.)

Similarly, arguing that the office of the prosecutor deems the evidence overwhelming is misconduct:

“on the basis of what the United States considers is overwhelming evidence that the defendant is guilty” exceeded mere inference; indeed, the prosecutor suggested to the jury that he offered an expert assessment of the strength of the government’s case, in light of his training and expertise in criminal prosecutions. This was improper vouching.

(United States v. Ruiz (9th Cir. 2013) 710 F.3d 1077, 1085-86.)³⁰

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].]) In Cheney v. Washington (9th Cir. 2010) 614 F.3d 987, the state and federal court found similar comments improper but harmless given that they were reviewed on federal habeas under the “double deference” standard for ineffective assistance of counsel. The offending argument was as follows:

My job, by law, is I--I can only advocate for cases where I believe that it's true, where I believe that it happened. If I think it's a close case, if I think it's a case I could win, and I still don't feel good about it, I'm required by law not to go through with it. That's a very different job than [defense counsel] has. Very different.

And what is the job of the police in this particular case? What did they tell you? There are many cases where we do not recommend prosecution. There are many cases that we find unfounded and we don't go ahead with those. And it is only on true cases that we are required to recommend prosecution. (Id., at 992.)

42. 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);

³⁰ The court added at 1085:

A prosecutor “has no business telling the jury his individual impressions of the evidence.” United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992); *see also* United States v. McKoy, 771 F.2d 1207, 1210–11 (9th Cir. 1985) (“The rule that a prosecutor may not express his personal opinion of the defendant’s guilt or his belief in the credibility of witnesses is firmly established.”); United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970) (concluding that the prosecutor engaged in improper vouching when he stated, “I don’t know of a case where the evidence has been as strong as it has been in this case to establish the guilt of any defendant”).

People v. Anzalone (2006) 141 Cal.App.4th 380, 395-396 [“defense counsel was prejudicially ineffective in failing to object to the prosecutor's misstatements of the law as to three of the attempted murder counts”]; 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). *See* Sechrest v. Ignacio (9th Cir. 2008) 549 F.3d 789 (DA makes false inflammatory statements during voir dire and closing argument that the defendant would be paroled even with an LWOP sentence; this denied a fair trial); U.S. v. Flores, 802 F.3d 1028 (9th Cir. 2015) (prosecutorial misconduct in the misstating the law in telling the jury it could convict based on the defendant’s admission to carrying marijuana to Mexico when the charge was importation into the U.S., and misstating the defendant's testimony; harmless for lack of objection and not plain error). In Deck v. Jenkins, 814 F.3d 954 (9th Cir. 2016), federal habeas corpus relief was granted (reversal of state conviction) where the prosecutor argued in rebuttal a misstatement of a crucial element of the offense thus improperly expanding the basis for conviction.)

43. 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.)

Improper arguments in rebuttal are deemed more likely prejudicial. *See* United States v. Carter, 236 F.3d 777, 788 (6th Cir. 2001) (finding significant “[t]he prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations”), *cited by* U.S. v. Sanchez, 659 F.3d 1252, 1259 (9th Cir. 2011).

44. Prosecutor'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.)

45. “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.” (See People v. Holt (1984) 37 Cal.3d 436, 458 (misconduct for the prosecutor to argue the effect of a certain finding on punishment); People v. Shannon (1956) 147 Cal.App.2d 300, 306 (punishment is not an issue for the guilt phase jury to consider.)

In Trillo v. Biter (9th Cir. 2014) 754 F.3d 1085, on habeas, the court found err in the prosecution argument that the jury should convict else they would feel “uncomfortable” with their verdict and because defendant would be a danger in their neighborhoods. Error deemed harmless.

46. Asking a Witness: “Have You Been Threatened by the Defendant?” With No Proof. (People v. Perez (1962) 58 Cal.2d 211, 240-241, discussed *supra*); “It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.” (People v. Hannon (1977) 19 Cal.3d 588, 597.)

47. Misuse of the Term “The People” to Imply That the Jury Is Aligned with the Prosecutor Against the Defendant. General use of the phrase has not been deemed misconduct, but one appellate court warns that their ruling “is not to be interpreted as a license for a zealous prosecutor to somehow use our opinion as justifying anything other than the use of appropriate conduct to see that justice is done.” (People v. Romero-Arellano (2009) 171 Cal. App.4th 58, 70.) This is because the prosecution role and interest is obviously *not* the same as jury. Indeed, the phrase “the People” includes the defendant:

The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. “The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. *That body of 'The People' includes the defendant and his family and those who care about him.* It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name.” (People v. Eubanks (1996) 14 Cal.4th 580, 589-590; italics added.)

48. No Arguing Victim Impact in Guilt Phase. Just as evidence of victim impact is not admissible at a guilt phase ("[E]vidence of a crime's effect on the victim is generally not admissible during the guilt phase of a trial." (Sager v. Maass (D.C. Ore. 1995) 907 F.Supp. 1412, 1420, *affirmed*, 84 F.3d 1212 (9th Cir. 1996), *citing inter alia* U.S. v. Copple (3d Cir. 1994) 24 F.3d 535, 545-46 [error to admit victims' testimony about fraudulent scheme's harm to their health and savings]; Armstrong v. State, 826 P.2d 1106, 1116 (Wyo. 1992) ["Consideration of victim-impact testimony or argument remains inappropriate during proceedings determining the guilt of an accused"]; Miller-El v. State (Tex. Crim. App. 1990) 782 S.W.2d 892, 895 [in attempted murder case, victim's paraplegic disability hardship not admissible in guilt phase]), so too is argument about it by the prosecutor. (People v. Vance (2010) 188 Cal.App.4th 1182, 1193, 1200.)

49. No Arguing Those Pesky Rules of Evidence Prevented the Prosecutor From Introducing Evidence. In People v. Bolton (1979) 23 Cal.3d 208, 212, defense counsel had been allowed to impeach the victim of a nonfatal shooting incident with the latter's prior felonies. In his closing argument to the jury the prosecutor hinted that but for certain rules of evidence he could show that the defendant was "just as bad a guy." (Id., at p. 212, fn. 1.) The Supreme Court held: "There is no doubt that the prosecutor's statement constituted improper argument, for he was attempting to smuggle in by inference claims that could not be argued openly and legally. In essence, the prosecutor invited the jury to speculate about -- and possibly base a verdict upon -- 'evidence' never presented at trial. Appellant, in fact, had no prior criminal record."

50. No Sandbagging or Ambush in Final Arguments: "Finally, there was the prosecutor's argument to the jury. Section 1093, subdivision (e) permits the prosecutor to open the argument and to close the argument. It does not permit the prosecutor to give a perfunctory (three and one-half reporter transcript pages) opening argument designed to preclude effective defense reply, and then give a "rebuttal" argument--immune from defense reply--10 times longer (35 reporter transcript pages) than his opening argument. [Citations] That is what occurred here." (People v. Robinson (1995) 31 Cal.App.4th 494, 505 [reversed for Brady error also].)

Another form of sandbagging is the prosecution ambush argument and change of instructional theory at the very end of its case. In a homicide trial, arguing for the first time (and getting last minute instructions) felony murder when the theory of the case throughout had been premeditated murder was reversible error in Sheppard v. Rees (9th Cir. 1990) 909 F.2d 1234. More recently, the same occurred when the prosecution did a last minute "ambush" by arguing aiding and abetting as its new theory of homicide and misled the defense as to the prosecution theory of the case. Smith v. Lopez, 731 F.3d 859 (9th Cir. 2013).

51. “The Supreme Court Has Upheld Convictions on Facts Just like These.”

Such misconduct misleads the jury into diluting its role and responsibility. (People v. Jasso (2012) 211 Cal. App. 4th 1354, 1369.) This is much like saying, “he can always appeal your guilty verdict.” (People v. Morse (1964) 60 C.2d 631, 651 (“In the guilt phase the accepted rules forbid the jury from resolving doubts in favor of conviction upon the hypothesis that an appeal can cure the possible error or that the defendant may obtain parole or a pardon. Indeed, the clear weight of authority holds that the jury should not reach a compromise of the issue of guilt and find a conviction because appeal may cure this error....”; see citations at ibid., fn. 12.) Such statements could also convey to the personal belief in the defendant's guilt. (See People v. Alfaro (1976) 61 Cal. App. 3d 414, 426 (remarks by the judge that if trial court were in error, defense counsel could “tell it to the Court of Appeals [sic]” were possibly indicative of judge's belief in defendant's guilt and inappropriate; in a close case “one such remark could be prejudicial.”))

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the prosecutor made comments during the sentencing phase of a capital trial to the effect that the jury's decision as to life or death was not final, and that it would be reviewed by the State Supreme Court; thus, the jury should not feel that the entire burden of taking the defendant's life was theirs alone. The Supreme Court held such comments “presen[t] an intolerable danger that the jury will in fact choose to minimize the importance of its role.” (Id. at 333.) Caldwell is relevant where the prosecutor's comments “mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.” (Darden v. Wainwright, 477 U.S. 168, 183 (1986).)

52. Convict Because the State Can’t Afford to Try This Again.

Telling the jury about expense of a retrial is error in that it places irrelevant pressures on jurors. (*E.g.*, People v. Gainer (1977) 19 Cal.3d 835, 852, n. 16; People v. Andrews (1989) 49 Cal.3d 200, 221; People v. Barraza (1979) 23 Cal.3d 675, 685 (“It is not so much the irrelevance of such a reference that is troubling, however, as the additional pressure to decide thus created. Consideration of expense `may have an incalculably coercive effect on jurors reasonably concerned about the spiraling costs of government.”))

53. No Telling the Jury in Final Argument That the Presumption of Innocence Is Now Over.

(People v. Dowdell (2014) 227 Cal. App. 4th 1388.) This is because “the presumption of innocence continues not only during the taking of the testimony, but during the deliberations of the jury and until they reach a verdict.” (People v. Arlington (1900) 131 Cal. 231, 235.) Accord People v. Cowan (2016) 247 Cal.App.4th 651; **but note:** review granted and transferred to the Court of Appeal to vacate its decision and reconsider it light of People v. Centeno (2014) 60 Cal.4th 659 (telling jurors that the presumption of innocence ends with the reading of the charges is wrong and misconduct; warns prosecutors not to rely on harmlessness to save convictions, but this was held

harmless and the remand may be for the court to revisit the issue of prejudice.)

54. No Denigrating Legitimate Defenses as “Loopholes.” The prosecutor argued to the jury in an imperfect self-defense case, "Basically, this is what I consider a loophole." Also, “The defendant is not walking out of these doors using this excuse...” This was misconduct because the characterization of the defense as a "loophole" suggests to the jury it is illegitimate and the notion that he could be freed under it was equally improper. People v. Najera (2006) 138 Cal.App.4th 212, 220–221 (prosecutor's “referring to voluntary manslaughter as a legal fiction misleadingly suggested it is not a real crime”); People v. Babbitt (1988) 45 Cal.3d 660, 704 (misconduct for prosecutor to “suggest[] that when an accused is found insane he is let free”).(People v. Peau (2015) 236 Cal.App.4th 823.)

55. 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.) *See* Hein v. Sullivan, 601 F.3d 897, 913-914 (9th Cir. 2010) (listing a number of instances of improper argument during the prosecution's summation including *vouching* for the prosecution witness (a “very powerful and credible witness,” “painfully honest” who answered every question truthfully, no matter how much it cost him in terms of pain, discomfort, embarrassment and humiliation); *demeaning defense counsel* who worked “cheap lawyer tricks,” and “the other side did some very dirty things, dishonest. The defense in this case was dishonest” and that they pressured a witness to change his testimony; *demeaned the defendants* (“a pack of wolves” and one was “a little punk”), deemed non-prejudicial because of curative rulings by the trial judge. *See* People v. Villa (1980) 109 Cal.App.3d 360, (“In this case we find that the prosecutor acted unprofessionally, indeed childishly, on several occasions at trial. Only due to the overwhelming evidence of guilt do we find that his misconduct does not justify reversal.” *Id.* at 362. The misconduct included telling the jury the prosecutor had damaging evidence regarding the defendant’s prior sexual behavior.)

In People v. Shazier (2014) 60 Cal.4th 109, the Supreme Court reversed the Court of Appeal decision which had found pervasive misconduct (see formerly 212 Cal.App.4th 520) in an SVP case. There, the prosecutor had been held to deny due process to the defendant when he: **1)** unfairly denigrated defense counsel as “deceptive;” **2)** asked the jury how the community would react after they give the defendant a favorable verdict; **3)** baselessly inferred other crimes the defendant committed; **4)** made references to the defendant living near a school when released and not being on parole supervision (*i.e.*, referring to alleged consequences of the jury verdict); **5)** questioned a defense expert on

the egregious facts of other cases in which he testified; 6) told the jury the defendant "groomed" them to manipulate a favorable verdict; and 7) questioned a witness by saying, "You don't know what you're talking about, do you?" The Supreme Court agreed only that number 4 was misconduct and that number 3 was "arguable misconduct." Even with those errors, the decision was affirmed as the errors were harmless.

In People v. Fuiava (2012) 53 Cal.4th 622, 693-694, 729, the prosecution called an officer who wept on the stand while wearing the uniform of the victim officer with his blood still on it; this was argued to the jury (inflammatory and irrelevant); there was evidence the police had their own alleged gang (Vikings) so the prosecutor put on the gang pin and said to the jury he was going to be one too (vouching); finally, he called the defendant a "killing machine" and asked how many more victims were out there (asking jury to speculate). All of this was deemed misconduct, but was not preserved by objection.

Inflammatory comments were discussed in People v. Gonzalez (2011) 51 Cal.4th 894, 952. The Court criticized a prosecutor for his erroneous and inflammatory penalty phase final argument which included an "extended and melodramatic oration couched as a letter to the victim."

These purely emotional appeals invited a subjective response from the jurors and tended to divert them from their proper role of rational deliberation on the statutory factors governing the penalty determination. It was the trial court's responsibility to intervene and redirect the jury, to remind it that its duty was not to replace Genny's family or to answer for the failures of society at large to prevent child abuse, but to reach a penalty decision based on the facts of this case.

The court's admonitions, while partially effective, were insufficient. Reminding the jury to channel its emotions through the aggravating and mitigating factors was appropriate insofar as the prosecutor's emotional appeals related to those factors, or to the jury's proper role as the conscience of the community operating within the criminal justice system. (See People v. Zambrano, supra, 41 Cal.4th at pp. 1178–1179.) This was not, however, an adequate check on the prosecutor's untethered summons to the jury to "adopt" the victim as the benevolent family she never had, and essentially to act as her protector and advocate during deliberations. Similarly, while it was proper to remind the jury that the opinions of counsel were irrelevant, the court's advice that the jurors' own opinions were relevant did not sufficiently stem the effects of the argument soliciting subjective, irrational emotions from the jurors.

The error was deemed harmless because there was no “reasonable (i.e., realistic) possibility” that the jury was diverted from returning a life sentence by the improper arguments in the prosecutor's “letter to Genny.” (Id. at 954.)

Speaking of harmless error and judicial warnings, see United States v. Barragan, 871 F.3d 689 (9th Cir. 2017). The found prosecutorial misconduct in closing and that “[t]he prosecutor's remarks crossed the line.” Because: “[T]he prosecutor emphasized the violent nature of the defendants' crimes and repeatedly urged the jury to say 'no more.'” Found harmless, but the court issued the following warning: “We recognize-and lament-that in the absence of a reversal, some prosecutors may infer from today's opinion that whatever works is permissible. That would be the wrong conclusion; we today only conclude that the prosecutor's improper argument was limited in nature, addressed by the district court, and did not have a probable effect on the jury's verdict in light of the entire record. But forewarned is forearmed. On a different record, we will not hesitate to reverse or even suggest sanctions.”

In Martinez v. Department of Transportation (2015) 238 Cal.App. 4th 559, Ms. Bilotti, the State’s attorney, in a civil case, engaged in repeated misconduct while ignoring the judge’s rulings and making Nazi references about the plaintiff. The Court criticized the trial judge for letting Bilotti get away with the misconduct without a sanction and noted the adverse impact this had on the jury:

By simply ignoring the trial judge's rulings, Bilotti made it inevitable that the jury would conclude. After all, defense counsel was repeatedly ignoring what he told her in front of their very eyes and getting away with it. He took no corrective action whatsoever. The authoritative force of his instructions was seriously diminished by Bilotti's conduct. (Id. at 17-18.)

Remember, as stated in Viereck v. United States, 318 U.S. 236, 247 (1943), if the purpose and effect of the prosecutor's emotionally charged appeal was “wholly irrelevant to any facts or issues in the case,” then it “could only have been to arouse passion and prejudice.”

CONCLUSION

Issues of prosecution misconduct go to the core of the fairness of the trial. They continually arise. Trial and appellate attorneys have the obligation to vigorously curb such conduct in order to permit defendants the due process promise of the U.S. Constitution. Here are some parting quotations of note:

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 (1961) 367 U.S. 643, 659.)

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."

(U.S. v. Agurs (1976) 427 U.S. 97, 110-111.)

It is a well-known fact that intemperate and inflammatory language coming from the lips of a high officer of the county claims an attention from the ordinary juror which, if similarly given voice by the defense, it does not receive. When it is considered that what was said by the district attorney *was apparently with the sanction and approval of the judge* of the trial court, the prejudicial effect on the substantial rights of the defendant becomes apparent.

(People v. Pantages (1931) 212 Cal. 237, 245; italics added.)

"A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (People v. Espinoza (1992) 3 Cal.4th 806, 820 [12 Cal. Rptr. 2d 682, 838 P.2d 204] (Espinoza).) "But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (Ibid.)

(People v. Poletti 92015) 240 Cal.App.4th 1191, 1215.)

"It is a prosecutor's duty 'to see that those accused of crime are afforded a fair trial.' (People v. Talle (1952) 111 Cal.App.2d 650, 667 [245 P.2d 633].) 'The role of the prosecution far transcends the objective of high scores of conviction; its function is rather to serve as a public instrument of inquiry and, pursuant to the tenets of the decisions, to expose the facts.' (People v. Franklin (1961) 194 Cal.App.2d 23, 29-30 [14 Cal.Rptr. 375].)" (People v. Andrews (1970) 14 Cal.App.3d 40, 48 [92 Cal.Rptr. 49].)

(People v. Daggett (1990) 225 Cal.App.3d 751, 759.)

The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the

dictates of common sense."
(People v. Mullings (1890) 83 Cal. 138, 23 P. 229, 231.)

The District Attorney "should always do his sworn duty, of course, but he should always do it fairly and justly and not permit the great power with which he is clothed to be converted into an instrument of persecution." (People v. Hail (1914) 25 Cal.App. 342, 358.)

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1. The Brady Team Concept: the Prosecutor Is Responsible For the Knowledge of the Prosecution Team

We know the prosecutor is duty bound to turn over exculpatory evidence within his or her possession. Brady v. Maryland (1963) 373 U.S. 83, 87 says: "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 good faith or bad faith of the prosecution."

Brady violations, especially when purposeful, should lead to significant sanctions because "[t]he intentional suppression of material evidence by the state would, of course, be a denial of a fair trial and due process." (People v. Kiihoa (1960) 53 Cal.2d 748, 752.) But even non-intentional suppression of Brady material is a constitutional violation that can upset trial verdicts.

Just a few weeks ago the federal prosecution in a large health care fraud and conspiracy case dismissed charges against two defendants because it had hidden the "side-deal" with its key cooperating witness. The election to dismiss came after the deal was revealed and after the prosecutor received withering criticism from the trial court; the writing was on the wall. See "Judge Drops Indictments Against Two Pharmacists at Rare Request of Federal Prosecutors," October 20, 2014, p. 1, Los Angeles Daily Journal.

It's one thing to hold prosecutors responsible for what they know or have in their files, but how far does the Brady responsibility extend? Answer: all the way out to the "team" that works with the prosecutor or law enforcement agencies in helping investigate the case. The Supreme Court has clearly stated: "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. 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, [citation]), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." (Kyles v. Whitley (1995) 514 U.S. 419, 437–438.)

Brady compliance is not met by the prosecution simply having an "open file" policy. The Supreme Court has stated: "if a prosecutor asserts that he complies with Brady through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady." (Strickler v. Greene (1999) 527 U.S. 263, 283 fn 23.) Thus, if the file lacks exculpatory evidence from the prosecution team, an open file does not save the prosecutor from Brady sanctions.

A leading California case is In re Brown (1998) 17 Cal.4th 873. Brown won habeas corpus relief due to the nondisclosure of a portion of toxicology blood test results on his blood (a radioactive immunoassay). The test was positive for PCP (a fact the defense wanted to establish) whereas other results presented at trial (gas chromatography mass spectrometry [GC/MS]) were negative for PCP. (Id. at p. 877.) The Court held that a crime laboratory assisting the district attorney's office in prosecution of cases was "part of the investigative 'team.'" Failure to provide the toxicology test result showing PCP in the blood was Brady error because it was relevant to the defendant's defense.

As to the issue of the Brady team concept, Brown stated: "Courts have thus consistently 'decline[d]' 'to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel.'" [Citation.] 'A contrary holding would enable the prosecutor "to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial," [citation].' [Citations.]" (Brown, supra, 17 Cal.4th 879, fn. omitted.)

Additional case examples discussing who or what is part of the Brady team:

◆ Joint state-federal drug investigations

Carey v. Duckworth (7th Cir. 1984) 738 F.2d 875, 878 ("[A] prosecutor's office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of a case." Multi-agency task force drug investigations are common, "and prosecutors should give some thought to these potential problems of coordination. Being forewarned, they should not simply assume that they have no responsibility for keeping abreast of decisions made by other members of the team.")

◆ Multi-State Investigations

State v. Farris (W. Va. 2007) 656 S.E.2d 121, 221 W. Va. 676, 680 ("The appellant, in part, urges that the investigation in this case was a joint investigation between law enforcement authorities in West Virginia and Kentucky authorities and that because it was a joint investigation, the Kentucky authorities became part of the prosecution team. The appellant further argues that because the Kentucky authorities were acting on the behalf of the West Virginia law enforcement authorities, the knowledge obtained by the Kentucky authorities should be imputed to the prosecutor. We agree.")

◆ Knowledge held by the State-hired psychologist

State v. Farris (W. Va. 2007) 656 S.E.2d 121, 221 W. Va. 676, 681 [knowledge of Kentucky forensic psychologist retained by West Virginia police to interview a possible victim of sexual abuse (and who exonerated him) imputed to prosecution under Brady.]

◆ **SART exam records at the Medical Center**

People v. Uribe (2008) 162 Cal.App.4th 1457, 1481 (When it performed the SART exam, the Center at Valley Medical was “acting on the government's behalf” or “assisting the government's case.” (People v. Superior Court (Barrett) 80 Cal.App.4th at p. 1315.) Thus, the personnel in the Center at Valley Medical responsible for conducting SART exams were part of the “prosecution team” for Brady purposes.)

◆ **Canine sniff test history records**

Aguilar v. Woodford (9th Cir. 2013) 725 F.3d 970, 985 (held that the prosecution's failure to disclose that a police dog had a history of mistaken identifications violated Brady and that the error was prejudicial.)

◆ **Documents with the Medical Examiner**

Martinez v. Wainwright (5th Cir. 1980) 621 F.2d 184, 188 (prosecution failed to provide a "rap sheet" of the deceased victim to the defense after a request. The rap sheet was in the possession of the medical examiner's office and the assistant medical examiner testified on the cause of death. It was standard practice for the medical examiner's office to submit fingerprint records of all bodies to the FBI and receive the FBI rap sheet as a verification of identification. Held: the prosecutor was deemed to have been in possession of the rap sheet by virtue of its retention by the medical examiner)

◆ **Documents within cooperating branches of government (U.S. Post Office)**

U.S. v. Deutsch (5th Cir. 1973) 475 F.2d 55, 57 (held that the United States Attorney's failure to produce the personnel file of a key witness that was not in his possession, but in the possession of the Post Office Department for whom the witness worked constituted error and remanded to the trial court for a determination of the materiality of the file. A good quote from the case: “We find no reference in Brady to an arm of the prosecution. It was a Post Office employee who had been sought to be bribed. The government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files. In fact it did not even deny access, but only present possession without even an attempt to remedy the deficiency.... there is no suggestion in Brady that different "arms" of the government, particularly when so closely connected as this one for the purpose of the case, are severable entities.”)

◆ **Documents within cooperating branches of government (VP office & CIA)**

U.S. v. Libby (D.C. D.C. 2006) 429 F.Supp.2d 1, 10 (Department of Justice authorized the FBI to investigate the possible unauthorized disclosure of classified information of a person's affiliation with the CIA (Valerie Plame) to several journalists. The defendant requested discovery and the Office of Special Counsel said they were not in possession of the documents requested, but that they were in the physical possession of the White

House [more specifically the Office of the Vice President and/or the CIA. Held: the documents in physical possession of the Vice President or the CIA were within the possession, custody, or control of the government, for purposes of criminal discovery rule requiring government to disclose them. These entities contributed significantly to the investigation, and without their contribution it is unlikely that the indictment in this case would ever have been secured. Thus, the Office of Special Counsel had knowledge of and access to the documents responsive to the defendant's requests for discovery. These entities are closely aligned with the prosecution. Because the Office of Special Counsel "has benefitted from the cooperation of the White House [and the CIA], ... he cannot now, in fairness, be permitted to disclaim all responsibility for obtaining Presidential [and CIA] documents that are material to the preparation of the defense." Id. at 11.)

◆ **Jailers may or may not be on the team**

People v. Zambrano (2007) 41 Cal.4th 1082, 1133-1134 (not on the team), quoting In re Steele (2004) 32 Cal.4th 682, 696-697 (not on the team because the prosecution's case had nothing to do with petitioner's prison behavior; test: "an agency that has no connection to the investigation or prosecution of the criminal charge" is not part of the team); *but see* People v. Superior Court (Barrett) (2000) 80 Cal.App.4th 1305, 1315, indicating when the jail/prison can be part of the team.)

These examples are by no means comprehensive. They give road maps to when the team concept is established. They make plain that prosecutors have an obligation to make a thorough inquiry of all law enforcement or other agencies that have a potential case connection with the witnesses, documents or relevant investigation. (U.S. v. Thornton (3d Cir. 1993) 1 F.3d 149, 158.) The prosecutor's duty is to "demand compliance with disclosure responsibilities by all relevant dimensions of government." (U.S. v. Osorio (1st Cir. 1991) 929 F.2d 753, 760-62.)

Even if the prosecution tries in good faith to garner this information from relevant agencies but is unsuccessful in doing so, the fault still lies with the State. The determinative factor is "the character of the evidence, not the character of the prosecutor." (U.S. v. Agurs (1976) 427 U.S. 97, 110. Like Brutus ("The fault, dear Brutus, is not in our stars, But in ourselves, that we are underlings." [Julius Caesar, Act I, Scene 2], the issue of fault is irrelevant. We are all underlings to the law and Brady's goal of fair trials cannot be undermined by "nice tries."

Prosecutors should be proactive in establishing protocols to educate the prosecution team players on their duties with regard to Brady. At a Brady violation hearing, a legitimate line of inquiry will be: what did the prosecution do to garner team evidence?

2. Important California Developments on Prosecution Conduct 2016-2017

A. New Prosecution Misconduct Statutes. This past weekend was a momentous one in the effort to curtail prosecution misconduct. On September 30, 2016, Governor Brown signed into law AB 1909. It adds to **Penal Code section 141** the following felony provision for intentionally, and in bad faith, withholding relevant exculpatory matter:

(c) A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

This new law comes on top of the bill passed last year which added to **Penal Code section 1424.5**, allowing trial courts to hold hearings on issues of prosecutor's withholding exculpatory material:

(a)(1) Upon receiving information that a prosecuting attorney may have deliberately and intentionally withheld relevant, material exculpatory evidence or information in violation of law, a court may [hold a hearing and] make a finding, supported by clear and convincing evidence, that a violation occurred.

If the court finds such a violation, the court **shall** [pursuant to Bus. & Prof. Code § 6086.7(a)(5)] inform the State Bar of California of that violation if the prosecuting attorney acted in bad faith and the impact of the withholding contributed to a guilty verdict, guilty or nolo contendere plea, or, if identified before conclusion of trial, seriously limited the ability of a defendant to present a defense.

(b)(1) If a court finds ... that a violation occurred in bad faith, the court may **disqualify an individual prosecuting attorney from a case.**

(2) [If] a court [disqualifies] an individual prosecuting attorney ..., the defendant ... may [make] a motion ... to **disqualify the prosecuting attorney's office** if there is sufficient evidence that other employees of [that] office knowingly and in bad faith participated in or sanctioned the

intentional withholding of [that] evidence or information and that withholding is part of a pattern and practice of violations.

Note that for years, Bus. & Prof. Code § 6068(o)(7) has required the attorney to report court findings of misconduct to the State Bar when the result is a “[r]eversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.”

Bus. & Prof. Code § 6086.7(a)(2) requires the court to notify the State Bar of “a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.” Further, that statute has been amended to add a reference to Penal Code section 1425, *supra*, stating, in subsection (5), that the court must report “[a] violation described in paragraph (1) of subdivision (a) of Section 1424.5 of the Penal Code by a prosecuting attorney, if the court finds the findings described in that section.” Note that a court may refer an attorney for misconduct even without it causing reversal. (People v. Poletti (2015) 240 Cal. App.4th 1191, 1216 fn 10.)

B. The CA Rules of Professional Conduct. On October 1, 2016, the State Bar Board of Trustees held a meeting in San Diego to approve (or not) an addition to Rule 5-110 of the Rules of Professional Conduct. The rule makes it an ethical violation, one subject to State Bar discipline, if a prosecutor fails to:

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor that the prosecutor knows or reasonably should know mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

There was overwhelming support for the addition. However, several prosecutorial agencies wrote to oppose the amendment and one testified against it. (CACJ was represented at the hearing by myself and Bob Boyce, but Michael Ogul carried the day with a terrific presentation). The vote was 11 to 1 in favor of the amendment. The argument in favor was supported by the fact that California was the only state in the union to not have such a rule. The California Supreme Court approved the reform in November so it is now part of the Rules.

Here’s the importance of this rule. Some state and federal prosecutors view

exculpatory evidence, at least in the pre-trial stage, and necessitating both a quality of exculpation and being “material,” that is, having the force to make a difference in the outcome. That materiality issue is totally irrelevant to the pre-trial stage because prosecutors should not be excusing themselves from turning over exculpatory evidence because they think it won’t make a difference in the trial. This rule will settle that matter. Prosecutors will be subject to discipline, including disbarment, for not turning over exculpatory evidence in discovery.³¹

The adoption could directly impact federal prosecutors, and not just those who are members of the California Bar. Those who are not, will still be bound by the rule because most local federal district rules in California require adherence to the California rules. See United States District Court, Southern District of Calif., Local Rule 83.4(b) “Standards of Professional Conduct. Every member of the bar of this court and any attorney permitted to practice in this court must be familiar with and comply with the standards of professional conduct required of members of the State Bar of California, which are now adopted as standards of professional conduct of this court.”

In the meantime, don’t wait. Make the argument that pre-trial discovery has no “materiality” obstacle, as noted next.

C. No Materiality Test Now for Pre-trial Discovery. In California exculpatory evidence must be turned over by statutory mandate. Penal Code section 1054.1, subdivision (e), requires the prosecution to disclose “[a]ny exculpatory evidence,” *not* just material exculpatory evidence. To prevail on a claim the prosecution violated this duty, defendants challenging a conviction would have to show materiality, but they do not have to make that showing just to be entitled to receive the evidence before trial.” (Barnett v. Superior Court (2010) 50 Cal.4th 890, 901; restated in People v. Cordova (2015) 62 Cal.4th 104, 124.)

This is true as a constitutional matter as well. In U.S. v. Price, 566 F.3d 900, 913 n. 14 (9th Cir. 2009), the Circuit framed the Brady v. Maryland, 373 U.S. 83 (1963), pre-trial disclosure requirement as follows:

³¹ The Bar is not waiting for the contours of the new rule to be determined. See “Ca Bar Recommends Law License Suspension for Conduct of OC Prosecutor Who Testified She’d ‘Do It’ Again,” *MynewsLA.com* (10/11/17), found at <https://mynewsLA.com/orange-county/2017/10/11/ca-bar-recommends-law-license-suspension-for-conduct-of-oc-prosecutor-who-testified-shed-do-it-again>. See State Bar Court Case No. 14-0-00027-YDR.

“For the benefit of trial prosecutors who must regularly decide what material to turn over, we note favorably the thoughtful analysis set forth by two district courts in this circuit: ¶ [T]he 'materiality' standard usually associated with Brady . . . should not be applied to pretrial discovery of exculpatory materials. . . . [J]ust because a prosecutor's failure to disclose evidence does not violate a defendant's due process rights does not mean that the failure to disclose is proper. . . . [T]he absence of prejudice to the defendant does not condone the prosecutor's suppression of exculpatory evidence [ex ante]. . . . [Rather,] the proper test for pretrial disclosure of exculpatory evidence should be an evaluation of whether the evidence is favorable to the defense, i.e., whether it is evidence that helps bolster the defense case or impeach the prosecutor's witnesses. . . . [I]f doubt exists, it should be resolved in favor of the defendant and full disclosure made. . . . [T]he government [should therefore] disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case, even if the evidence is not admissible so long as it is reasonably likely to lead to admissible evidence. United States v. Acosta, 357 F. Supp. 2d 1228, 1239-40 (D. Nev. 2004) (emphasis added) (citing United States v. Sudikoff, 36 F. Supp. 2d 1196 (C.D. Cal. 1999)).”

And further, as another more recent case states:

A trial prosecutor’s speculative prediction about the likely materiality of favorable evidence, however, should not limit the disclosure of such evidence, because it is just too difficult to analyze before trial whether particular evidence ultimately will prove to be “material” after trial. Thus, “there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge.” United States v. Agurs, 427 U.S. 97, 108 (1976). As this court has noted, some trial courts therefore have concluded that the retrospective definition of materiality is appropriate only in the context of appellate review, and that trial prosecutors must disclose favorable information without attempting to predict whether its disclosure might affect the outcome of the trial. See Price, 566 F.3d at 913 n.14 (noting favorably “the thoughtful analysis set forth by two district courts in this circuit” on the matter and citing United States v. Acosta, 357 F.Supp.2d 1228, 1239–40 (D. Nev. 2005) (“[T]he ‘materiality’ standard usually associated with Brady for pretrial discovery purposes . . . should not be applied to pretrial discovery of exculpatory materials.”), and United States v. Sudikoff, 36 F. Supp. 2d 1196 (C.D. Cal. 1990) (The standard of whether evidence would have changed the outcome “is only appropriate, and thus applicable, in the context of appellate review.

. . . [I]t obviously cannot be applied by a trial court facing a pretrial discovery request.”)). See also United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) (“The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed — with the benefit of hindsight — as affecting the outcome of the trial.”)

United States v. Olsen, 704 F.3d 1172, 1183 fn. 3 (9th Cir. 2013).

See also Dennis Riordan’s FLASH of March 17, 2016, discussing the recent U.S. Supreme Court case of Weary v. Cain, 136 S.Ct. 1002 (2016), raising the issue whether it has lowered the standard of materiality on appeal.

D. New Laws on Habeas Corpus Petitions Based on New Evidence. Senate Bill 1134, amends Penal Code section 1473, and goes into effect on January 1, 2017. It allows a writ of habeas corpus to be prosecuted when, “(3) (A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.”

Previously, to challenge a conviction in a habeas writ based on new evidence, the defense had to present evidence casting a "fundamental doubt on the accuracy and reliability of the proceedings" and show how the new evidence "undermine[s] the entire prosecution case and point[s] unerringly to innocence." (In re Lawley (2008) 42 Cal.4th 1231, 1239). This was an almost impossible standard to meet. No more. See In re Miles (2017) 7 Cal.App. 5th 821 (reversing a conviction based entirely on the new standard of proof; *CAVEAT*, this case depublished but is still useful for its analysis).

Now, with new evidence that meets the lower threshold, the habeas writ may succeed and win a new trial. This new evidence could be previously hidden Brady material, or perhaps, new scientific discoveries showing, for example, that bite mark evidence is worthless. The new evidence pantry is now full.

See also new amendment to Penal Code § 1473.6, entitled: Motion to vacate judgment by person no longer restrained on basis of newly discovered evidence. This bill allows the prosecution of a state habeas petition without the requirement of custody (constructive or otherwise). It reads:

(a) Any person no longer unlawfully imprisoned or restrained may prosecute a motion to vacate a judgment for any of the following reasons:

(1) Newly discovered evidence of fraud by a government official that completely undermines the prosecution's case, is conclusive, and points unerringly to his or her innocence.

(2) Newly discovered evidence that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the government official was substantially probative on the issue of guilt or punishment.

(3) Newly discovered evidence of misconduct by a government official committed in the underlying case that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. Evidence of misconduct in other cases is not sufficient to warrant relief under this paragraph.

(b) For purposes of this section, "newly discovered evidence" is evidence that could not have been discovered with reasonable diligence prior to judgment.

(c) The procedure for bringing and adjudicating a motion under this section, including the burden of producing evidence and the burden of proof, shall be the same as for prosecuting a writ of habeas corpus.

(d) A motion pursuant to this section must be filed within one year of the later of the following:

(1) The date the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence of the misconduct or fraud by a government official beyond the moving party's personal knowledge.

(2) The effective date of this section.

All of the above are important new tools for our litigation. Use them.

NOTE

“[T]here is a clearly established constitutional due process right not to be subject to criminal charges on the basis of false evidence that was deliberately fabricated by the government.” (Devereaux v. Abbey, 263 F.3d 1070, 1074-1075 (9th Cir. 2001) (en banc)).

3. New Rule of Professional Conduct for California State and Federal Prosecutors Compels Pre-trial Discovery of all Exculpatory Evidence

Chuck Sevilla (December 26, 2017)

There has been a controversy about whether exculpatory evidence which the prosecutor deems “non-material” must be turned over in pre-trial discovery. That controversy is over. It must be turned over.

A. RPC 5-110(D). On November 2, 2017, the California Supreme Court adopted the recommendation of the State Bar Board of Trustees to amend Rule 5-110 of the Rules of Professional Conduct (RPC). Subsection (D) of the rule makes it an ethical violation, one subject to State Bar discipline, if a prosecutor fails to:

(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

In the Comments to the new rule, the RPC explains:

[3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by Brady v. Maryland (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (D) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure’s timeliness will vary with the circumstances, and paragraph (D) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

The rule makes clear what the duty to disclose entails and “materiality” is not part of the consideration. Some state and federal prosecutors have viewed exculpatory evidence in the pre-trial stage as necessitating both a quality of exculpation and being “material,” that is, having the force to make a difference in the outcome. This view left the turn-over obligation to the prosecutor’s subjective evaluation of whether the evidence was a trial game-changer. Obviously, past experience demonstrated that the influences of

professional bias and institutional pressures led to a lot of failed disclosures.

The concept of materiality is relegated strictly to the appellate arena when Brady v. Maryland, 373 U.S. 83 (1963), violations are found on appeal. Materiality is irrelevant to the pre-trial discovery stage because prosecutors cannot excuse themselves from turning over exculpatory evidence simply because *they subjectively think* it won't make a difference in the upcoming trial. The new Rule of Professional Conduct settles that matter and the disclosure obligations of prosecutors are "not limited" to evidence that is "material" under the Brady definition. Prosecutors will be subject to discipline, including possible disbarment, for not turning over exculpatory evidence in discovery. More severe sanctions, including criminal prosecution, exist for intentional, bad faith Brady violations. See Penal Code sections 141 and 1424.5.

This development should not be a surprise to state prosecutors because they have always had the statutory duty to turn over exculpatory evidence. Penal Code section 1054.1, subdivision (e), requires the prosecution to disclose "[a]ny exculpatory evidence." Materiality is irrelevant. Exculpatory evidence, including impeachment evidence, must be turned over. (Barnett v. Superior Court (2010) 50 Cal.4th 890, 901; see also People v. Cordova (2015) 62 Cal.4th 104, 124.)

B. What about Federal Prosecutors? They have resisted the notion of a required turn over of exculpatory evidence without a "materiality" component attached. The U.S. Attorneys Manual makes explicit that only exculpatory evidence that is material need be turned over. See Addendum 2 at end of this paper quoting the Manual. So what does Rule 5-110(D) mean for federal prosecutors in California? It means they had better turn over *all* exculpatory evidence regardless of their views on its materiality or they are in violation of State Bar rules, federal law, *and* their own federal district local rules.

Federal law mandates prosecutors comply with state ethical mandates. 28 U.S.C. § 530B (Ethical standards for attorneys for the Government) provides, "(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

Further, each of the four California federal districts local rules incorporate the California Rules of Professional Conduct. See Addendum 1, Local Rules for the Southern, Central, Northern and Eastern District Courts. The California Rules of Professional Conduct "are binding upon all members of the State Bar." (Cal. Bus.& Prof. Code 6077.) Thus, federal prosecutors who are members of the California Bar are bound by them. But those not members of the California Bar are still bound by them under their California district's local rules which incorporate the California Rules of Professional Conduct. See, e.g., United States v. Lopez (9th Cir. 1993) 989 F.2d 1032, 1042 (Fletcher, B., concurring): "A criminal attorney ... is bound by the Rules of Professional Conduct of the State Bar of California ("California Rules") and California's standards of professional

conduct....”)³²

Normally, the disciplinary rules apply whether the attorney knows the rule or not because knowledge of the Rules of Professional Conduct is not an element of the offense of violating them. (Millsberg v. State Bar of California (1971) 6 Cal.3d 65, 75.) The RPC 5-110(D) requires that “the prosecutor knows or reasonably should know” of the evidence to be turned over, so how that applies in disciplinary proceedings remains to be seen.

In the past, there has been some controversy in limited contexts whether state bar ethical rules can impact the conduct of federal prosecutors, but in those instances, they have been a compelling rationale for excluding the prosecutors from coverage. *See* Cramton & Udell, “State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules,” 53 U. Pitt. L. Rev. 291, 315 (1992). But here we deal with an ethical rule that every state in the country has adopted³³ and also has support in federal law. *See* U.S. v. Price, 566 F.3d 900, 913 n. 14 (9th Cir. 2009): “[T]he ‘materiality’ standard usually associated with Brady . . . should not be applied to pretrial discovery of exculpatory materials;” *quoting* United States v. Acosta, 357 F.Supp. 2d 1228, 1239-40 (D. Nev. 2004), *citing* United States v. Sudikoff, 36 F.Supp. 2d 1196 (C.D. Cal. 1999).

C. Discovery Motions Going Forward. State Bar ethical rules do not provide an independent basis for a court to compel disclosure of evidence. As noted above, state statutes and federal case law already provide the impetus to gain exculpatory evidence prior to trial without it being filtered through the materiality strainer. On the other hand, it is worth reminding prosecutors that it is not only their moral and legal obligation to turn over pre-trial all exculpatory evidence, but it is also ethically compelled as well. Indeed, the RPC makes it an ethics violation to violate legally imposed obligations. *See* the cross references in Rule 5-220, having to do with the “Suppression of Evidence,” with Rule 5-

³² RPC 1-100(D)(2) states that the Bar’s rules apply to members as well as to “lawyers from other jurisdictions who are not members: ¶ These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.” (Italics added.)

³³ Most states have adopted the American Bar Association Model Rule of Professional Conduct, Rule 3.8(d), Special Responsibilities of a Prosecutor, which states the prosecutor’s duty to: “(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

110. Rule 5-220 states, “A member shall not suppress evidence that the member or the member’s client has a legal obligation to reveal or to produce.”

CAVEAT: Beware of Brady withholding *exculpatory* evidence before a plea of guilty. See Smith v. Baldwin, 510 F.3d 1127, 1148 (9th Cir. en banc 2007) (defendant could assert a viable Brady claim even though he pled guilty), but see U.S. v. Ruiz, 536 U.S. 622, 633 (2002) (Constitution does not require disclosure of material *impeachment* evidence prior to plea); see Alvarez v. Brownsville, __ F.3d __; 2018 U.S. App. LEXIS 26469 (5th Cir. No. 16-40772, Sept 18, 2018) (Brady does not require turning over *exculpatory* evidence *pre-plea*).

Hopefully, the RPC clarification will end any dispute that all exculpatory evidence is to be produced prior to trial whether in California state or federal courts. This is important. Brady errors may never go detected for obvious reasons: if the evidence is not turned over, the defense may never learn of it. To the extent the failure to turn exculpatory evidence is caused by the prosecutor’s subjective belief that a materiality showing is necessary, no more.

Finally, consider these words of wisdom from the Ninth Circuit:

There is a serious need for constant vigilance in both prosecutors' offices and federal courtrooms to safeguard individuals' Fifth Amendment rights as explained in Brady and Giglio. This is no less true of the Fourth Amendment, and the important individual interests in privacy and personal security that it protects. Those charged with crime deserve a fair shake from government prosecutors. The prosecutors' duty is not to gain conviction at any cost but rather to help ensure that justice is done. Prosecutors have a critical role in the criminal justice system. Of course, we expect prosecutors to be able and aggressive advocates, in the best traditions of the American bar, and they may enlist many of the tools used by private advocates as they put the government's case in its most appealing form. But our system maintains important safeguards of individual rights and this constrains the actions of the government. Prosecutors cannot withhold from disclosure information that it has that is favorable to the accused, nor knowingly present false testimony.

United States v. Mazarella, 784 F.3d 532, 542 (9th Cir. 2015)

ADDENDUM 1: LOCAL RULES IN CA DISTRICTS

1. *Southern District of California as of 4/25/17*

Civil Rule 83.4 Professionalism

b. Standards of Professional Conduct. Every member of the bar of this court and any attorney permitted to practice in this court must be familiar with and comply with the standards of professional conduct required of members of the State Bar of California, *which are now adopted as standards of professional conduct of this court*. No attorney

permitted to practice before this court will engage in any conduct which degrades or impugns the integrity of the court or in any manner interferes with the administration of justice within the Court.

2. Central District of California as of 12/1/17

L.R. 83-3.1.2 Standards of Professional Conduct - Basis for Disciplinary Action. In order to maintain the effective administration of justice and the integrity of the Court, each attorney shall be familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto. These statutes, rules and decisions are hereby *adopted as the standards of professional conduct, and any breach or violation thereof may be the basis for the imposition of discipline.* The Model Rules of Professional Conduct of the American Bar Association may be considered as guidance.

3. Northern District of California as of 5/11/17

11-4. Standards of Professional Conduct

(a) Duties and Responsibilities. Every member of the bar of this Court and any attorney permitted to practice in this Court under Civil L.R. 11 must:

(1) Be familiar and *comply with the standards of professional conduct required of members of the State Bar of California;*

4. Eastern District of California as of 4/1/17

RULE 180 (Fed. R. Civ. P. 83) ATTORNEYS

(e) Standards of Professional Conduct. Every member of the Bar of this Court, and any attorney permitted to practice in this Court under (b), shall become familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and court decisions applicable thereto, which are hereby *adopted as standards of professional conduct in this Court.* In the absence of an applicable standard therein, the Model Code of Professional Responsibility of the American Bar Association may be considered guidance. No attorney admitted to practice before this Court shall engage in any conduct that degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice

ADDENDUM 2: U.S. ATTORNEYS MANUAL

U.S. Attorneys Manual, Title 9-5.001 - Policy Regarding Disclosure of Exculpatory and Impeachment Information Purpose. Consistent with applicable federal statutes, rules, and case law, the policy set forth here is intended to promote regularity in disclosure practices, through the reasoned and guided exercise of prosecutorial judgment and discretion by attorneys for the government, with respect to the government's obligation both to disclose exculpatory and impeachment information to criminal defendants and to seek a just result in every case. The policy is intended to ensure timely disclosure of an appropriate scope

of exculpatory and impeachment information so as to ensure that trials are fair. The policy, however, recognizes that other interests, such as witness security and national security, are also critically important, see USAM 9-21.000, and that if disclosure prior to trial might jeopardize these interests, disclosure may be delayed or restricted (e.g. pursuant to the Classified Information Procedures Act). This policy is not a substitute for researching the legal issues that may arise in an individual case. Additionally, this policy does not alter or supersede the policy that requires prosecutors to disclose "substantial evidence that directly negates the guilt of a subject of the investigation" to the grand jury before seeking an indictment, see USAM 9-11.233.

Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence. Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. Brady, 373 U.S. at 87; Giglio, 405 U.S. at 154. Because they are Constitutional obligations, Brady and Giglio evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. Kyles v. Whitley, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. U.S. v. Ruiz, 536 U.S. 622, 629 (2002); Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

Materiality and Admissibility. Exculpatory and impeachment evidence is material to a finding of guilt—and thus the Constitution requires disclosure -when there is a reasonable probability that effective use of the evidence will result in an acquittal. United States v. Bagley, 475 U.S. 667, 676 (1985). Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. Kyles, 514 U.S. at 439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question. (Bolding added.)

<https://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings>

4. Clara Shortridge Foltz, Public Defenders, 31 Amer. Law Rev. 395-97 (1897)

Foltz was a leader in the woman's voting rights movement. During a career that spanned 56 years, Foltz almost single-handedly pushed a great deal of progressive legislation for women's rights in the voting and legal fields including becoming the first female attorney in California. In 1910, she was appointed to the Los Angeles District Attorney's Office, becoming the first female deputy district attorney in the United States. Wikipedia.

Clara Shortridge Foltz (July 16, 1849 – September 2, 1934) pioneered the idea of the public defender. The Criminal Courts Building in downtown Los Angeles was renamed after her in 2002. She was the first woman admitted to the California bar 1878. She was a pioneer in so many ways, including the then radical notion of a public defender. At the Chicago World's Fair in 1893, during a "congress" of the Board of Lady Managers, Foltz made her first highly public presentation of her idea of the public defender, stating one major reason for the office– the need to counter the misconduct of prosecutors. Here is part of what she said:

The district attorney is not required to develop all the facts in the case. He is no longer an impartial investigator seeking for justice and conforming to the law. He has become the hired and violent advocate seeking only to win. In his mind he soothes his conscience by putting the responsibility on the jury. And so he misstates the facts and obtrudes improper matter into his opening statement to the jury; impresses the jury by the suggestion of other crimes than the one charged; attempts to get improper matter before the jury; abuses witnesses; injects his personal and other unsworn and damaging statements into the testimony; calls the defendant all the vile names in his too plethoric Billingsgate dictionary and resorts to all sorts of reprehensible devices to awaken prejudice; urges upon a too pliant court the giving of improper instructions; opens the public treasury for funds to secure evidence for conviction but not evidence of innocence; and brings to his aid a detective and police force ever too ready to forge a missing link in the legitimate testimony.

This drifting away from the old landmarks is the natural result of many causes. The vicious assumption that the defendant is always guilty; the prosecution's vanity of winning causes, and desire to uphold a blundering police; the fear of newspaper criticism; and the money reward often given for each conviction, all conjoin to warp the prosecuting officer from a fair and impartial attitude toward the accused, and incite him to override court properties and legal rules to secure conviction.